

1 CHAVEZ & GERTLER LLP
Mark A. Chavez (CA Bar No. 90858)
2 Nance F. Becker (CA Bar No. 99292)
42 Miller Avenue
3 Mill Valley, California 94941
Tel: (415) 381-5599
4 Fax: (415) 381-5572
mark@chavezgertler.com
5 nance@chavezgertler.com

6 *Additional Plaintiffs' Counsel on signature page*

7 Attorneys for Plaintiffs Nicholas Miller, Jeffrey Borneman,
and the Proposed Class
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 NICHOLAS MILLER and JEFFREY
12 BORNEMAN, individually and on behalf of
all others similarly situated,

13 Plaintiffs,

14 vs.

15 WISE COMPANY INC.,

16 Defendant.
17
18

Case No: 5:17-cv-00616-JAK-PLA

CLASS ACTION

**DECLARATION OF MARK
FALKENHAGEN IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Hrg. Date: Jan. 29, 2018

Time: 8:30 a.m.

Ctrm: 10B

Hon. John A. Kronstadt

19 I, Mark Falkenhagen, declare:

20 1. I am an individual over the age of 18 and a resident of the State of California. I
21 have personal knowledge of all matters stated below, and if called upon to do so I could testify
22 competently to them.

23 2. I have been retained as an expert by counsel for the Plaintiffs in this matter. I
24 understand that this declaration will be used to support Plaintiffs' motion for class certification.

25 **Qualifications**

26 3. I am a Partner at Hagen, Streiff, Newton & Oshiro, P.C. ("HSNO"), a forensic consulting
27 firm that specializes in the application of finance, valuation, economics and statistical principles to
28 questions that arise in a variety of contexts, including as here, in the context of litigation. I have been

1 employed by HSNO for 25 years where I have gained significant experience in a variety of industries. I
2 hold a B.S. in Business Administration. I have calculated damages and performed analyses related to class
3 certification claims. I have testified on economic damages and related subjects in federal and state court.

4 4. Further details about my qualifications and experience are set forth in my resume,
5 a true and correct copy of which is attached hereto as Exhibit A.

6 5. I have been compensated for my time in preparing this declaration at my
7 customary rate for case work, which is \$385 per hour.

8 **Summary of Opinions**

9 6. I have been retained by Plaintiffs to propose workable models for measuring the economic
10 damages and/or restitution to the putative class based upon Plaintiffs' theories of liability as alleged in the
11 Class Action Complaint for Damages, Restitution, Declaratory and Injunctive Relief (the "Complaint")
12 filed February 15, 2017. If additional issues arise, I may be asked to expand the scope of this analysis.
13 I have considered two models commonly used to measure damages and/or restitution in class action
14 product liability lawsuits: (1) the "full refund" or "full restitution" model, and (2) the "benefit-of-the-
15 bargain" model. The "full refund" or "full restitution" model restores the consumer to his or her position
16 prior to the injury by refunding the entire purchase or "register" price. The "benefit-of-the-bargain"
17 model calculates the amount to be paid to the aggrieved party as the difference between the
18 misrepresented value of the product and the actual value received. For each model, I have written a
19 brief description of my approach and a discussion of how each would be a workable means of calculating
20 damages and/or restitution in this case.

21 7. I have considered how the foregoing two models may be applied to measure the
22 economic damages and/or restitution to consumers who purchased Wise long term food kits. In
23 my professional opinion, either of these two damage models can be used to reliably, accurately,
24 and equitably determine the amount of compensation due to each of the members of the proposed
25 class consistent with the theories of liability that Plaintiffs allege.

26 **Methodology and Materials Reviewed**

27 8. In reaching the conclusions expressed herein, I have relied on my extensive
28 knowledge and experience valuing economic losses in a variety of contexts over the past 25

1 years. In addition, I have reviewed and considered the following documents and pleadings
2 provided to me by Plaintiffs' counsel in this matter:

- 3 a. Class Action Complaint filed February 15, 2017;
- 4 b. Joint Rule 16(b)/26(f) Report;
- 5 c. Reporter's Transcript of the Deposition of Marcus Sorensen dated August 15,
6 2017;
- 7 d. Excel Spreadsheets exhibited to Sorensen Deposition: CA Sales by Class by SKU
8 2013 to 2016 - FINAL - AJ 08102017; CA Sales by Class by SKU 2013 to 2016 (25
9 products ECom);

10 9. In addition, I have consulted and relied on the following publicly available data,
11 studies and information:

- 12 a. Wise Company website, <http://www.wisefoodstorage.com> ("Wise Website");
- 13 b. A sample of prior versions of the Wise Website on the Internet Archive Wayback
14 Machine: <https://archive.org/web/>.

