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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. 15cv1146 WQH (KSC)
ORDER

HAYES, Judge:

The matters before the Court are (1) the Motion to Dismiss Class Action Complaint (ECF No. 7) filed by Defendant Aqua Lung America, Inc. and (2) the Motion to Strike Defendant Aqua Lung America Inc.’s Evidentiary Submission Submitted in Support of its Motion to Dismiss (ECF No. 11) filed by Plaintiff Ralph A. Huntzinger.

I. Background

On May 21, 2015, Plaintiff initiated this action by filing a class action complaint. (ECF No. 1). Plaintiff contends that Aqua Lung America, Inc. (“Aqua Lung”) committed unlawful business practices by advertising and distributing Suunto scuba diving computers (“Dive Computers”) without disclosing material facts to consumers that the computers are defective. Plaintiff alleges that the Dive Computers can malfunction, causing injury or death to consumers. Plaintiff alleges the following claims for relief on behalf of himself and all others similarly situated: (1) violation of

1 the Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*, (2) violation of the
2 Business and Professions Code, § 17200 *et seq.*, and (3) breach of implied warranty of
3 merchantability.

4 On July 10, 2015, Defendant filed a motion to dismiss (ECF No. 7), asserting (1)
5 that Plaintiff has not alleged an injury sufficient to establish standing, (2) that Plaintiff's
6 claim should be limited to the model of dive computer he purchased, (3) that a national
7 class should not be certified because differences in state law overwhelm the common
8 issues of the class, (4) that privity does not exist between Plaintiff and Defendant
9 because Plaintiff purchased his computer from a third party retailer, (6) that the
10 complaint does not plead fraud with particularity, and (7) that the statute of limitations
11 has passed for claims regarding some dive computers. On August 17, 2015, Plaintiff
12 filed a response to the motion to dismiss (ECF No. 10) and a motion to strike
13 Defendant's evidentiary submission submitted in support of its motion to dismiss (ECF
14 No. 11). On August 28, 2015, Defendant filed a reply to Plaintiff's response to the
15 motion to dismiss (ECF No. 18) and a response in opposition to Plaintiff's motion to
16 strike (ECF No. 18). On September 8, 2015, Plaintiff filed a reply to the motion to
17 strike. (ECF No. 20). On September 22, 2015, Plaintiff filed a notice of supplemental
18 authority in support of opposition to motion to dismiss. (ECF No. 21).

19 **II. Allegations of the Complaint**

20 "Aqua Lung is the exclusive United States distributor for Suunto-branded dive
21 computers, including the Dive Computers at issue and is a Suunto authorized repair
22 facility for the Dive Computers." (ECF No. 1 ¶ 14).

23 The Dive Computers are a critical instrument to assist divers in avoiding
24 decompression sickness. The Dive Computers are used to track the depth
25 and time of the dive and calculate theoretical and actual time and depth
limits the diver should stay within Inaccurate information regarding
depth and dive time can lead to serious injury or death to the diver.

26 *Id.* ¶ 17. "Dive Computers also display other critical information such as, water
27 temperature, . . . air tank pressure, and estimated remaining air time. A misreading of
28 any of this information can also lead to serious injury or death." *Id.* ¶ 18. "The only

1 reason to purchase a Dive Computer is to have knowledge of the critical information
2 regarding a dive. If the Dive Computer cannot reliably provide that information, it is
3 worthless.” *Id.* ¶ 19.

4 Aqua Lung advertises the Dive Computers as having the ability to provide
5 critical information regarding a dive such as dive depths, air pressure, and
6 remaining air time. For example, on its website Aqua Lung states: ‘Suunto
7 Cobra 3 enables continuous decompression for optimal ascent time.’
8 ‘Suunto Cobra 3 monitors and displays your tank pressure, tracks your rate
9 of air consumption, and continuously escalates your remaining air time.
10 It also provides visual and audible alarms for depth and pressure and
11 warns you when you’re running low on air.’ ‘Suunto Cobra monitors and
12 displays your tank pressure, tracks your rate of consumption, and
13 continuously calculates your remaining air time.’

14 *Id.* ¶ 20.

15 “However, the Dive Computers are defective and prone to malfunction, resulting
16 in the Dive Computers providing inaccurate information regarding dive depth, dive
17 time, air pressure, and remaining air time.” *Id.* ¶ 21. “Aqua Lung, as the distributor and
18 an authorized repair facility for the Dive Computers, knew or should have known that
19 the Dive Computers were failing and defective and knew or should have known that the
20 failing and defective Dive Computers created a life threatening risk of harm to
21 consumers.” *Id.* ¶ 22. “Aqua Lung repair representatives are trained by Suunto on how
22 to repair the Dive Computers. Aqua Lung receives Dive Computers for repair directly
23 from consumers and through dive shops” *Id.* ¶ 23.

