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Superior Court of California,
County of San Diego
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Clerk of the Superior Court
By Michael Clemens, Deputy Clerk

6 Attorneys for Plaintiff, MICHAEL HEREDIA

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8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO-NORTH COUNTY DIVISION**

10 MICHAEL HEREDIA, an individual,
11 Plaintiffs,

12 vs.

13 WELK RESORT GROUP, INC.,
14 DOES 1-25;
15 Defendants.

Case No.: 37-2019-00040824-CU-BC-NC

16 **COMPLAINT FOR DAMAGES**
17 **AND INJUNCTIVE RELIEF FOR**
18 **VIOLATIONS OF:**

- 19 **1. CALIF. CONSUMER CREDIT**
20 **REPORTING AGENCIES**
21 **ACT**
- 22 **2. ROSENTHAL FAIR DEBT**
23 **COLLECTION PRACTICES**
24 **ACT**
- 25 **3. BREACH OF CONTRACT**
- 26 **4. BREACH OF IMPLIED**
27 **COVENANT OF GOOD**
28 **FAITH AND FAIR DEALING**
- 5. NEGLIGENCE**

22 TO THE CLERK OF THE COURT, ALL PARTIES, AND THE HONORABLE
23 CALIFORNIA SUPERIOR COURT JUDGE:

24 Plaintiff, MICHAEL HEREDIA (“Plaintiff”), an individual, by and through his
25 attorneys of record, hereby files the instant Complaint against Defendant WELK
26 RESORT GROUP, INC. (“Defendant”) and alleges violations under the California
27 Consumer Credit Reporting Agencies Act (“CCCRAA”), California Rosenthal Fair
28 Debt Collection Practices Act (“Rosenthal FDCPA”), breach of contract, breach of

1 implied covenant of good faith and fair dealing, and negligence.

2 **JURISDICTION & VENUE**

3 1. Because Defendant regularly conducts business within the County of San
4 Diego, and maintains its principal entity address at 300 Rancheros Drive, Suite 450,
5 City of San Marcos, State of California, personal jurisdiction is established.

6 2. Because all tortious conduct occurred in the County of San Diego, City of
7 San Marcos, State of California, and witnesses are present therein, venue properly lies
8 in this Court.

9 **PARTIES & DEFINITIONS**

10 5. Plaintiff is a natural person and is therefore a “consumer” as that term is
11 defined by Calif. Civ. Code § 1785.3(b) of the CCCRAA.

12 6. This matter pertains to Plaintiff’s “consumer credit reports”, as that term is
13 defined by Calif. Civ. Code § 1785.3(c) of the CCCRAA, in that inaccurate
14 misrepresentations of Plaintiff’s credit worthiness, credit standing, and credit capacity
15 were made via written, oral, or other communication of information by a consumer
16 credit reporting agency, which is used or is expected to be used, or collected in whole or
17 in part, for the purpose of serving as a factor in establishing Plaintiff’s eligibility for,
18 among other things, credit to be used primarily for personal, family, or household
19 purposes, and employment purposes.

20 7. As far as this matter pertains to the CCCRAA, Defendant is a partnership,
21 corporation, association, or other entity, and is therefore a “person” as that term is
22 defined by Calif. Civ. Code § 1785.3(j) of the California CCRAA.

23 8. Plaintiff, as a natural person allegedly obligated to pay a consumer debt to
24 Defendant, alleged to have been due and owing, is therefore a “debtor” as that term is
25 defined by Calif. Civil Code § 1788.2(h) of the Rosenthal FDCPA.

26 9. Defendant alleged that it was trying to collect monies from Plaintiff upon a
27 home mortgage loan that was issued to Plaintiff to purchase ownership in real property.
28 Therefore, Plaintiff is informed and believes that the money alleged to be owed to

1 Defendant originated from monetary credit that was extended primarily for personal,
2 family, or household purposes, and is therefore a “debt” Calif. Civil Code § 1788.2(d)
3 of the Rosenthal FDCPA.

