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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

KIM ALLEN, et al., on behalf of
themselves, all others similarly
situated, and the general public,

Plaintiffs,

v.

HYLAND'S, INC., a California
Corporation; and STANDARD
HOMEOPATHIC COMPANY,

Defendants.

Case No. 3:12-cv-1150-DMG (MAN)

CLASS ACTION

Filed: February 9, 2012

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

[FILED CONCURRENTLY WITH
DECLARATIONS OF RONALD A.
MARRON, JON A. KROSNICK, Ph.D.
AND CHARLENE PODLIPNA]

Judge: Hon. Dolly M. Gee

Courtroom: 7

[Briefing submitted per Court's Order, Dkt.
No. 282]

Allen v. Hyland's, Inc., Case No. 12-cv-1150

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

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1 Plaintiffs respectfully submit the following supplemental memorandum in
2 support of their Motion for Class Certification (the “Motion”), Dkt. No. 60, as
3 ordered by the Court, Dkt. No. 282.

4 **I. Plaintiffs have Standing Because they Suffered Injury in Fact,**
5 **as a Result of Defendants’ Advertising Practices**

6 In its June 20, 2014 Minute Order (Dkt. No. 282), the Court raised issues
7 regarding statutory standing, seeking additional briefing as to whether the named
8 Plaintiffs have suffered an “injury in fact” under Article III of the Constitution” and
9 whether there is a “causal connection” between Defendants’ acts and that injury.¹

10 An injury in fact under Article III arises where the named plaintiff loses
11 “money or property;” and a causal connection arises where such loss would not have
12 occurred “but for” defendant’s unfair or fraudulent business practices. *Rubio v.*
13 *Capital One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010); *Hinojos v. Kohl’s Corp.*,
14 718 F.3d 1098, 1104 (9th Cir. 2013) (finding standing under § 17204 of UCL is met:

15 by alleging ... that he or she would not have bought the product but for
16 the misrepresentation. . . . From the original purchasing decision we
17 know the consumer valued the product as labeled more than the money
18 he or she parted with; from the complaint’s allegations we know the
19 consumer valued the money he or she parted with more than the product
20 as it actually is; and from the combination we know that because of the
21 misrepresentation the consumer (allegedly) was made to part with more
22 money than he or she otherwise would have been willing to expend, i.e.,
that the consumer paid more than he or she actually valued the product.
That increment, the extra money paid, is economic injury and affords the
consumer standing to sue.

23 ¹ Plaintiffs submitted argument on Article III standing in their supplemental briefing
24 of August 23, 2013 (Dkt. No. 224). The Court also held that Plaintiffs had Article III
25 standing, in its Order dated May 2, 2012 (Dkt. No. 59 at p. 4). The Court also
26 previously ruled that Plaintiffs had adequately alleged economic injury, at least as to
the effectiveness claims. (Dkt. No. 80 at p. 2). The current complaint now includes
economic injury as to the “100% natural” claims. See citations *supra*.

1 *See also Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 728 (9th Cir. 2012)
2 (finding that standing under the UCL met when the named plaintiffs relied on the
3 defendant's "misleading marketing materials").

4 Here, each of the named Plaintiffs lost money based on actual reliance on
5 Defendants' unfair and fraudulent business practices; i.e., "but for" for the
6 representations that the Products were "100% natural" (or "natural") and/or effective,
7 they would not have purchased the Products. Third Am. Compl. (Dkt. No. 198,
8 "TAC") ¶¶ 41-43, 46, 47 & 50 (Calms Forte), 57-59, 64 & 67 (Teething Tablets), 69-
9 71, 74 & 79 (Migraine Headache Relief), 81, 85 & 88 (ClearAc), 90, 94 & 97
10 (Poison Ivy/Oak Tablets), 99, 103 & 106 (Colic Tablets), 108, 110 & 122 (Leg
11 Cramps with Quinine), 124-125, 129 & 141 (Leg Cramps), 144-145, 147 & 153
12 (Defend Cold & Cough Night), 156, 158 & 165 (Defend Cold & Cough), 167, 169 &
13 176 (Hyland's Cough), 178, 180 & 184 (Seasonal Allergy Relief). *See also id.* ¶¶
14 195-196, 202, 204-206. The record in this case also establishes that Plaintiffs read
15 the Products' labeling prior to their purchases, and relied on the natural and
16 effectiveness claims on the Products' packaging. *See* Dkt. Nos. 192 at 16:10-21,
17 17:4-11; 192-16 (excerpts from Plaintiffs' deposition transcripts). Plaintiffs have
18 also testified in their discovery responses that they each relied on the Products'
19 packaging as to the effectiveness claims and the "100% natural" claims. *See* Decl. of
20 Ronald A. Marron filed concurrently herewith, Ex. 1. Defendants can point to no
21 evidence that the named Plaintiffs lack statutory standing under the UCL. The Court
22 should find that standing is satisfied for purposes of the Motion.