24 Since at least 2005, Aqua Lung has received Dive Computers for repair
25 from consumers who experienced permanent malfunction of the dive
26 computer due to the defective software and/or hardware. When a
27 permanent malfunction occurs, the Dive Computers report incorrect
28 depths, ‘self-dive’ or indicate that a dive is occurring when no dive is in
fact occurring, report incorrect air time remaining, and/or report incorrect
air tank pressure. All of these malfunctions are the result of defective
software and or/hardware in the Dive Computers.

29 *Id.* ¶ 24. “There has been at least one reported death as a result of a defective Dive
30 Computer malfunctioning during a dive. . . . The Dive Computer reported substantial
31 air remaining in Ms. Seigman’s air tank when, in reality, she was out of air.” *Id.* ¶ 25.

32 “As the distributor and authorized repair provider of the Dive Computers, and a
33 dive equipment manufacturer for over 60 years, Aqua Lung knows that the safe and

1 reliable operation of the Dive Computers is an important concern to consumers.” *Id.*
2 ¶ 27. “[D]efendant is in the superior position to know about actual and potential risks
3 and dangers with the Dive Computers.” *Id.*

4 Despite having knowledge that the Dive Computers all contain the
5 inherent defects, malfunction, and pose a significant hazard to consumers,
6 defendant does not inform consumers . . . of these facts. Indeed, defendant
7 has never issued a recall of the Dive Computers or otherwise notified
8 consumers that the Dive Computers contain a defect in the software and/or
9 hardware that can result in inaccurate readings of critical information
10 during a dive.

11 *Id.* ¶ 28.

12 Instead, Aqua Lung continues to cover up the defect and consumers who
13 use the Dive Computers are left using dangerous and defective products.
14 When Aqua Lung receives a Dive Computer that has suffered a permanent
15 malfunction as described above, it is Aqua Lung’s practice to not conduct
16 any repairs. That is because, when the Dive Computer has malfunctioned
17 permanently as a result of the defective software and/or hardware it is
18 unrepairable.

19 *Id.* ¶ 29. “If the Dive Computer is outside of warranty, Aqua Lung simply tells the
20 customer that there is no repair.” *Id.* ¶ 30. “[T]he computer defect is so prevalent that
21 the ordinary two-year warranty for the Dive Computers was extended to five years for
22 problems related to self-diving, incorrect depth readings, tank pressure, and temperature
23” *Id.* ¶ 31. “[B]ecause all of the Dive Computers contain substantially the same
24 software and/or hardware, the defect exists in all of the them, including the
25 replacements.” *Id.* ¶ 32.

26 “None of the warnings on the product packaging or in other marketing informed
27 plaintiff or other consumers . . . ordinary use of the Dive Computers carries a substantial
28 risk of serious malfunction whereby the Dive Computer may quit working and/or
29 provide incorrect information about a dive.” *Id.* ¶ 33. “Instead of properly warning
30 consumers of the hazards posed by using the Dive Computers . . . Aqua Lung continues
31 to falsely represent that the Dive Computers will provide certain accurate information
32 during a dive and impliedly that the Dive Computers are safe for use.” *Id.* ¶ 33.
33 “Defendant advertised the Dive Computers as a safe product and failed to warn
34 consumers that the Dive Computers are defective, and may malfunction and cause

1 serious bodily harm or death during intended use.” *Id.* ¶ 35.

2 “As a result of Aqua Lung’s omissions and representations, plaintiff and class
3 members have been deceived into purchasing and continuing to use the inherently
4 defective, unsafe, and unreliable Dive Computers that have caused plaintiff and the
5 class members to suffer injury and lose money or property.” *Id.* ¶ 34. “Plaintiff and
6 class members purchased and used the Dive Computers reasonably believing that the
7 product was safe for its intended use.” *Id.* ¶ 35. “[T]he defect caused safety concerns
8 and unreasonable risk of injury, and plaintiff would not have purchased or used the
9 Dive Computer had he known that the product was defective and could malfunction and
10 cause serious bodily harm or death.” *Id.* ¶ 36.

11 “Plaintiff brings this action on behalf of himself and all others similarly situated
12 pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure.” *Id.*
13 ¶ 39. Plaintiff “seeks certification of the following class: All persons and entities who
14 purchased a Suunto Cobra, Suunto Cobra 2, Suunto Cobra 3, Suunto Cobra 3 Black,
15 Suunto Vyper, Suunto Vyper 2, Suunto Vyper Air, Suunto HelO2, Suunto Gekko,
16 Suunto Vytec, Suunto Vytec DS, Suunto D9tx, Suunto D9, Duunto D6, Suunto D6i,
17 Suunto D4i, Suunto D4, and Suunto Zoop (collectively, ‘Dive Computers’) in the
18 United States for personal use.” *Id.* ¶ 39.