4 10. The credit that was provided to Plaintiff that Defendant was attempting to
5 collect was issued as a home mortgage loan, which was given to Plaintiff without
6 payment being required at the time, with an agreement that Plaintiff would pay the loan
7 back over time, and therefore the underlying alleged debt was a “consumer credit
8 transaction” within the meaning of Calif. Civil Code § 1788.2(e) of the Rosenthal
9 FDCPA.

10 11. Because Plaintiff, a natural person allegedly obligated to pay money to
11 Defendant arising from a consumer credit transaction, the money allegedly owed was
12 a “consumer debt” within the meaning of Calif. Civil Code § 1788.2(f) of the
13 Rosenthal FDCPA.

14 12. Plaintiff is informed and believes that Defendant regularly collects or
15 attempts to collect on behalf of themselves debts owed or due or asserted to be owed or
16 due, and is therefore a “debt collector” within the meaning of Calif. Civil Code §
17 1788.2(c) of the Rosenthal FDCPA, and thereby engages in “debt collection”
18 within the meaning of California Civil Code § 1788.2(b) of the Rosenthal FDCPA, is
19 also therefore a “person” within the meaning of California Civil Code § 1788.2(g) of
20 the Rosenthal FDCPA, and is also a “creditor” under California Civil Code § 1788.2(i).

21 **FACTUAL ALLEGATIONS**

22 13. At some point prior to December 2018, Plaintiff and Defendant entered
23 into a mortgage loan credit agreement, whereby Plaintiff took ownership of real estate
24 property and a residence in exchange for Plaintiff agreeing to make monthly payments
25 to Defendant.

26 14. Plaintiff took possession of the property without payment being required in
27 full at the time of the transaction, which means Plaintiff took ownership on credit.

28 15. As the mortgage loan credit agreement pertained to Plaintiff’s ownership

1 in real estate and a residence, the credit transaction therefore pertained to matters for
2 personal and household purposes.

3 16. At some point prior to December 2018, Plaintiff fell behind in his monthly
4 payments due to financial hardship issues.

5 17. In December 2018, Defendant offered in writing that it would accept as
6 “full satisfaction of your obligations under the note” if Plaintiff simply allowed
7 Defendant to take possession and ownership of the real estate property that Plaintiff had
8 mortgaged from Defendant within 20 days of the written offer, and if Plaintiff were to
9 perform under this written offer then Defendant would be taking possession of the
10 property “in lieu of pursuing any deficiency against [Plaintiff]”.

11 18. Plaintiff fully performed his obligations under the December 2018 written
12 offer by Defendant, thereby allowing Defendant to take possession and ownership of
13 the real estate property within 20 days of the written offer.

14 19. As such, pursuant to Plaintiff’s full performance to accept the terms of the
15 written offer, Defendant thereby was obligated to release Plaintiff from any and all
16 further liability to owe any more monies to Defendant upon the mortgage loan and
17 Defendant thereby expressly waived any rights to pursue “any deficiency against
18 [Plaintiff]”.

19 20. Pursuant to applicable statutes, Defendant was also obligated to update its
20 reporting of the account history to reflect no deficiency balance was owed any longer
21 and the account status was closed with a \$0.00 balance owed.

22 21. At some point in June of 2019, Plaintiff contacted a mortgage loan officer
23 in an attempt to refinance another mortgage loan for his primary residence in the hopes
24 of obtaining lower interest rates and lower monthly payments.

25 22. Plaintiff reasonably believed that Defendant would not have been reporting
26 any deficiency balance upon his credit history, as he fully performed his obligations
27 pursuant to the December 2018 written offer.

28 23. As such, Plaintiff reasonably believed he would be able to secure the

1 mortgage loan refinancing in June 2019 without issue.

2 24. Unfortunately, however, Plaintiff was informed by his loan officer that his
3 application could not proceed because Defendant was, in fact, reporting a deficiency
4 balance owed upon the mortgage loan between Plaintiff and Defendant.

5 25. However, Defendant's reporting of a deficiency balance is in direct
6 contradiction to the December 2018 agreement.

7 26. As such, Defendant's reporting of a deficiency balance is false, misleading,
8 and inaccurate.