23 **II. Plaintiffs Assert Two Primary Theories of Liability, Only One of Which**
24 **Involves Premium Pricing**

25 The Court in its Minute Order also sought supplemental briefing from
26 Plaintiffs regarding their damages theories. Here, after investigation and discovery,
27

1 Plaintiffs assert the following fundamental claims: (a) that the Products are not
2 inherently effective for their claimed uses, and under this theory, all the money the
3 class members spent on the Products during the class period should be refunded
4 because the Products are valueless; and (b) that the “100% natural” claims on the
5 Products are false or deceptive, such that any premium price received by Defendants
6 due to this advertising should be restored to the class. *See also* Reply in Supp. of
7 Mot. for Class Cert. (Dkt. No. 98) at p. 1.

8 Plaintiffs’ effectiveness claims invoke a full refund damages model because
9 there is no inherent value to the Products.² *See* TAC, Ex. 1 (“Sleep Aid” on Calms
10 Forte, “Relieves Pain and Irritability from Teething” on Teething Tablets, and so
11 on); Dkt. No. 224 (supplemental briefing with evidence of full refund damages
12 model). On the other hand, other allegations in the TAC that do not devolve on
13 effectiveness, but instead concern an ingredient in the Products, such as the “100%
14 natural” claim, invoke a premium pricing model, whereby Plaintiffs will prove the
15 amount of premium price unfairly or fraudulently garnered by Defendants as a result
16 of this type of false or deceptive advertising. Regarding this second damages model,
17 Plaintiffs respectfully submit this briefing and the Declarations of Jon A. Krosnick,
18 Ph.D. and Charlene Podlipna.

19
20 ² High level of dilution in the Products is a function of their lack of effectiveness. *See*,
21 *e.g.*, Dkt. No. 197 at p. 4 (Order on Mot. for Judgment on the Pleadings, finding that
22 Plaintiffs’ theory of liability is lack of effectiveness, based on high levels of dilution:
23 “They state that there is such a low concentration of active ingredient that the
24 challenged products could not *possibly* work.”) (emphasis in original). Thus, while
25 the essential claims can be distilled down to two main theories, other allegations in the
26 TAC color these claims and explain why Defendants’ advertising is false or deceptive.
27 Similarly, Plaintiffs’ UCL unlawful claims do not involve premium pricing valuation
28 because no consumer would purchase an illegal product, and the total purchase price
would need to be refunded. *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th
145, 154-157 (2010) (holding that a plaintiff “does not put valuation at issue when he
alleges that he bought a product that was illegal to sell or possess”).

1 The cases identified by the Court in its Minute Order concerned products for
2 which class members received something that had some value, but for which a
3 premium price may have been involved. See, e.g., *Lanovaz v. Twinings N. Am.,*
4 *Inc.*, C-12-02646-RMW, 2014 WL 1652338, at *7 (N.D. Cal. Apr. 24, 2014)
5 (concerning “antioxidant” labeling on teas and ruling that “[w]ithout a regression
6 analysis, plaintiffs do not present any damages model capable of estimating the price
7 premium attributable to Twinings' antioxidant labels”); *In re POM Wonderful LLC*,
8 ML 10-02199 DDP RZX, 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014)
9 (regarding health claims on fruit drink and holding that a “Full Refund model is
10 invalid because it fails to account for any value consumers received”); *Astiana v. Ben*
11 *& Jerry's Homemade, Inc.*, C 10-4387 PJH, 2014 WL 60097, at *1 (N.D. Cal. Jan. 7,
12 2014) (regarding “all natural” ice cream for which consumers arguably received
13 some value).