19 Plaintiff asserts claims against Defendant for violations of (1) the Consumer
20 Legal Remedies Act (“CLRA”) (Cal. Civ. Code § 1750); (2) violation of California
21 Business & Professions Code § 17200 (“Unfair Competition Law” or “UCL”); and (3)
22 breach of implied warranty of merchantability (Uniform Commercial Code (“UCC”)
23 § 2-314). Plaintiff seeks an order certifying the proposed class and an order that
24 Defendant engage in a corrective advertising campaign, awarding Plaintiff and the
25 proposed class members damages, restitution and disgorgement of Defendant’s
26 revenues, declaratory an injunctive relief, attorneys’ fees and costs, and such further
27 relief as may be just and proper. (ECF No. 1 at 19-20).

28

1 **II. Standards of Review**

2 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move
3 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed.
4 R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject
5 matter jurisdiction over an action. *Assoc. of Med. Colleges v. United States*, 217 F.3d
6 770, 778-779 (9th Cir. 2000). In resolving an attack on a court’s jurisdiction, the court
7 may go outside the pleadings and consider evidence beyond the complaint relating to
8 jurisdiction without converting the motion to dismiss into a motion for summary
9 judgment. *Safe Air For Everyone v. Doyle*, 373 F.3d 1035, 1039 (9th Cir. 2004).

10 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
11 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that
12 states a claim for relief must contain . . . a short and plain statement of the claim
13 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under
14 Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or
15 sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
16 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

17 To sufficiently state a claim for relief and survive a Rule 12(b)(6) motion, a
18 complaint “does not need detailed factual allegations” but the “[f]actual allegations
19 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*
20 *Twombly*, 550 U.S. 544, 555 (2007). “[A] plaintiff’s obligation to provide the grounds
21 of his entitlement to relief requires more than labels and conclusions, and a formulaic
22 recitation of the elements of a cause of action will not do.” *Id.* When considering a
23 motion to dismiss, a court must accept as true all “well-pleaded factual allegations.”
24 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not “required to accept
25 as true allegations that are merely conclusory, unwarranted deductions of fact, or
26 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th
27 Cir. 2001). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory
28 factual content, and reasonable inferences from that content, must be plausibly

1 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572
2 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

3 Claims sounding in fraud or mistake must additionally comply with the
4 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which
5 requires that a complaint “must state with particularity the circumstances constituting
6 fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) “requires . . . an account of the time,
7 place, and specific content of the false representations as well as the identities of the
8 parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
9 2007) (internal quotation marks omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317
10 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who,
11 what, when, where, and how of the misconduct charged”) (internal quotation marks
12 omitted). “To comply with Rule 9(b), allegations of fraud must be specific enough to
13 give defendants notice of the particular misconduct which is alleged to constitute the
14 fraud charged so that they can defend against the charge and not just deny that they
15 have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.
16 2001) (citation and internal quotation marks omitted).

17 **III. Discussion**

18 **A. Standing**

19 Defendant contends that Plaintiff “does not allege any injury in fact, nor does he
20 allege that he relied upon any misstatement to his detriment. Huntzinger does not allege
21 his Cobra 3 malfunctioned, that it provided inaccurate data or how such data was
22 inaccurate.” (ECF No. 7-1 at 16). Defendant contends that Plaintiff “does not allege
23 that Aqua Lung did or did not service his Cobra 3, or that it was replaced. Huntzinger
24 fails to even allege he has ever used his Cobra 3 to scuba dive.” *Id.* Defendant
25 contends that Plaintiff “has no ‘injury in fact’ standing under the CLRA or UCL.” *Id.*
26 at 17. Defendant contends that even if Plaintiff does show that he was injured, Plaintiff
27 does not have “standing to assert any claim regarding any dive computer other than the
28 single Cobra 3” computer that Plaintiff purchased. *Id.* at 18. Defendant contends that

1 Plaintiff’s “claims as they relate to dive computers he did not purchase, and
2 advertisements he never saw or relied upon, must be dismissed” for lack of standing.
3 *Id.* at 20.

4 Plaintiff contends that the complaint establishes “standing under the UCL and
5 CLRA because he alleges he purchased the Dive Computer reasonably believing it was
6 non-defective and safe to use as a dive computer, when in fact it was defective, resulting
7 in an inaccurate display of dive related information.” (ECF No. 10 at 17, citing Compl.
8 ¶ 11). Plaintiff contends that his “allegations that Aqua Lung failed to inform him of
9 a safety defect and that he would not have purchased the Dive Computer had he known
10 of that safety defect are sufficient to confer standing.” *Id.* at 18. Plaintiff alleges that
11 the alleged computer defect is “a material fact, as the defect caused safety concerns and
12 unreasonable risk of injury, and plaintiff would not have purchased or used the Dive
13 Computer had he known that the product was defective and could malfunction and
14 cause serious bodily harm or death.” *Id.* (citing Compl. ¶ 36).