9 27. Moreover, the failure of Defendant to delete the information that Plaintiff
10 owes an alleged past due balance upon the account creates the false and misleading
11 impression that he presently owes upon the account to Defendant and is presently
12 failing to address his financial obligations, whereas in reality he did not any longer owe
13 any monies to Defendant and no longer had any liability to Defendant.

14 28. In July of 2019, Plaintiff contacted Defendant in an attempt to obtain
15 Defendant's agreement to update the credit reporting to reflect no deficiency balance
16 owed and the account status is closed with a \$0.00 balance owed.

17 29. In response, Defendant persisted in attempting to collect from Plaintiff a
18 purported deficiency balance in excess of \$13,000.00.

19 30. As stated above, however, any attempt to collect a deficiency balance by
20 Defendant is in direct contraction to the December 2018 agreement.

21 31. As a result, Defendant's attempts to collect a deficiency balance in July
22 2019 amounted to attempts to collect amounts that are not due or owing.

23 32. Defendant knows that it's attempts to collect a deficiency balance in July
24 2019 was false and improper, based on Defendant itself drafting the offer that was
25 accepted by Plaintiff in December 2018.

26 33. Also, in response to Plaintiff's dispute directly with Defendant, Defendant
27 updated the reporting on July 20, 2019 to show a \$0.00 balance owed, but inaccurately
28 listed the account status as an "involuntary repossession" of the property.

1 34. However, Defendant’s characterization of the status of the account as an
2 “involuntary repossession” of the property is false, misleading, and inaccurate, because
3 Plaintiff specifically accepted Defendant’s offer for Defendant to retake possession of
4 the property in exchange for the account being satisfied in full and for Defendant to
5 waive any rights to pursue a deficiency judgment against Plaintiff.

6 35. In turn, this means that the repossession of the property was voluntary and
7 not involuntary.

8 36. Defendant’s false and inaccurate reporting of the account as being an
9 “involuntary repossession” creates a false, inaccurate, and misleading impression of
10 Plaintiff’s status as a creditworthy applicant to potential creditors because it makes it
11 appear as if he refused to cooperate with Defendant to conclude the status of the
12 account.

13 37. Plaintiff has been harmed by way of inaccurate and derogatory information
14 remaining in his credit file that creates an undeniably inaccurate picture of his standing
15 as a creditworthy consumer, and that which creates an undeniably inaccurate picture of
16 his creditworthiness.

17 38. As a result of the derogatory credit reporting, Plaintiff’s credit scores
18 dropped to a number they should not be.

19 39. Plaintiff has been forced to pay higher interest rates on credit cards as a
20 result of the lowered credit scores.

21 40. Plaintiff has been forced to delay his application for refinancing of his
22 home mortgage loan, and has therefore suffered damages by way of having to pay
23 higher interest rates and higher monthly payments, and it remains to be seen whether
24 Plaintiff will even be able to finish his application for refinancing.

25 41. Plaintiff has also been damaged by way of general pain and suffering such
26 as anger, nervousness, embarrassment, loss of sleep, and feelings of distraught and
27 hopelessness.

28 42. Plaintiffs has also suffered actual out of pocket loss by way of gas,

1 mileage, printing, and postage in their efforts to seek informal rectification of
2 Defendant's inaccurate and misleading reporting.

3 **FIRST CAUSE OF ACTION**
4 **CALIFORNIA CONSUMER CREDIT REPORTING AGENCIES ACT**
5 **Calif. Civ. Code §1785.25**

6 43. Plaintiff repeats, re-alleges, and incorporates by reference the above
7 paragraphs, as if fully set forth herein.

8 44. As the furnisher of information to credit reporting agencies, Defendant is
9 and always was obligated to not furnish information on a specific transaction or
10 experience to any consumer credit reporting agency if it knew or should have known
11 the information was incomplete or inaccurate, as required by Calif. Civ. Code §
12 1785.25(a) of the California CCRAA.

13 45. Even if the derogatory reporting is technically accurate, it is still a
14 violation of this law if the derogatory reporting is misleading in such a way and to such
15 an extent that it can be expected to adversely affect credit decisions. *Cisneros v. U.D.*
16 *Registry, Inc.* (1995) 39 Cal. App. 4th 548.