14 Here, the over-the-counter Products sold by Hylands had one intended use – to
15 help with a sickness. For this reason, the products have no inherent value if they are
16 not effective for their advertised uses. See *Khoday v. Symantec Corp.*, 11-180
17 (JRT/TNL), 2014 U.S. Dist. LEXIS 43315, at *103 (D. Minn. Mar. 31, 2014) (ruling
18 that “the full value of” a force downloaded insurance product was an accurate
19 damage measurement because “[t]his measure of damages would likely be
20 appropriate here, where the products in question have no intrinsic value other than
21 the advertised use”). In contrast, in *Jones v. ConAgra Foods, Inc.*, C 12-01633 CRB,
22 2014 WL 2702726, at *2-3 (N.D. Cal. June 13, 2014), the named plaintiffs alleged
23 that various food products were not “100% natural,” as labeled, but did not otherwise
24 contend that they received worthless products. *Id.* at *20 (noting that plaintiff’s
25 expert admitted the mislabeled products were “not economically worthless”). The
26 court observed that “[r]eturn of the full retail or wholesale prices is not a proper
27

1 measure of restitution, as it fails to take into account the value class members
2 received by purchasing the products.” *Id.* at *19. *See also Lanovaz*, 2014 WL
3 1652338, at *6 (“The proper measure of restitution in a mislabeling case is the
4 amount necessary to compensate the purchaser for the difference between a product
5 as labeled and the product as received.”) As noted above, there is no value to a drug
6 that lacks all effectiveness. *See Khoday*, 2014 U.S. Dist. LEXIS 43315, at *103.

7 In its Minute Order, the Court recognized that to the extent Plaintiffs assert the
8 products are nothing more than placebos and therefore ineffective, cases challenging
9 damages models that fail to consider that the product has some value are factual
10 distinguishable. Minute Order, Dkt 282, p. 3. Therefore, the remainder of this brief
11 will only focus on Plaintiffs’ second damages model, relating to premium pricing
12 and the “100% natural” and related claims.³

13 III. Premium Pricing Is Calculable By Classwide Proof

14 In *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013), the Supreme Court
15 ruled that parties seeking class certification must “establish that damages could be
16 measured on a classwide basis” in order to establish predominance. “Calculations
17 need not be exact, . . . but at the class-certification stage (as at trial), any model
18 supporting a ‘plaintiff’s damages case must be consistent with its liability case, . . .”
19 *Id.* (citation omitted). Moreover, a party seeking class certification should meet this
20 burden of proof with evidence. *See Guido v. L’Oreal, USA, Inc.*, No. 11-1067, 2013
21 WL 3353857, at *15 (C.D. Cal. July 1, 2013) (“Under *Comcast*, courts can only
22

23 ³ The “100% natural” allegations embrace claims that Defendants failed to disclose
24 the truth about an ingredient in the Product. For example, the TAC alleges
25 Defendants added synthetic isopropyl alcohol in Teething Tablets without informing
26 consumers. On investigation and discovery, isopropyl alcohol is not natural; thus
27 Plaintiffs challenge the inclusion of a synthetic in a Product that purports to be “100%
natural,” not simply the failure to disclose. *See Natural Claims Chart*, attached as
Exhibit 1 to Marron Decl., produced by Plaintiffs to Defendants in discovery.

1 certify a Rule 23(b)(3) class if there is evidence demonstrating the existence of a
2 classwide method of awarding relief that is consistent with the plaintiffs' theory of
3 liability.”)

4 In *Guido*, the court denied certification without prejudice because the plaintiffs
5 submitted no expert testimony supporting their contention that the difference
6 between what consumers paid for a beauty serum and the true value of the product
7 without its false advertising could be calculated. *See id.* at *16 (“Consequently,
8 without evidence affirmatively demonstrating that the true market price of Serum can
9 be calculated on a classwide basis, plaintiffs' claim that there is a classwide method
10 of granting relief is factually unsupported.”). Here, Plaintiffs are submitting expert
11 testimony that demonstrates Plaintiffs can and will present evidence of the measure
12 of damage to Plaintiffs and class members flowing from Defendants' false
13 advertising regarding claims that the Products are “100% natural.” *See* Decls. of
14 Krosnick & Podlipna filed concurrently herewith.

15 Damages need not be calculated at the class certification stage – the party
16 seeking to certify a class need only show that their theories of relief are tethered to
17 workable methods of assessing classwide damages. *Jacob v. Duane Reade, Inc.*, 293
18 F.R.D. 578, 582 (S.D.N.Y. 2013) (

19 [I]n *In re Diamond Foods, Inc., Sec. Litig.*, No. 11 Civ. 5386, 2013 WL
20 1891382 (N.D. Cal. May 6, 2013), the court held that Rule 23(b)(3) class
21 certification was proper, despite *Comcast*, ‘[w]hether [a] plaintiff
22 will ultimately prevail in proving damages is not necessary to determine
23 at [the certification] stage.’ *Id.* at *12. By contrast, the question at the
24 class certification stage, in light of *Comcast*, was only ‘whether [a]
25 plaintiff has met its burden of establishing that damages can be proven on
26 a classwide basis.’).