15 **Wise Data**

16 10. I have reviewed the pertinent pages of the Transcript of the Deposition of Wise's
17 designated witness Marcus Sorensen, including his testimony that Wise uses the QuickBooks
18 software system to maintain its books and records. Mr. Sorensen also testified, and the Excel
19 Spreadsheets produced to date by Wise show, that Wise can identify each consumer who made a
20 purchase through the Wise Website that was delivered to an address in California during the
21 proposed class period (since February 15, 2013); the specific product(s), identified by SKU
22 number, that they purchased; and the price paid. Those business records are sufficient for me to
23 make the calculations discussed below.

24 **Analysis:**

25 **The "Full Refund" or "Full Restitution" Model**

26 11. The first model determines and refunds the entire purchase or "register" price paid
27 for the food kits at issue. This model assumes that the Court finds that if consumers had been fully
28 aware of the facts about Wise long term food kits, they would never have purchased them at all.

1 Given that the “long-term” food kits provide sustenance for periods that allegedly fall considerably
2 short of those that Wise advertises, Plaintiffs contend that the products had no intrinsic value to
3 consumers. (What consumer would purchase a “long term” food supply that would leave one to
4 starve for the preponderance of the period it was purported to provide sustenance? This is
5 tantamount to crossing the Sahara desert with one-third of the water required to complete the trek.)
6 By offering a “no fault” return policy, Wise Company has implicitly conceded that consumers
7 should be “made whole” for any Wise Company purchase with which they are dissatisfied or
8 which falls short of their expectations.

9 12. Therefore, under this model, if Plaintiffs are able to establish that Wise Company
10 engaged in material misrepresentations and/or omissions in marketing its long term food kits, the
11 calculation of the restitution owed to each class member will be based on the full purchase price
12 paid. Restitution or out-of-pocket costs can be readily calculated using data possessed by Wise
13 Company indicating total revenue and quantity of units sold by product SKU number, channel,
14 state, and calendar year (e.g., Excel Spreadsheet: CA Sales by Class by SKU 2013 to 2016 -
15 FINAL - AJ 08102017). According to this damage/restitution methodology, as applied in
16 *Pulaski & Middleman, LL v. Google*, 802 F.3d 979 (9th Cir. 2015), any residual value provided by
17 the product is irrelevant: the calculation need not account for benefits received after the date of
18 purchase – *the focus is on the value of the product at the date of purchase.*

19 **The “Benefit-of-the-Bargain” Model**

20 13. The benefit-of-the-bargain model calculates the difference in fair market value
21 between the *product as represented* and the *product actually received*. One method of
22 determining damages and/or restitution under this model is the “implied v. actual product life”
23 approach.

24 14. This method measures the difference between the represented product life and the
25 actual product life as a function of the price paid by the consumer. Under this approach,
26 consumers would be refunded the value of the lost useful life of their food kit, calculated as the
27 average sales price multiplied by the expected duration of the food kit less the actual duration of
28 the food kit. Wise Company represented that the long-term food kits at issue contained sufficient

1 sustenance for periods extending from one month to one year. However, the food kits are alleged
 2 to actually provide sustenance for periods considerably shorter than those advertised. I understand
 3 that Plaintiffs have retained as an expert a Registered Dietitian Nutritionist who will opine that the
 4 long term food kits provide only 25% to 37% of the calories required by an average American
 5 adult for the stated periods.

6 15. To demonstrate how the amount to be restored to consumers would be determined,
 7 we can use two examples: (1) Wise's "1 Month Food Supply" product named 56 Serving
 8 Emergency Freeze Dried Breakfast and Entrée Bucket, which Wise advertises on its Website as
 9 feeding 1 adult for 4 weeks (or 4 adults for 1 week) based on 2 servings a day, and (2) Wise's "3
 10 Month Food Supply" named "1080 Serving Package of Long Term Emergency Food Supply,"
 11 which Wise advertises as providing a "1 Year Supply" for 1 adult or a 3 Month Supply for 4
 12 adults, based on eating 3 servings a day. For purposes of this analysis, I assume that the 56-serving
 13 long term food kit provides 25% of the calories needed by an average adult, and that the 1080-
 14 serving food kit provides 37% of the calories needed by an average adult. The formula can easily
 15 be adjusted if the evidence shows that a different percentage is appropriate for any or all of the
 16 products at issue.