17 46. Defendant violated its obligations under Section 1785.25(a) of the Calif.
18 CCRAA multiple times by falsely reporting that Plaintiff owed a deficiency balance
19 despite the December 2018 agreement for the account to be fully satisfied and whereby
20 Defendant waived any ability to pursue Plaintiff for any deficiency.

21 47. The false and inaccurate reporting by Defendant has caused Plaintiff actual
22 damages as explained in the statement of facts above.

23 48. Even after updating the reporting in July of 2019, Defendant violated its
24 obligations under Section 1785.25(a) of the Calif. CCRAA by falsely reporting that the
25 account ended in an "involuntary repossession".

26 49. The false and inaccurate reporting by Defendant has caused Plaintiff actual
27 damages as explained in the statement of facts above.

28 50. Plaintiff is informed and believe that Defendant's violations were negligent

1 at a minimum, because a reasonable person would not have reported the account in such
2 a manner.

3 51. Plaintiff is also informed and believe that Defendant's violations of §
4 1785.25(a) were willful in that Defendant acted with such a high degree of risk of
5 committing a legal violation that was higher than mere carelessness, and because the
6 reporting was in direct contradiction to the written agreement on the terms offered by
7 Defendant.

8 **SECOND CAUSE OF ACTION**
9 **ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT**
10 **Calif. Civ. Code § 1788, *et seq.***

11 52. Plaintiff repeats, re-alleges, and incorporate by reference the above
12 paragraphs, as if fully stated herein.

13 53. At all times during the aforementioned actions, there was in full force and
14 effect the following obligation for a debt collector in connection with the collection of
15 any debt, pertaining to pursuant to California Civil Code § 1788.17 of the Rosenthal
16 Act, requiring all debt collectors to be responsible for and liable for all requirements
17 contained with the Federal FDCPA, exceptions of which are not applicable:

18 Notwithstanding any other provision of this title, every debt
19 collector collecting or attempting to collect a consumer debt
20 shall comply with the provisions of Sections 1692b to 1692j,
21 inclusive, of, and shall be subject to the remedies in Section
22 1692k of, Title 15 of the United States Code. However,
23 subsection (11) of Section 1692e and Section 1692g shall not
24 apply to any person specified in paragraphs (A) and (B) of
25 subsection (6) of Section 1692a of Title 15 of the United States
26 Code or that person's principal. The references to federal codes
27 in this section refer to those codes as they read January 1, 2001

28 3. By attempting to collect a deficiency balance in July 2019, after Plaintiff

1 and Defendant entered into an agreement in December 2018 for Defendant to waive any
2 rights to pursue any deficiency against Plaintiff and for the account to be fully satisfied,
3 Defendant has engaged in multiple on-going violations of the FDCA as follows, all of
4 which are necessarily violations of the Rosenthal FDCPA via Calif. Civ. Code 1788.17:

- 5 a. 15 U.S.C. §1692d by engaging in conduct the natural consequence of
6 which is to oppress Plaintiff in connection with the collection of a debt, by
7 refusing to honor an agreement that was created when Plaintiff accepted
8 Defendant’s written offer in December 2018,
- 9 b. 15 U.S.C. §1692e by using false, deceptive, and misleading representations
10 in connection with the collection of a debt, by claiming that Plaintiff owes
11 money that he truly does not owe,
- 12 c. 15 U.S.C. §1692e(2)(A) by falsely representing the character, amount, and
13 legal status of the debt by claiming that Plaintiff owes money that he truly
14 does not owe,
- 15 d. 15 U.S.C. §1692e(10) by using false representations and deceptive means
16 to attempt to collect a debt, by claiming that Plaintiff owes money that he
17 truly does not owe,
- 18 e. 15 U.S.C. §1692f by using unfair and unconscionable means to attempt to
19 collect a debt, by refusing to honor an agreement that was created when
20 Plaintiff accepted Defendant’s written offer in December 2018 and by
21 claiming that Plaintiff owes money that he truly does not owe,
- 22 f. 15 U.S.C. §1692f(1) by collecting an amount not authorized by agreement
23 or by law, by claiming that Plaintiff owes money that he truly does not
24 owe.