27 *See also Jones*, 2014 WL 2702726, at *19 (“At class certification, plaintiff must
28 present a likely method for determining class damages, though it is not necessary to
show that his method will work with certainty at this time.”).

1 The Ninth Circuit has reiterated *Comcast*'s rule that a workable method of
2 proving damages must be tendered at class certification, but damages themselves
3 need not be calculated at this stage, and has even supported certification of classes
4 where individual damages predominate. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510,
5 514 (9th Cir. 2013) (noting that Rule 23(b)(3) itself contemplates individual
6 damages). *Comcast* merely requires that the named plaintiff translate "the legal
7 theory of the harmful event into an analysis of the economic impact of that event."
8 *Id.* (citing *Comcast*, 133 S. Ct. at 1435). To the extent any of the decisions cited by
9 the Court counter this rule, they conflict with the Ninth Circuit's decision in *Leyva*.
10 *See, e.g., Astiana*, 2014 WL 60097, at *12 (purporting to require expert to determine
11 at class certification that premium was indeed paid and the amount of that premium).

12 In *Astiana*, the court ruled that the plaintiff had to show that there was a price
13 premium in place at class certification. *See* 2014 WL 60097, at *12 ("plaintiff has
14 not offered any expert testimony demonstrating a gap between the market price of
15 Ben & Jerry's 'all natural' ice cream and the price it purportedly should have sold for
16 if it had not been labeled 'all natural'"). But this overreaches the real question,
17 which is whether the named plaintiff has presented "a damages methodology that
18 *can determine* the price premium attributable to [the defendant's] use of 'All
19 Natural'" labeling, and not whether it has been determined. *Brazil v. Dole Packaged*
20 *Foods, LLC*, 12-CV-01831-LHK, 2014 WL 2466559, at *15 (N.D. Cal. May 30,
21 2014); *see also Werdebaugh v. Blue Diamond Growers*, 12-CV-2724-LHK, 2014
22 WL 2191901, at *25 (N.D. Cal. May 23, 2014) ("*Comcast* did not articulate any
23 requirement that a damage calculation be performed at the class certification stage, . .
24 . ."). After all, if no price premium has been paid, it resolves the issue on a classwide
25 basis, albeit it for the defendant. *See id.* At this stage of the proceedings, the court
26 need only determine whether a "workable" methodology has been proposed.

1 *Werdebaugh*, 2014 WL 2191901, at *25. In this case, Plaintiffs have presented a
2 workable methodology.⁴ See Krosnick & Podlipna Decls. An analysis of premium
3 pricing will likely apply to all of Plaintiffs' claims other than effectiveness, such as
4 Plaintiffs' "100% natural" claims.⁵

5 Accordingly, Plaintiffs are tethering their two damages models to their two
6 different theories of liability: The first based on a complete lack of effectiveness of
7 the Products, for which briefing and expert testimony has already been submitted
8 (the Full Refund model; see Dkt. No. 224); and the second model being submitted
9 herewith, based on premium pricing for the false and deceptive "100% natural"
10 claims (Premium Pricing model). Plaintiffs' Premium Pricing model is sound and
11 puts forth a workable model tethered to this legal theory of harm.

12 Dr. Krosnick proposes a special form of conjoint analysis for the Premium
13 Pricing model, which will show two sets of survey participants a single Hyland's
14 Product, next to its competitors on a store shelf. One-half of the participants will
15 view the Product with its "100% natural" claim; the other half of the participants will
16 view the Product without its "100% natural" claim. Krosnick Decl. ¶¶ 38-42. In
17 *Jones*, the plaintiffs' expert created a damages model that relied on one comparator
18 in the marketplace, which the court criticized. See *Jones*, 2014 WL 2702726, at (20
19

20 ⁴ Defendants may challenge Plaintiffs' damages model by arguing Plaintiffs are
21 required at this stage to present actual damages in light of the Court's prior scheduling
22 order. However, Plaintiffs have addressed the scheduling issues with the Court and
23 respectfully submit that a ruling on class certification is integral to determining the
24 scope of any damage. Plaintiffs seek certification of a nationwide class as to twelve
products but have also in the alternative requested certification of specified state
classes. The resolution of the scope of the class is necessary to insure that the damage
calculation correlates with the certified class.