15 **1. Plaintiff’s Standing**

16 In the absence of Article III standing, a court lacks subject matter jurisdiction to
17 entertain the lawsuit. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109-110
18 (1998). Plaintiff must establish (1) an “injury in fact—an invasion of a legally
19 protected interest which is (a) concrete and particularized . . . and (b) actual or
20 imminent, not conjectural or hypothetical,” (2) “a causal connection between the injury
21 and the conduct complained of,” and (3) a likelihood “that the injury will be redressed
22 by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
23 (citations and internal quotation marks omitted).

24 “[L]ost money or property—economic injury—is itself a classic form of injury
25 in fact.” *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 886 (Cal. 2011). The UCL
26 was revised in 2004 by Proposition 64, limiting private standing “to any ‘person who
27 has suffered injury in fact or lost money or property as a result of unfair competition.’”
28 *Id.* at 320-21 (citing Bus. & Prof. Code, § 17204, as amended by Prop. 64, as approved

1 by voters, Gen. Elec. (Nov. 2, 2004) § 3). “While the economic injury requirement is
2 qualitatively more restrictive than federal injury in fact, embracing as it does fewer
3 kinds of injuries, nothing in the text of Proposition 64 or its supporting arguments
4 suggests the requirement was intended to be quantitatively more difficult to satisfy.”
5 *Id.* at 324.

6 “To establish standing to bring a claim under the UCL, the consumer must allege
7 that (1) the defendant made a false representation about a product, (2) the consumer
8 purchased the product in reliance on the misrepresentation, and (3) he would not have
9 purchased the product otherwise.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1109 (9th
10 Cir. 2013) (citing *Kwikset Corp.*, 246 P.3d at 877). Proposition 64 “imposes an actual
11 reliance requirement on plaintiffs prosecuting a private enforcement action under the
12 UCL’s fraud prong.” *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009). The
13 California Supreme Court has held that

14 Reliance is proved by showing that the defendant’s misrepresentation or
15 nondisclosure was an immediate cause of the plaintiff’s injury-producing
16 conduct. A plaintiff may establish that the defendant’s misrepresentation
17 is an immediate cause of the plaintiff’s conduct by showing that in its
18 absence the plaintiff in all reasonable probability would not have engaged
19 in the injury-producing conduct. . . . It is enough that the representation
20 has played a substantial part, and so had been a substantial factor, in
21 influencing his decision.

22 *Id.* (citations and internal quotation marks omitted).

23 [A] presumption, or at least an inference, of reliance arises wherever there
24 is a showing that a misrepresentation was material. A misrepresentation
25 is judged to be ‘material’ if a reasonable man would attach importance to
26 its existence or nonexistence in determining his choice of action in the
27 transaction in question.

28 *Id.* (citations and internal quotation marks omitted).

A plaintiff who has standing under the UCL’s “lost money or property”
requirement has also established standing under the CLRA. *Id.* at 1108 (citing *Klein*
v. Chevron U.S.A., Inc., 137 Cal. Rptr. 3d 293, 320 (2012) (“noting that where a
plaintiff alleged an economic injury under the UCL he also adequately alleged injury
under the CLRA”). “If a party has alleged or proven a personal, individualized loss
of money or property in any nontrivial amount, he or she has also alleged or proven

1 injury in fact.” *Kwikset Corp.*, 246 P.3d at 887.

2 In this case, Plaintiff alleges that he would not have purchased the Dive
3 Computer if Defendant had disclosed the alleged defects in the Dive Computer. This
4 allegation is sufficient to establish standing if supported by reasonable factual
5 inferences. Plaintiff alleges that the Dive Computers are advertised and sold for the sole
6 purpose of transmitting information to its wearer during scuba dives. Plaintiff alleges
7 that the purchased Suunto Dive Computer cannot be used for the only purpose it was
8 advertised and sold for because of the computer’s alleged defects. Plaintiff alleges that
9 Aqua Lung knew or should have known of the defects in the Dive Computers. Plaintiff
10 alleges that Aqua Lung continued to market and distribute Suunto Dive Computers
11 without notifying consumers of the inherent defects that make the computers unreliable
12 and therefore unsafe to use. Plaintiff states facts sufficient to infer that Defendant’s
13 omission was a material fact in causing Plaintiff to purchase a Dive Computer. *See In*
14 *re Tobacco II Cases*, 207 P.3d at 39. Plaintiff’s allegation of a material non-disclosure
15 by Aqua Lung is sufficient to infer that Plaintiff relied on Aqua Lung’s non-disclosure
16 in deciding to purchase the Suunto Dive Computer. *See id.*

17 2. Allegations Regarding the Seventeen Other Dive Computers

18 “District courts in the Ninth Circuit disagree on whether class representatives
19 have standing to bring claims for unpurchased products.” *Ruszecki v. Nelson Bach USA*
20 *Ltd.*, No. 12CV495, 2015 WL 6750980, at *3 (S.D. Cal. June 25, 2015) (citing *Aguilar*
21 *v. Boulder Brands, Inc.*, No. 12CV1862, 2013 WL 2481549, at *2 (S.D. Cal. June 10,
22 2013)).