17 16. For the 56 Serving food kit¹, with an advertised duration of four (4) weeks for one
 18 (1) adult and an average price of \$86.64², the damages would be calculated as follows:

$$19 \quad \$86.64 - [25\% \times (\$86.64)] = \$86.64 - \$21.66 = \$64.98$$

20 **\$64.98** per 56 Serving Emergency Freeze Dried Breakfast and Entrée Bucket

21 For all 3,235³ units sold from 2012 – 2016, total damages would be:

$$22 \quad 3,235 \times \$64.98 = \$210,210.30$$

23
 24
 25 ¹ 56 Serving Emergency Freeze Dried Breakfast and Entrée Bucket: SKU numbers 01-156, 01-
 156 (new), and 01-156T.

26 ² Per average price (total revenue divided by total units sold) for SKU numbers 01-156, 01-
 156(new), and 01-156T for the years 2013 through 2016 per Excel Spreadsheets exhibited to
 27 Sorenson Deposition: CA Sales by Class by SKU 2013 to 2016 - FINAL - AJ 08102017

28 ³ Per total units sold for SKU numbers 01-156, 01-156(new), and 01-156T for the years 2013
 through 2016 per Excel Spreadsheets exhibited to Sorenson Deposition: CA Sales by Class by
 SKU 2013 to 2016 - FINAL - AJ 08102017

1 17. Similarly, for the 1,080 Serving food kit⁴, with an advertised duration of three (3)
2 months for four (4) adults and an average price of \$2,140.96⁵, the damages would be:

3 $\$2,140.96 - [37\% \times (\$2,140.96)] = \$2,140.96 - \$792.16 = \$1,348.80$

4 **\$1,348.80** per 1080 Serving Long Term Food Supply Package

5 For all 169⁶ units sold from 2012 – 2016, total damages would be:

6 $169 \times \$1,348.80 = \$227,947.20$

7 18. Similar calculations can be readily done for each of the long term food kits at
8 issue, and for each member of the proposed class.

9 I declare under penalty of perjury under the laws of the United States that the foregoing is
10 true and correct and was executed on October 4, 2017 in Los Angeles, California.

11
12 
13 Mark Falkenhagen

14 *Additional counsel for Plaintiffs:*

15 BRAUN LAW GROUP, P.C.
16 Michael D. Braun (Bar No. 167416)
17 1999 Avenue of the Stars, Ste. 1100
18 Los Angeles, California 90067
Tel: (310) 836-6000
Fax: (310) 836-6010
mdb@braunlawgroup.com

19 LAW OFFICES OF ANDREW KIERSTEAD
20 Andrew S. Kierstead (Bar. No. 132105)
21 1001 SW 5th Avenue, Suite 1100
22 Portland, Oregon 97204
Tel: (508) 224-6246
Fax: (508) 244-4356
ajkier@aol.com

24 ⁴ 1080 Serving Long Term Food Supply Package - 3 month supply: SKU numbers 40-41080, 40-
25 41080 (new), 40-41080T

26 ⁵ Per average price (total revenue divided by total units sold) for SKU numbers 40-41080, 40-
27 41080 (new), and 40-41080T for the years 2013 through 2016 per Excel Spreadsheets exhibited to
Sorensen Deposition: CA Sales by Class by SKU 2013 to 2016 - FINAL - AJ 08102017

28 ⁶ Per total units sold for SKU numbers 40-41080, 40-41080 (new), and 40-41080T for the years
2013 through 2016 per Excel Spreadsheets exhibited to Sorensen Deposition: CA Sales by Class
by SKU 2013 to 2016 - FINAL - AJ 08102017

EXHIBIT A

Mark Olaf Falkenhagen
Shareholder

617 West 7th Street, Suite 605
Los Angeles, CA 90017
(213) 283-4001
mfalkenhagen@hsno.com

BIO

Mark Falkenhagen is a partner in the Los Angeles office and has been in the practice of forensic economics at Hagen, Streiff, Newton and Oshiro, P.C. for over 25 years. He specializes in valuing economic losses in employment cases, specifically, in defamation, discrimination, harassment, wage and hour, and wrongful termination cases. He also values economic losses and penalties in employment class action cases, as well as non-employment-related litigation: personal injury, marital dissolution, business valuation, and product class action cases. Mr. Falkenhagen has testified as an expert witness on many occasions in Federal and State Court.