25 ⁵ The cases noted by the Court relating to premium pricing, however, do not affect
26 Plaintiffs' prior damages calculations based on the separate theory that the Products
27 are not inherently effective and therefore provide no value to the class. See Minute
Order, Dkt 282, p. 3; Dkt. No. 224.

1 (“It is inadequate to identify a single comparator, . . .”). By contrast, here Dr.
2 Krosnick will be comparing Hyland’s to *itself*, with and without the “100% natural”
3 advertising on the packaging, and will do so in simulated marketplace conditions, by
4 having the Hyland’s product next to other comparators, as it would appear on store
5 shelves. Krosnick Decl. ¶¶ 38-43.

6 Dr. Krosnick’s proposed study is a “special form of an incredibly widely used
7 research technique called conjoint analysis.” Krosnick Decl. ¶ 48. Accordingly, Dr.
8 Krosnick’s study “will be able to assess the increase in the proportion of people who
9 purchase the Hyland’s product due to making the claim,” which he opines will be
10 “extremely solid evidence of the causal impact of the ‘100% natural’ claim.” *Id.* at
11 ¶¶ 43-44. *See also id.* ¶ 45 (opining that his survey will yield:

12 (1) the proportion of people who would purchase the Hyland’s product
13 when presented with the addition of the ‘100% natural’ claim who would
14 not have purchased the product in the absence of that claim, and (2) the
15 demand curve for the product with and without the ‘100% natural’ claim,
16 which can be used to gauge how much more money consumers were
willing to pay for the product as the result of seeing the ‘100% natural’
claim.

17 Moreover, because the Hyland’s products will be shown alongside their
18 competitors, as they appear in the marketplace, both with and without the “100%
19 natural” packaging claim, the study will be evaluating the Hyland’s package with the
20 “100% natural” claim against the same Hyland’s package without the “100%
21 natural” claim. *See id.* ¶¶ 38-45. Accordingly, the study has both internal and
22 external validity and relies on no false comparisons which have plagued studies in
23 other class certification decisions. *See id.* ¶ 44.

24 Indeed, Dr. Krosnick’s proposed study is like the regression model approved
25 by the court in *Brazil*, because it tests the product against itself, and not against
26 comparators. *See Brazil*, 2014 WL 2466559, at *19 (“[T]he Regression Model
27

1 compares data on identical Dole products—the product before the label statement
2 was introduced, and the same product after its label included the alleged
3 misrepresentation.”). The percentage of change in consumer behavior based on the
4 removed claim will then be given to Plaintiffs’ accounting expert, who will be able
5 to apply the percentage of market impact to the actual sales and unit figures Plaintiffs
6 possess for the Products. See Podlipna Decl. ¶¶ 11-13.

7 Other courts have approved the use of conjoint studies, such as that proposed
8 by Dr. Krosnick. See, e.g., *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 12-CV-00630-
9 LHK, 2014 U.S. Dist. LEXIS 24506, at *60-76 (N.D. Cal. Feb. 25, 2014) (upholding
10 conjoint study as being strongly supported by peer review and other *Daubert*
11 factors); *Khoday*, 2014 U.S. Dist. LEXIS 43315, at *105 (ruling that “conjoint
12 analysis” was appropriate evidence for a “means to isolate the value for specific”
13 features of a good; and that “disputes about the precision of the particular model . . .
14 do not indicate that damages will not be measurable on a classwide basis”);
15 *Microsoft Corp. v. Motorola, Inc.*, 904 F. Supp. 2d 1109, 1120 (W.D. Wash. 2012)
16 (ruling that conjoint analysis to “determine what value a customer places on a
17 particular feature of a product” was based on sufficiently sound evidence to survive
18 *Daubert* challenge). Conjoint analysis tests a consumer’s “willingness to pay” and is
19 the appropriate methodology for assessing classwide damages for the “100%
20 natural” claims at issue in this case. See *Apple, Inc.*, 2014 U.S. Dist. LEXIS 24506,
21 at *64.

22 Plaintiffs respectfully submit that they can and will present evidence as to
23 damages that conforms with *Comcast* that is tethered to Plaintiffs’ theories of
24 liability. For these and all of the reasons stated in Plaintiffs’ prior briefing and
25 documents in support of certification, Plaintiffs respectfully request that the Court
26 grant their motion and certify a class in this case.

1 Dated: July 7, 2014

Respectfully submitted,

2 /s/ Ronald A. Marron

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