23 Some district courts allow only a narrow scope of claims a plaintiff may
24 bring in a class action. . . . Other courts, however, find that when a plaintiff
25 otherwise has standing to bring UCL and CLRA claims for products she
26 actually purchased, ‘the issue of whether that plaintiff may be allowed to
present claims on behalf of others who have similar, but not identical,
interests depends not on standing, but on an assessment of typicality and
adequacy of representation.’

27 *Id.* (citing *Cardenas v. NBTY, Inc.*, 870 F.Supp.2d 984, 992 (E.D. Cal. 2012); *Aguilar*,
28 2013 WL 2481549, at *2; *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530

1 (C.D. Cal. 2011).

2 The *Cardenas* court refused to grant a motion to dismiss based on a
3 standing argument that plaintiff had not purchased all the products in the
4 complaint, and explained that this issue was better addressed under Rule
5 23 because she had sufficiently alleged that all of the relevant products
6 that [sic] shared similar ingredients and representations.

5 *Id.*

6 Plaintiff alleges that all eighteen Dive Computers included in the complaint have
7 the same software and/or hardware defect that makes the Dive Computers unfit for the
8 purpose they are marketed and sold for. Plaintiff alleges that the business practice of
9 concealing the defects in the computers “is uniform across all Dive Computers.” (ECF
10 No. 10 at 20). The Court concludes that Plaintiff’s ability to represent class members
11 injured by similar products should be analyzed under Rule 23.¹

12 **B. Class Action Allegations**

13 Defendant contends that Plaintiff’s class claims should be dismissed. (ECF No.
14 7-1 at 21). Defendant asserts that “[t]he only connections to California alleged in the
15 Complaint is that Huntzinger lives here and he bought the Cobra 3 here” and that “Aqua
16 Lung is incorporated in Delaware.” *Id.* at 22. Defendant asserts that “the transactions
17 that are the subject of Huntzinger’s class claims presumably occurred in all fifty states.”
18 *Id.* (citation omitted). Defendant contends that “[u]nder these circumstances, and
19 California’s choice of law rules, this Court cannot apply California law on a classwide
20 basis.” *Id.* Defendant asserts that the “Court would have to apply the laws of all the
21 other states. . . . The task for the litigants and Court would be too burdensome and the
22 jury would be overwhelmed with complexity” because “state consumer protection laws
23 of the 49 remaining states differ in material respects.” *Id.* at 22-23.

24 Plaintiff contends that California law should apply to the nationwide class action
25 because Aqua Lung “is headquartered in California, has its operations in California,
26 conducts all relevant business in California . . . and a significant portion of the class
27

28 ¹ The Court does not consider Defendant’s evidentiary submissions attached to
the motion to dismiss at this stage in the proceedings.

1 members reside in California” (ECF No. 10 at 21).

2 Determining the law to apply in a nationwide class action requires a choice of law
3 analysis. At the motion to dismiss stage of litigation, the record is not developed and
4 a determination of choice of law may be premature. *See Czuchaj v. Conair Corp.*,
5 13CV1901, 2014 WL 1666427, at *3 (S.D. Cal. April 17, 2014). In *Mazza v. American*
6 *Honda Motor Company, Inc.*, 666 F.3d 581, 589-94 (9th Cir. 2012), the court conducted
7 a detailed choice of law analysis and concluded that based on the circumstances before
8 it, California law should not be applied to non-resident class members. *Mazza*, cited by
9 Defendants, was decided at the class certification stage of the case and does not stand
10 for the bright-line rule that “nationwide classes do not have standing to assert California
11 consumer protection statutes.” *See Won Kyung Hwang v. Ohso Clean, Inc.*, 2013 WL
12 1632697, at *21 (N.D. Cal. April 16., 2013). A choice of law “inquiry is most
13 appropriate at the class certification stage, after the parties have engaged in discovery.”
14 *See id.*

15 In this case, whether California law can be applied to all claims is a choice of law
16 inquiry that will be addressed at the class certification stage of the case, after the parties
17 have had the opportunity to conduct discovery. Plaintiff’s class action claims are not
18 dismissed at this stage of the proceedings.