SELECT INDUSTRY EXPERIENCE

Employment Law	Wage & Hour	Logistics
Casinos	Construction Defect	Product Recall
Class Action Filings	Employee Dishonesty	Stock Options
Personal Injury	Wrongful Termination	Semiconductor
Entertainment	Franchises	Railroads
Hospitality	Oil and Gas	Consumer Products

PUBLICATIONS

The State Bar of California - MCLE Single Activity Provider Certificate No. 18119.
"Computing Economic Damages in Wrongful Termination and Class Action Cases"

MEMBERSHIPS

ABA - American Bar Association
LACBA - Los Angeles County Bar Association
AREA - American Rehabilitation Economics Association
AEA - American Economic Association

EDUCATION

University of Southern California, Los Angeles, California
1992, Bachelor of Science - Business Administration

Mark Olaf Falkenhagen
HSNO | Los Angeles | Shareholder
(213) 283-4001
mfalkenhagen@hsno.com

Recent case detail regarding Mr. Falkenhagen's deposition and/or trial:

Newco International, Inc. v. Hartford Underwriters Insurance Company: Case PC051536
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen's deposition was taken on February 2, 2012.

Nicholas Cruz. V. Northridge Tire & Services Center: Case BC452788
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen's deposition was taken on April 2, 2012.

Sandoval v. Mercedes-Benz, USA, LLC, et al.: Case: 11-CV-04255-DMG-JCG.
United States District Court Central District of California.
Mr. Falkenhagen's deposition was taken on June 14, 2012.

Sherman v. Automobile Club of Southern California: Case 1220042481.
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen's deposition was taken on July 20, 2012.

Sandoval v. Mercedes-Benz, USA, LLC, et al.: Case: 11-CV-04255-DMG-JCG.
United States District Court Central District of California.
Mr. Falkenhagen testified in trial on September 13, 2012.

Huggins v. Warner Bros. Studio Facilities, et al: Case: BC478514
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen's deposition was taken on February 13, 2013.

Dickson v. Burke Williams, Inc., A California Corporation: Case: BC465675
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen's deposition was taken on May 30, 2013.

Dickson v. Burke Williams, Inc., A California Corporation: Case: BC465675
Superior Court of California, County of Los Angeles.
Mr. Falkenhagen testified in trial on September 4, 2013.

Recent case detail regarding Mr. Falkenhagen's deposition and/or trial: (Page 2)

The Salvation Army v. Raymond Village, LLC, et al: Case: 30-2011-00516026
Superior Court of California, County of Orange.
Mr. Falkenhagen's deposition was taken on September 26, 2013.

Minoo Eshaghian v. Bais Chaya Case: BC484403
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on January 24, 2014.

Minoo Eshaghian v. Bais Chaya Case: BC484403
Superior Court of California, County of Los Angeles
Mr. Falkenhagen testified in trial on February 4, 2014.

Hana Financial, Inc. v. U-Sun USA, Inc., et al., Case: BC462877
Superior Court of California, County of Los Angeles
Mr. Falkenhagen testified in trial on February 7, 2014.

David and Laura Johnson v. Armored Autogroup, Inc. et al: Case: RG13669270
Superior Court of California, County of Alameda
Mr. Falkenhagen's deposition was taken on March 18, 2014.

Jason Jones v. County of Los Angeles et al: Case: BC500644
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on May 15, 2014.

Marlyn Sali, et al. v. Universal Health Services of Rancho Springs, Inc., et al: Case: 14-CV-00985
United States District Court Central District of California
Mr. Falkenhagen's deposition was taken on May 7, 2015.

Annette Blackwell v. Steve's Plating Corporation, et al: Case: BC531129
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on May 11, 2015.

Pearl Ultra Lounge v. Thomas Roselli, First Insurance et al: Case: 13-1-3177-12 GWBC
Hawaii State Judiciary, First Circuit Civil Court, Kauikeaouli Hale
Mr. Falkenhagen testified in trial on October 20 and October 21, 2015.

ADX Components, Inc. v. SBR Construction, Inc. Case: 30-2013-00657802-CU-BC-CJC
Superior Court of California, County of Orange
Mr. Falkenhagen's deposition was taken on October 30, 2015.

Recent case detail regarding Mr. Falkenhagen's deposition and/or trial: (Page 3)

Skycom Wireless International Inc. v. Farmers Insurance Group, Case: BC564027
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on November 10, 2015.

Ribas v. JP Morgan Chase National Corporate Services, Inc. Case: BC562533
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on November 24, 2015.

Jayne Steen v. St. Pius V Catholic School, Case: 30-2014-00757844-CU-WT-CJC
Superior Court of California, County of Orange – Central Justice Center
Mr. Falkenhagen's deposition was taken on December 8, 2015.

Jayne Steen v. St. Pius V Catholic School, Case: 30-2014-00757844-CU-WT-CJC
Superior Court of California, County of Orange – Central Justice Center
Mr. Falkenhagen testified in trial on December 16, 2015.

