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WISE COMPANY, INC.
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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
MAR 30 2017
B. Ellico-Mestas

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF RIVERSIDE**
11

12 NICHOLAS MILLER and JEFFREY
13 BORNEMAN, individually and on behalf of
all others similarly situated,
14
Plaintiff,
15
v.
16 WISE COMPANY, INC., and DOES 1
17 through 10, inclusive,
18 Defendant.
19

CASE NO. RIC 1702659
[Case Assigned to: Hon. Sharon J. Waters]

DEFENDANT WISE COMPANY, INC.'S
ANSWER TO PLAINTIFFS' COMPLAINT;
DEMAND FOR JURY TRIAL

Action Filed: February 15, 2017
Trial Date: None Set

1 Defendant Wise Company, Inc. ("Defendant") hereby answers the Complaint of Plaintiffs
2 Nicholas Miller and Jeffrey Borneman ("Plaintiffs") as follows:

3 **GENERAL DENIAL**

4 In accordance with Section 431.30(d) of the California Code of Civil Procedure, Defendant
5 hereby generally denies each and every allegation contained in the Complaint. Defendant further denies
6 that Plaintiff is owed or has sustained damages in the amount alleged or any amount whatsoever, and
7 denies that Plaintiff is entitled to any legal relief of any kind against Defendant.

8 **DEFENSES**

9 In addition, Defendant alleges and asserts the defenses set forth herein. By pleading these
10 defenses, Defendant does not assume the burden of proving any fact, issue, or element of a cause of
11 action where such burden properly belongs to Plaintiff. Because of the vague language and allegations
12 in the Complaint, including but not limited to several allegations that render the Complaint uncertain
13 pursuant to California Code of Civil Procedure § 430.10(f), Defendant cannot anticipate all possible
14 defenses at this time. As such, Defendant reserves its right to add additional separate defenses at an
15 appropriate time. Moreover, nothing stated herein is intended or shall be construed as a concession that
16 any particular issue or subject matter is relevant to Plaintiffs' allegations.

17 **FIRST AFFIRMATIVE DEFENSE**

18 (Failure to State a Claim)

19 The Complaint fails to state a claim on which relief can be granted

20 **SECOND AFFIRMATIVE DEFENSE**

21 (Not Appropriate for Class Treatment)

22 Plaintiffs' claims, and those of any putative class alleged in the Complaint, may not be certified
23 or maintained as a class action.

24 **THIRD AFFIRMATIVE DEFENSE**

25 (Standing)

26 Plaintiffs and putative class members have suffered no actual injury in fact, and therefore lack
27 standing to assert any claim, whether set forth in the Complaint or otherwise.

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1 **FOURTH AFFIRMATIVE DEFENSE**

2 (Express Regulatory Approval)

3 Plaintiffs' and putative class members' claims are barred by virtue of the express regulatory
4 approval, such that any relief to Plaintiff or class members would be inconsistent with regulatory
5 oversight by bodies to whom Congress has delegated such authority in furtherance of regulating
6 interstate consumers.

7 **FIFTH AFFIRMATIVE DEFENSE**

8 (Constitutional Protection)

9 Plaintiffs' and putative class members' claims are barred in whole, or in part, by the First
10 Amendment to the United States Constitution and the applicable provisions under the California
11 Constitution that may apply to this lawsuit and which protect the rights to freedom of speech.

12 **SIXTH AFFIRMATIVE DEFENSE**

13 (No Materiality or Justifiable Reliance)

14 Plaintiffs' and putative class members' claims are barred, in whole or in part, because any
15 statement by Defendant that is alleged to be false (which Defendant denies) or any omission allegedly
16 made by Defendant (which Defendant denies) was not material to a reasonable person's purchasing
17 decision nor detrimentally or justifiably relied upon by Plaintiffs or putative class members.

18 **SEVENTH AFFIRMATIVE DEFENSE**

19 (Safe Harbor/Compliance with Laws)

20 Plaintiffs' and the putative class members' claims are barred by California's safe harbor doctrine
21 because Defendant's alleged actions, at all relevant times and places, were in compliance with
22 applicable law, and because any product distributed by Defendant (including any advertising of its
23 products) was in compliance with all applicable governmental regulations at the time such product was
24 distributed.