19 **C. Fed. R. Civ. P. 9(b)**

20 Defendant contends that Plaintiff’s causes of action for violations of the CLRA
21 and UCL should be dismissed because the complaint fails to plead the claims “with the
22 particularity required under Fed. R. Civ. P. 9(b).” (ECF No. 7-1 at 25). Defendant
23 alleges that “Huntzinger’s Complaint makes broad conclusory allegations of fraud, but
24 fails to provide any particulars.” *Id.* Defendant alleges that the complaint “does not
25 identify any alleged misrepresentation that Huntzinger saw or read and it does not allege
26 when, where or how any such misrepresentation to him was made.” *Id.* Defendant
27 contends that the complaint “fails to provide Aqua Lung with sufficient notice to defend
28 the fraud claims.” *Id.*

1 Plaintiff contends that “Rule 9(b) only applies to UCL and CLRA averments
2 based on fraudulent conduct,” not “all UCL and CLRA claims.” (ECF No. 10 at 27)
3 (citations and internal quotation marks omitted). Plaintiff contends that “[e]ven if Rule
4 9(b) applies, Plaintiff’s allegations are sufficient” to meet the requirements of Rule 9(b).
5 *Id.* Plaintiff contends that “[i]n an omission case like this, a plaintiff ‘faces a slightly
6 more relaxed burden, do to the fraud-by-omission plaintiff’s inherent inability to specify
7 the time, place, and specific content of an omission in quite as precise a manner.’” *Id.*
8 (citing *Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711 DOC, 2011 WL
9 3941387, at *2 (C.D. Cal. Aug. 31, 2011)). Plaintiff contends that

10 Plaintiff alleges the facts surrounding the omission with sufficient detail
11 to put Aqua Lung on notice, including the information Aqua Lung
12 concealed from Plaintiff (the defective nature of the Dive Computer, ¶¶4,
13 21), that Aqua Lung knew or should have known that the Dive Computers
14 were defective (¶¶22-27), that the omission concerned a safety issue (¶36),
15 that the concealed information was material (*id.*), and that had Plaintiff
16 known that his Dive Computer was defective he would not have purchased
17 it (¶11). Additionally . . . Plaintiff’s injury is that he purchased a falsely
18 advertised product and thus, he does not have to allege that his Dive
19 Computer malfunctioned.

20 *Id.* at 28.

21 Rule 9(b) of the Federal Rules of Civil Procedure states that “[i]n alleging fraud
22 or mistake, a party must state with particularity the circumstances constituting fraud or
23 mistake.” Fed. R. Civ. P. 9(b). “Averments of fraud must be accompanied by the who,
24 what, when, where, and how of the misconduct charged.” *Vess v. Ciba-Geigy Corp.*
25 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations and internal quotation marks
26 omitted). A fraud-based omission claim under the UCL and CLRA “must be contrary
27 to a representation actually made by the defendant, or an omission of fact the defendant
28 was obliged to disclose.” *In re Sony Gaming Networks and Consumer Data Security*
Breach Litigation, 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014). “A duty to disclose may
arise: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when
the defendant had exclusive knowledge of material facts not known to the plaintiff; (3)
when the defendant actively conceals a material fact from the plaintiff; or (4) when the
defendant makes partial representations but also suppresses some material fact.” *Id.*

1 “[I]n a case where fraud is not an essential element of a claim, only allegations
2 (‘averments’) of fraudulent conduct must satisfy the heightened pleading requirements
3 of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary
4 notice pleading standards of Rule 8(a).” *Vess*, 317 F.3d at 1104. “While fraud is not
5 a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless
6 allege that defendant engaged in fraudulent conduct In that event, the claim is said
7 to be grounded in fraud or to sound in fraud, and the pleading as a whole must satisfy
8 the particularity requirement of Rule 9(b).” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
9 1125 (9th Cir. 2009) (citations omitted). “Because the Supreme Court of California has
10 held that nondisclosure is a claim for misrepresentation in a cause of action for fraud,
11 it (as any other fraud claim) must be pleaded with particularity under Rule 9(b).” *Id.*
12 at 1127. This Court has held that Rule 9(b) does not apply when a “Plaintiff alleges that
13 Defendants made representations and omissions on their product packaging, but does
14 not allege knowledge of falsity or intent to induce reliance.” *Johns v. Bayer Corp.*,
15 09CV1935, 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010).

16 In this case, Plaintiff alleges that “Defendant advertised the Dive Computers as
17 a safe product.” (ECF No. 1 ¶ 35). Plaintiff alleges that Defendant knew “that the Dive
18 Computers all contain the inherent defects, malfunction, and pose a significant hazard
19 to consumers.” *Id.* ¶ 28. Plaintiff alleges Defendant’s knowledge was based on
20 consumer complaints and based on Defendant’s repairs on Dive Computers belonging
21 to “consumers who experienced permanent malfunction of the dive computer due to the
22 defective software and/or hardware.” *Id.* ¶¶ 24-25. These factual allegations are
23 sufficient to support an inference that the Defendant knew of the defects that existed in
24 the Dive Computers and failed to disclose the material defect to consumers while
25 continuing to market and distribute the Dive Computers. The Court concludes that
26 under the requirements of Rule 9(b), the Plaintiff has plead sufficient facts to put the
27 Defendant on notice of the claims.

28 **D. Implied Warranty of Merchantability**

1 Defendant contends that California requires direct privity between buyer and
2 seller for an implied warranty claim. (ECF No. 7-1 at 23). Defendant contends that
3 “direct privity is absent in this case since Huntzinger bought the Cobra 3 from a third
4 party internet retailer, not from Aqua Lung.” *Id.* at 24.