ADX Components, Inc. v. SBR Construction, Inc. Case: 30-2013-00657802-CU-BC-CJC
Superior Court of California, County of Orange
Mr. Falkenhagen testified in trial on February 19, 2016.

Annette Blackwell v. Steve's Plating Corporation, et al: Case: BC531129
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on March 3, 2016.

Payala v. Wipro Technologies, Inc.: Case: 2:15-cv-04063-JAK-JPR
United States District Court, For The Central District of California
Mr. Falkenhagen's deposition was taken on March 25, 2016.

Lloyd Truong v. Canoga Perkins Corporation.: Case: BC578066
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on May 18, 2016.

Cynthia L. Czuchaj v. Conair Corporation: Case: 13-cv-1901-BEN-RBB
United States District Court, For The Southern District of California
Mr. Falkenhagen's deposition was taken on July 20, 2016.

Tjie Wong v. See's Candy Shops, Inc.: Case: BC598819
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on September 9, 2016.

Recent case detail regarding Mr. Falkenhagen's deposition and/or trial: (Page 4)

Tjie Wong v. See's Candy Shops, Inc.: Case: BC598819
Superior Court of California, County of Los Angeles
Mr. Falkenhagen testified in trial on October 6, 2016.

Frank Parrino v. Guild Mortgage Company: Case: 30-2013-00670553-CU-OE-CXC
Superior Court of California, County of Orange
Mr. Falkenhagen's deposition was taken on October 11, 2016.

Mai Ngoc Luong v. Hoang-Chuong Nguyen Vu: Case: 30-2015-00822385-CU-CO-CJC
Superior Court of California, County of Orange
Mr. Falkenhagen's deposition was taken on December 5, 2016.

Vicki Kirch v. Macy's, Inc., Macy's Retail Holdings, Inc.: Case: BC545315
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on December 12, 2016

Steven Babyak v. Cardiovascular Systems, Inc. : Case: BC601259
Superior Court of California, County of Orange - Unlimited Civil
Mr. Falkenhagen's deposition was taken on January 31, 2017.

Angela Wergechik v. Anaheim Arena Management, Inc. : Case: 30-2015-00786670-CU-WT-CJC
Superior Court of California, County of Orange - Unlimited Civil
Mr. Falkenhagen's deposition was taken on March 7, 2017.

Linda Pfeifer v. Yuki Mancebo; Golden Rain Foundation: Case: 30-2015-00819256-CU-PO-CJC
Superior Court of California, County of Orange - Central Justice Center
Mr. Falkenhagen's deposition was taken on March 8, 2017.

Steve Lim v. STW Enterprises, Inc. dba Cailyn Cosmetics; Smile World Inc.: Case: BC582384
Superior Court of California, County of Los Angeles, Central District
Mr. Falkenhagen's deposition was taken on April 6, 2017.

Yesenia Jimenez v. Altamed Health Services Corporation. : Case: BC589587
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on April 10, 2017.

Melissa Hilgerman-West v. Wal-Mart Associates, Inc.: Gary Waso. : Case: BC599669
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on April 12, 2017.

Recent case detail regarding Mr. Falkenhagen's deposition and/or trial: (Page 5)

Steven Babyak v. Cardiovascular Systems, Inc.: Case: BC601259
Superior Court of California, County of Orange – Unlimited Civil
Mr. Falkenhagen testified in trial on April 20, 2017.

Blanca Ramirez v. Jack In The Box, Inc., Sandy Oliveros: Case: BC593619
Superior Court of California, County of Los Angeles – Central District
Mr. Falkenhagen's deposition was taken on April 27, 2017.

Jason Blasdell v. Space Exploration Technologies Corp. et al : Case: BC615112
Superior Court of California, County of Los Angeles – Central District
Mr. Falkenhagen's deposition was taken on May 3, 2017.

Della Hill v. Asian American Drug Abuse Program, Inc. : Case: BC582516
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on May 9, 2017

Keith Kramer v. Los Angeles Unified School District et al: Case: BC619785
Superior Court of California, County of Los Angeles
Mr. Falkenhagen's deposition was taken on May 17, 2017

Jason Blasdell v. Space Exploration Technologies Corp. et al : Case: BC615112
Superior Court of California, County of Los Angeles – Central District
Mr. Falkenhagen testified in trial on May 30, 2017.

Hiroyaki Oda v. DeMarini Sports, Inc. Wilson Sporting Goods Co.: Case: 8:15-cv-02131-JLS-JCG
United States District Court, Central District of California – Southern Division
Mr. Falkenhagen's deposition was taken on June 26, 2017