25 **EIGHTH AFFIRMATIVE DEFENSE**

26 (Laches)

27 Plaintiffs' and the putative class members' claims are barred by the doctrine of laches.
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1 **NINTH AFFIRMATIVE DEFENSE**

2 (Waiver)

3 Plaintiffs' and the putative class members' claims are barred by the doctrine of waiver.

4 **TENTH AFFIRMATIVE DEFENSE**

5 (Unclean Hands)

6 Plaintiffs' and the putative class members' claims are barred by the doctrine of unclean hands.

7 **ELEVENTH AFFIRMATIVE DEFENSE**

8 (Estoppel)

9 Plaintiffs' and the putative class members' claims are barred by the doctrine of estoppel.

10 **TWELFTH AFFIRMATIVE DEFENSE**

11 (Statute of Limitations/Repose)

12 Plaintiffs' and the putative class members' claims are barred, in whole or in part, by the
13 applicable statute of limitations and any applicable statute of repose, including but not limited to Cal.
14 Bus. & Prof. Code § 17208, Cal. Civ. Proc. Code §§ 338(d), 339(1), and Cal. Civ. Code § 1783.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 (Puffing)

17 Plaintiffs' and the putative class members' claims for false advertising are barred to the extent
18 that any alleged deceptive statements were such that no reasonable person would have reasonably relied
19 upon or misunderstood Defendant's statements as claims of fact.

20 **FOURTEENTH AFFIRMATIVE DEFENSE**

21 (Speculative Damages)

22 Plaintiffs' and the putative class members' claims are barred, in whole or in part, because any
23 damages sought are too speculative or remote.

24 **FIFTEENTH AFFIRMATIVE DEFENSE**

25 (Adequate Remedy at Law)

26 Plaintiffs' and the putative class members' claims for equitable relief are barred to the extent
27 there is an adequate remedy at law.

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1 **SIXTEENTH AFFIRMATIVE DEFENSE**

2 (No Right to Injunctive Relief)

3 To the extent the Complaint seeks injunctive relief, Plaintiffs and putative class members are not
4 entitled to such relief because the hardship that would be imposed on Defendant by any such relief
5 would be greatly disproportionate to any hardship that Plaintiffs might suffer in its absence. Further, any
6 injunctive relief that would require regulation by the Court on an ongoing basis is inappropriate, as
7 advertising and marketing activities are already monitored by various federal and state agencies.

8 **SEVENTEENTH AFFIRMATIVE DEFENSE**

9 (Failure to Mitigate)

10 Without admitting any wrongful conduct on the part of Defendant, and without admitting that
11 Plaintiffs and putative class members have suffered any loss, damage or injury, recovery for any such
12 claimed loss, damage, or injury is barred, in whole or in part, because Plaintiffs and putative class
13 members failed to mitigate such loss, damage, or injury.

14 **EIGHTEENTH AFFIRMATIVE DEFENSE**

15 (Actions Comported with Prevailing Practices)

16 Plaintiffs' and putative class members' claims are barred, in whole or in part, because the alleged
17 conduct of which Plaintiffs and putative class members complain comported with prevailing business
18 practices and standards of the industry at issue.

19 **NINETEENTH AFFIRMATIVE DEFENSE**

20 (No Legal Duty)

21 Plaintiffs' and putative class members' claims are barred, in whole or in part, because Defendant
22 did not owe a legal duty to Plaintiffs and putative class members, or, if Defendant owed a legal duty to
23 Plaintiff and putative class members, Defendant did not breach that duty.

24 **TWENTIETH AFFIRMATIVE DEFENSE**

25 (No Injury)

26 Plaintiffs' and putative class members' claims are barred, in whole or in part, because neither
27 Plaintiff nor putative class members suffered any actionable injury or because such injuries, which
28

1 injuries are denied, were not proximately caused by Defendant, and any injury alleged is subject to the
2 economic loss doctrine.