5 Plaintiff contends that an exception to the vertical privity requirement applies in
6 this case because “Plaintiff and the rest of the Class are the third-party beneficiaries of
7 the implied warranty made between Aqua Lung as the distributor of the Dive
8 Computers and the ultimate retail sellers where Plaintiff and the other Class members
9 purchased the Dive Computers.” (ECF No. 10 at 26).

10 “Under California Commercial Code section 2314, . . . a plaintiff asserting breach
11 of warranty claims must stand in vertical contractual privity with the defendant.”
12 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). “A buyer and
13 seller stand in privity if they are in adjoining links of the distribution chain. . . . Some
14 particularized exceptions to the rule exist.” *Id.* “Under California Civil Code § 1559,
15 a third party beneficiary can enforce a contract made expressly for his benefit . . . the
16 only requirement is that the party is more than incidentally benefitted by the contract.”
17 *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008); *see e.g.*,
18 *Shell v. Schmidt*, 272 P.2d 82 (Cal. App. 1954) (finding that where a contractor
19 constructing homes promised to follow plans which were filed with Federal Housing
20 Authority (“FHA”) in return for FHA’s grant of priority permits to contract, plaintiffs
21 who purchased the homes were third party beneficiaries of the agreement between the
22 contractor and the FHA); *Gilbert Fin. Corp. v. Steelform Contracting Co.*, 145 Cal.
23 Rptr. 448 (Cal. App. 1978) (finding that a plaintiff who contracted for construction of
24 a bank records storage building could sue the subcontractor for breach of implied
25 warranty as a third party beneficiary of the contract between the contractor and
26 subcontractor).

27 Determining whether a third party is an intended beneficiary of a contract
28 “involves construction of the intention of the parties, gathered from reading the contract

1 as a whole in light of the circumstances under which it was entered.” *Northstar*
2 *Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1063 (9th Cir. 2015).
3 “[W]here a plaintiff pleads that he or she is a third-party beneficiary to a contract that
4 gives rise to the implied warranty of merchantability, he or she may assert a claim for
5 the implied warranty’s breach.” *In re Toyota Motor Corp. Unintended Acceleration*
6 *Marketing, Sales Practices, and Products Liability Litigation*, 754 F. Supp. 2d 1145,
7 1185 (C.D. Cal. 2010). Plaintiff does not cite any reported California cases extending
8 the third party beneficiary exception to the consumer products context. However,
9 district courts have recognized a the third party beneficiary exception to the privity
10 requirement in the consumer products context. *See e.g., In re MyFord Touch Consumer*
11 *Litig.*, 46 F. Supp. 3d 936, 983 (N.D. Cal. 2014) (applying the third party beneficiary
12 exception to plaintiffs who bought a car from a dealership and then sued the
13 manufacturer for breach of implied warranty); *Roberts v. Electrolux Home Products,*
14 *Inc.*, CV12-1644, 2013 WL 7753579, at *10 (C.D. Cal. March 4, 2013) (finding that the
15 decision of the California Supreme Court in “*Gilbert* is best interpreted to establish an
16 exception to the privity requirement that applies when a plaintiff is the intended
17 beneficiary of implied warranties in agreements linking a retailer and a manufacturer,
18 and therefore a lack of privity does not bar plaintiff’s implied warranty claims.”); *In re*
19 *Sony Vaio Computer Notebook Trackpad Litigation*, 9CV2109, 2010 WL 4262191, at
20 *3 (S.D. Cal. Oct. 28, 2010) (finding that “a plaintiff may maintain an implied warranty
21 claim against a manufacturer when a plaintiff is a third party beneficiary of a contract
22 between the manufacturer . . . and a third party” retailer); *Cartwright v. Viking*
23 *Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008) (finding that the complaint
24 sufficiently alleged that plaintiffs were the intended third party beneficiaries of the
25 product manufacturer’s warranty because the plaintiffs claimed that agreements
26 between the manufacturer and distributors or initial purchasers were intended to benefit
27 the ultimate consumers of the product).

28 In this case, the complaint alleges that “plaintiff purchased a Suunto Cobra 3 dive

1 computer from leisurepro.com for \$699.95.” (ECF No. 1 at 4). The complaint alleges
2 that “Aqua Lung marketed, and distributed the Dive Computers to thousands of
3 consumers in the United States . . .” and that “Aqua Lung is the exclusive United States
4 distributor for Suunto-branded dive computers, including the Dive Computers at issue
5” *Id.* at 5. The complaint includes the conclusory allegations that “Plaintiff and
6 class members were the intended beneficiaries and users of the Dive Computers” and
7 that “Defendant created the advertising at issue and warranted the Dive Computers to
8 them directly and/or through the doctrine of agency.” These conclusory allegations are
9 not supported by facts sufficient to infer a contractual relationship between
10 leisurepro.com and Aqua Lung. *See Northstar Financial Advisors, Inc.*, 779 F.3d at
11 1063.