25 4. By furnishing false and misleading information to the consumer credit
26 reporting agencies that Plaintiff owes a deficiency balance and that the account ended in
27 an “involuntary repossession”, Defendant has engaged in multiple on-going violations
28 of the FDCA as follows, all of which are necessarily violations of the Rosenthal

1 FDCPA via Calif. Civ. Code 1788.17:

- 2 a. 15 U.S.C. §1692e(8), by furnishing credit reporting information to the
- 3 consumer credit reporting agencies that Defendant knew or should
- 4 know is false,
- 5 g. 15 U.S.C. §1692d by engaging in conduct the natural consequence of
- 6 which is to oppress Plaintiff in connection with the collection of a debt, by
- 7 refusing to honor an agreement that was created when Plaintiff accepted
- 8 Defendant's written offer in December 2018,
- 9 h. 15 U.S.C. §1692e by using false, deceptive, and misleading representations
- 10 in connection with the collection of a debt, by claiming that Plaintiff owes
- 11 money that he truly does not owe,
- 12 i. 15 U.S.C. §1692e(2)(A) by falsely representing the character, amount, and
- 13 legal status of the debt by claiming that Plaintiff owes money that he truly
- 14 does not owe,
- 15 j. 15 U.S.C. §1692e(10) by using false representations and deceptive means
- 16 to attempt to collect a debt, by claiming that Plaintiff owes money that he
- 17 truly does not owe,
- 18 k. 15 U.S.C. §1692f by using unfair and unconscionable means to attempt to
- 19 collect a debt, by refusing to honor an agreement that was created when
- 20 Plaintiff accepted Defendant's written offer in December 2018 and by
- 21 claiming that Plaintiff owes money that he truly does not owe,
- 22 l. 15 U.S.C. §1692f(1) by collecting an amount not authorized by agreement
- 23 or by law, by claiming that Plaintiff owes money that he truly does not
- 24 owe.

25 54. The actions taken by Defendant that form the basis of Plaintiff's Rosenthal
26 FDCPA violations in this matter were always done in an attempt to collect money from
27 Plaintiff and were never done to simply enforce the security interest.

28 55. Defendant's violations of the Rosenthal FDCPA were willful, because

1 Defendant at all times knew, or should have known, that the actions giving rise to such
2 violations were wrongful and in direct contradiction to the December 2018 agreement
3 for voluntary repossession in exchange for Defendant closing the account as “fully
4 satisfied” and waiving any rights to pursue any deficiency judgment against Plaintiff.

5 56. Defendant’s violations have caused Plaintiff damages as explained in the
6 factual allegations above.

7 **THIRD CAUSE OF ACTION**
8 **BREACH OF CONTRACT**

9 57. Plaintiff repeats, re-alleges, and incorporate by reference the above
10 paragraphs, as if fully stated herein.

11 58. Plaintiff and Defendant entered into an agreement in December 2018 for
12 Defendant to take possession and ownership of the property in exchange for the account
13 being fully satisfied and for Defendant to waive any rights to pursue any deficiency
14 against Plaintiff.

15 59. Plaintiff accepted by specific performance and in a timely manner.

16 60. However, Defendant breached the agreement by reporting Plaintiff as
17 owing a deficiency balance, and by persisting in attempting to collect from Plaintiff an
18 alleged deficiency of \$13,232.65, and by updating its reporting of the account as
19 “involuntary repossession”.

20 61. Plaintiff attempted to rectify the problem, yet Defendant persisted in its
21 breach of the December 2018 agreement.

22 62. Plaintiff has been damaged as explained in the statement of facts above.

23 **FOURTH CAUSE OF ACTION**
24 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

25 63. Plaintiff repeats, re-alleges, and incorporates by reference the above
26 paragraphs, as if fully stated herein.

27 64. In every agreement there exists the implied covenant that the parties will
28 act with good faith and fair dealings with each other.