3 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

4 Plaintiffs' and putative class members' claims are barred, in whole or in part, because the acts or
5 omissions alleged to have been performed by Defendant, if performed at all, were done in good faith.

6 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

7 An award of monetary relief, other than restitution, to Plaintiff and/or putative class members
8 under California Business & Professions Code Sections 17200, et seq., would violate the due process
9 provisions of the Constitution of the State of California and the Constitution of the United States of
10 America.

11 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

12 (Justification)

13 Plaintiffs' and putative class members' claims are barred, in whole or in part, because the acts or
14 omission alleged to have been performed by Defendant, if performed at all, were performed in
15 accordance with business necessity and for legitimate reasons.

16 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

17 Plaintiffs' and putative class members' claims are barred, in whole or in part, by the doctrine of
18 voluntary payment.

19 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

20 Plaintiffs' and putative class members' request for attorneys' fees in this matter is barred
21 because it lacks any basis in law or contract.

22 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

23 (Unjust Enrichment)

24 Plaintiffs' and putative class members' claims are barred to the extent that Plaintiff and putative
25 class members would be unjustly enriched if allowed to recover any monies claimed to be due in the
26 Complaint.

1 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

2 (Unconstitutionality of Compelled Speech)

3 Any claim for corrective advertising or “disclosures” is barred, in that any form of compelled
4 speech would violate the First Amendment to the United States Constitution.

5 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

6 (Abstention)

7 Plaintiffs’ and putative class members’ claims should be denied under the equitable doctrine of
8 abstention because such relief would unreasonably encroach upon federal administration prerogatives or
9 substitute the Court’s oversight for that of federal or state administrative agencies.

10 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

11 (Set-off)

12 Even if Plaintiffs’ and the putative class members’ claims are meritorious, which Defendant
13 denies, those claims are subject to an offset or set-off for the value of the benefits that Plaintiff received.

14 **THIRTIETH AFFIRMATIVE DEFENSE**

15 (No Non-Restitutionary Disgorgement)

16 Plaintiffs’ and putative class members’ claims are barred by California law to the extent they
17 seek non-restitutionary disgorgement.

18 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

19 (Failure to Comply with Statutory Pre-Suit Notice Requirements)

20 Plaintiffs’ and putative class members’ claim for relief brought under the Consumer Legal
21 Remedies Act is barred to the extent Plaintiffs and putative class members have failed to adequately
22 satisfy pre-suit notice requirements to bringing an action for damages, as set forth in California Civil
23 Code Section 1782, and/or to the extent the purported violation has already been remedied pursuant to
24 California Civil Code Section 1784.

25 **RIGHT TO ASSERT ADDITIONAL DEFENSES**

26 Plaintiffs’ and putative class members’ claims in the Complaint against Defendant may be
27 subject to defenses unknown to Defendant at this time, and Defendant will amend its answer to allege
28 each additional affirmative defense if and when such defense becomes known to Defendant.

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WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiffs and the putative class take nothing by reason of the Complaint and that judgment be rendered in favor of Defendant;
2. That Defendant be awarded its costs and attorneys' fees incurred in defense of this action; and
3. For such other and further relief as the Court deems just and proper.


JURY DEMAND

Defendant hereby demands a jury trial on all claims to which it is entitled.

DATED: March 30, 2017

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: 
Rick L. Shackelford
Attorney for Defendant
WISE COMPANY, INC.

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PROOF OF SERVICE
(Miller, et. al., v. Wise Company, Inc.
Riverside Superior Case No: RIC 1702659

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **1840 Century Park East, Suite 1900, CA 90067.**

On the date given below, I served the document(s) titled **ANSWER TO COMPLAINT** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

- (BY MAIL)**
 I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.
 I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of such business.
- (BY OVERNIGHT DELIVERY)**
By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- (BY COURTESY E-MAIL)**
On the below date prior to 5:30 p.m. PST, I transmitted the foregoing document(s) by electronic mail, and the transmission was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 30, 2017, at Los Angeles, California.



DEBBIE GUTIERREZ

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SERVICE LIST

*(Miller, et. al., v. Wise Company, Inc.
Riverside Superior Case No: RIC 1702659*

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