12 **E. Statute of Limitations**

13 Defendant contends that “[t]he California consumer claims for the putative class
14 have a statute of limitations of three years for the CLRA, Cal. Civil Code § 1783, and
15 four years for the UCL, Cal. Business & Professions Code § 17208.” (ECF No. 7-1 at
16 27). Defendant contends that “[t]he implied warranty claim has a statute of limitations
17 in California of 4 years, Cal. U. Com. Code § 2725, but in other states it is a three-year
18 limitation period” *Id.* Defendant asserts that “a number of the accused dive
19 computers are so old, and have been so long out of production or sale that they should
20 not be included in this case. *Id.* at 26. Defendant asserts that

21 The Cobra 2 and the Vyper 2, were last manufactured in 2008, and last
22 sold in July 2009 Three computer models have not been
23 manufactured since 2010: Vytec, and Vytec DS, Gekko; but U.S. sales
24 ended in 2008 for the Vytec and in May 2009 for the Vytec DS . . . with
25 sales of the Gekko ending May 11, 2010. Finally, sales ended in August
26 2011 for the D6 and D4 computers, and December 2011 for the D9.

27 *Id.* at 27. Defendant contends that the Cobra 2, Vyper 2, Gekko, Vytec, and Vytec DS
28 computers were last sold on dates outside of the statute of limitations for the CLRA,
UCL, and implied warranty claims. Defendant contends that the CLRA claim should
also be dismissed as to the D9, D6, and D4 because they were last sold on dates outside
of the three-year statutory of limitations period for a CLRA claim.

1 “Plaintiff alleges that Aqua Lung actively concealed the defect by not informing
2 consumers of the defect and instead, implementing an undisclosed extended warranty
3 program Plaintiff and other Class members could not have known of the defect
4 when they purchased their Dive Computers.” *Id.* (citing Compl. ¶¶ 29-31). Plaintiff
5 contends that the statute of limitations on Plaintiff’s claims is tolled. *Id.*

6 “When a motion to dismiss is based on the running of the statute of limitation,
7 it can be granted only if the assertions of the complaint, read with the required liberality,
8 would not permit the plaintiff to prove that the statute was tolled.” *Jablon v. Dean*
9 *Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). The statute of limitations for UCL and
10 CLRA claims begins to run “when a reasonable person would have discovered the
11 factual basis for a claim.” *Broberg v. The Guardian Life Ins. Co. of Am.*, 171 Cal. App.
12 4th 912, 920 (2009); *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1196-97
13 (2013). “A statute of limitations may be tolled if the defendant fraudulently concealed
14 the existence of a cause of action in such a way that the plaintiff, acting as a reasonable
15 person, did not know of its existence.” *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d
16 1055, 1060 (9th Cir. 2012). “The plaintiff carries the burden of pleading and proving
17 fraudulent concealment; it must plead facts showing that the defendant affirmatively
18 misled it, and that the plaintiff had neither actual nor constructive knowledge of the
19 facts giving rise to its claim despite its diligence in trying to uncover those facts.” *Id.*

20
21 The complaint alleges that “Aqua Lung, as the distributor and an authorized
22 repair facility for the Dive Computers, knew or should have known that the Dive
23 Computers were failing and defective Since at least 2005, Aqua Lung has received
24 Dive Computers for repair from consumers who experienced permanent malfunction
25 of the dive computer due to the defective software and/or hardware.” (ECF No. 1 ¶¶
26 22, 24). The complaint alleges that “[d]espite having knowledge that the Dive
27 Computers all contain the inherent defects, malfunction, and pose a significant hazard
28 to consumers, defendant does not inform consumers . . . of these facts.” *Id.* ¶ 28. The


1 complaint does not specifically allege when Plaintiff discovered the alleged defects in
2 the Dive Computers Defendant markets and sells. Plaintiff does, however, allege that
3 Plaintiff purchased the Cobra 3 dive computer on or about May 14, 2013 and alleges
4 that “plaintiff would not have purchased or used the Dive Computer had he known that
5 the product was defective” (ECF No. 1 ¶¶ 11, 36). Accepting as true the
6 allegations that Defendant knew about the defective Dive Computers but concealed the
7 defects from consumers and that Plaintiff and the other class members did not know
8 about the defects until at least 2013, the complaint alleges sufficient facts to survive a
9 motion to dismiss based on the statute of limitations.

10 **IV. Conclusion**

11 IT IS HEREBY ORDERED that Plaintiff’s implied warranty of merchantability
12 claim is dismissed without prejudice. The motion to dismiss (ECF No. 7) filed by
13 Defendant Aqua Lung is denied in all other respects.

14 IT IS FURTHER ORDERED that Plaintiff’s motion to strike (ECF No. 11) is
15 denied as moot.

16 DATED: December 10, 2015

17 
18 **WILLIAM Q. HAYES**
United States District Judge

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