1 65. Plaintiff and Defendant entered into an agreement in December 2018 for
2 Defendant to take possession and ownership of the property in exchange for the account
3 being fully satisfied and for Defendant to waive any rights to pursue any deficiency
4 against Plaintiff.

5 66. Plaintiff accepted by specific performance and in a timely manner.

6 67. However, Defendant breached the agreement by reporting Plaintiff as
7 owing a deficiency balance, and by persisting in attempting to collect from Plaintiff an
8 alleged deficiency of \$13,232.65, and by updating its reporting of the account as
9 “involuntary repossession”.

10 68. Plaintiff attempted to rectify the problem, yet Defendant persisted in its
11 breach of the December 2018 agreement.

12 69. Plaintiff has been damaged as explained in the statement of facts above.

13 **FIFTH CAUSE OF ACTION**
14 **NEGLIGENCE**

15 70. Plaintiff repeats, re-alleges, and incorporate by reference the above
16 paragraphs, as if fully stated herein.

17 71. At all times mentioned herein, Defendant had and owed a duty of
18 reasonable care to Plaintiff in the fair and accurate reporting of the account as
19 pertaining to Plaintiff’s standing as a customer, borrower, and consumer.

20 72. However, Defendant has breached said duty of due care by reporting a
21 deficiency balance that Plaintiff did not owe.

22 73. At all times mentioned herein, Defendant also had and owed a duty of
23 reasonable care to Plaintiff to ensure that its statements to Plaintiff were truthful and
24 accurate.

25 74. Also, Defendant has breached this duty of care by failing to ensure the
26 truthfulness and accuracy of its statement that it would not pursue any deficiency
27 balance against Plaintiff.

28 75. As a proximate result of Defendant’s negligence, Plaintiff has been

1 damaged as explained in detail in the statement of facts above.

2 76. Defendant's conduct was willful and wanton negligence because
3 Defendant knew that its manner of reporting was likely to cause harm to Plaintiff, and
4 knew that its conduct was contrary to the agreement offered by Defendant to Plaintiff,
5 yet Defendant persisted in such reporting anyway.

6 77. Defendant's actions were willful, malicious, fraudulent and oppressive,
7 and were committed with the wrongful intent to injure Plaintiff and in conscious
8 disregard of Plaintiff's rights and Defendant's obligations, which entitles Plaintiff to
9 exemplary and/or punitive damages in an amount to be proven at trial.

10 78. To the extent that any violations of the above cause of action is based upon
11 the conduct of executives, managers, and supervisors, Defendant knew about such
12 conduct and ratified such conduct and did so with the wrongful intent to injure Plaintiff
13 while in conscious disregard of Plaintiff's rights

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays that judgment be entered against Defendant, and
16 Plaintiff be awarded damages as follows:

17 1. Actual damages in the amount of \$150,000.00, or as the jury may allow,
18 subject to proof at jury trial;

19 2. Punitive damages of \$150,000.00 pursuant to Cal. Civ. Code § 3294, or as
20 the jury may allow, subject to proof at jury trial;

21 3. Plus punitive damages of \$5,000.00 for each individual willful violation of
22 Calif. Civ. Code § 1785.25(a) pursuant to Calif. Civ. Code § 1785.31(a)(2)(A)-(C), in
23 favor of each Plaintiff individually;

24 4. Plus statutory damages of \$1,000.00 for each Plaintiff individually
25 pursuant to Calif. Civ. Code §1788.30(b);

26 5. Injunctive relief to order Defendant to delete all negative account history,
27 pursuant to Calif. Civ. Code § 1785.31(b);

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6. Any reasonable attorney's fees and costs to maintain the instant action.

SEMNR & HARTMAN, LLP

DATED: 7-31-19

Jared M. Hartman,
Jared M. Hartman, Esq.
Attorneys for Plaintiff,
MICHAEL HEREDIA

TRIAL BY JURY

Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

SEMNR & HARTMAN, LLP

DATED: 7-31-19

Jared M. Hartman,
Jared M. Hartman, Esq.
Attorneys for Plaintiff,
MICHAEL HEREDIA