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Plaintiffs Clarke and Rebecca Wixon and
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Clarke and Rebecca Wixon and Norman and
Barbara Wixon, derivatively and on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

Wyndham Resort Development Corp. (f/k/a
Trendwest Resorts, Inc.), Gene Hensley, David
Herrick, John Henley, Peggy Fry, John
McConnell, and nominally, WorldMark, The
Club,

Defendants.

) **Case No. C 07 2361 JSW**
)
) **SECOND AMENDED COMPLAINT**
)
) **DEMAND FOR JURY TRIAL**
)
)
) **CLASS AND DERIVATIVE ACTION**

1 Plaintiffs Clarke and Rebecca Wixon and Norman and Barbara Wixon (collectively, “Plaintiffs”)
2 allege on behalf of themselves and WorldMark, The Club (“WorldMark”) derivatively, and on behalf of
3 all others similarly situated the following:

4 **I.**

5 **JURISDICTION AND VENUE**

6 1. The Court has subject matter jurisdiction over this case under the Class Action Fairness
7 Act, 28 U.S.C. § 1332(d)(2). This is a civil action in which the matter in controversy exceeds the value
8 of \$5,000,000, exclusive of interest and costs, and this is a class action in which more than two-thirds of
9 the proposed plaintiff class, on the one hand, and Defendants, on the other, are citizens of different
10 states. Defendant Wyndham Resort Development Corp. (“Wyndham”) is an Oregon corporation with
11 headquarters in Redmond, Washington. Nominal Defendant WorldMark is a California mutual benefit
12 corporation. Defendants Gene Hensley, David Herrick and Peggy Fry are citizens of Washington.
13 Defendant John Henley is a citizen of British Columbia, Canada, and Defendant John McConnell is a
14 citizen of Florida.

15 2. Defendant Wyndham is subject to jurisdiction in this District by virtue of its extensive
16 business dealings and transactions within the State of California. Wyndham is registered to do business
17 in the State of California and, as a seller of timeshares in California, has consented to regulation by the
18 California Department of Real Estate. Wyndham has approximately fourteen (14) sales offices in
19 California.

20 3. Nominal Defendant WorldMark is subject to jurisdiction in this District as a California
21 mutual benefit corporation. WorldMark is registered to do business in the State of California, has
22 consented to regulation by the State of California, and has extensive business dealings and transactions
23 within the State of California.

24 4. Defendants Hensley, Herrick, Henley, Fry and McConnell (collectively the “Director
25 Defendants”) are subject to jurisdiction in this District by virtue of their extensive business dealings and
26 transactions within the State of California. The Director Defendants are or were members of the Board
27 of Directors of WorldMark. This suit arises from the Director Defendants’ conduct as directors of
28 WorldMark.

1 members, and acts solely through an uncompensated five-member Board of Directors (“WorldMark
2 Board”).

3 10. Defendant Gene Hensley is the President of the WorldMark Board and has been a
4 member of the WorldMark Board for more than ten years. Mr. Hensley was a senior executive of
5 Wyndham from 1990 until his recent retirement. Prior to his retirement, Mr. Hensley was Wyndham’s
6 Chief Operating Officer. Mr. Hensley is not compensated as a WorldMark director, but while employed
7 by Wyndham, did receive compensation from Wyndham.

8 11. Defendant David Herrick is a member of the WorldMark Board. He has been a member
9 of the Board since February 2007, when he was appointed to replace Defendant McConnell. Mr.
10 Herrick is a Senior Vice President of Wyndham and is responsible for overseeing all aspects of
11 WorldMark’s operations. Mr. Herrick is not compensated as a WorldMark director, but does receive
12 compensation from Wyndham in connection with his employment by Wyndham.

13 12. Defendant John Henley is a member of the WorldMark Board. He has been a member of
14 the Board since 1994. Until his recent retirement, Mr. Henley was employed as a senior executive of
15 Wyndham South Pacific, an affiliate of Wyndham, and later held a paid position as Wyndham’s Director
16 of Business Continuity. Mr. Henley is not compensated as a WorldMark director, but while employed
17 by Wyndham, did receive compensation from Wyndham.

18 13. Defendant Peggy Fry is a member of the WorldMark Board. She was appointed to the
19 Board in 2005, to replace Don Harrill, a departing WorldMark Board member who was also a senior
20 executive of Wyndham. Ms. Fry has been employed by Wyndham for more than thirteen years and is
21 currently Vice President of Owner Services. Ms. Fry is not compensated as a WorldMark director, but
22 does receive compensation from Wyndham in connection with her employment by Wyndham.

23 14. Defendant John McConnell is a former member of the WorldMark Board. He served on
24 the Board from 2002 until February 2007. While on the Board, Mr. McConnell was the President and
25 Chief Executive Officer of Wyndham Vacation Ownership, Inc., the parent company of Wyndham. Mr.
26 McConnell was not compensated as a WorldMark director, but while employed by Wyndham Vacation
27 Ownership, did receive compensation from it.

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1 15. Defendants, and each of them, are individually sued as participants and as aiders and
2 abettors in the improper acts, plans, schemes, and transactions that are the subject of this lawsuit.

3 16. Defendants, and each of them, have participated as members of the improper acts or acted
4 with or in furtherance of them, or aided or assisted in carrying out their purposes as alleged in this
5 Complaint, and have performed acts and made statements in furtherance of the violations and
6 conspiracy.

7 **III.**

8 **SUBSTANTIVE ALLEGATIONS**

9 **A. The Relationship between Wyndham and WorldMark**

10 17. Wyndham purchases and develops the properties that become WorldMark resorts. Upon
11 completion of development, Wyndham transfers complete ownership of the properties to WorldMark.
12 Wyndham retains the rights to market the properties and to sell the original timeshare interests created
13 by the development of each property. Wyndham also is the managing agent for all of the WorldMark
14 properties.

15 18. WorldMark is a California mutual benefit corporation owned by its members.
16 WorldMark owns, operates and maintains all of the WorldMark properties on behalf of its members.
17 There are currently more than 60 WorldMark resorts in the United States, Canada, Mexico and Fiji.
18 Most WorldMark resorts in the United States, Canada and Mexico are within driving distance of a major
19 metropolitan region.

20 19. WorldMark is run by its Board of Directors. WorldMark's Board of Directors is, and
21 always has been, dominated and controlled by current and former Wyndham officers and executives.
22 Four of the five Directors currently on WorldMark's Board (the Director Defendants) are or recently
23 were employed by or affiliated with Wyndham as senior executives.

24 20. Wyndham profits from the WorldMark development scheme through the sale of
25 WorldMark Vacation Credits and from the management fees it receives from WorldMark. Wyndham
26 maintains the exclusive right to market and sell the original Vacation Credits that are created each time
27 it develops a new resort and ownership is then transferred to WorldMark. The number of Vacation
28 Credits generated by each additional new WorldMark property is determined by the size of the resort,

1 the value of a night at the resort in comparison to other comparable WorldMark resorts (known as
2 “relative use-value”), and the number of nights in the year available for usage by WorldMark members.
3 For example, a new resort with 100 rooms, each valued at 1,200 credits per night, would generate
4 40,440,000 Vacation Credits to be sold by Wyndham (100 rooms x 1,200 credits per room x 337 nights
5 of usage per year (historically, one week is set aside for maintenance and three weeks are set aside to
6 ensure Bonus Time availability)). When purchased through Wyndham, each Vacation Credit currently
7 costs approximately \$1.77.

8 21. WorldMark pays Wyndham substantial fees for the ongoing management of the
9 WorldMark resorts. At its inception in 1989, WorldMark entered into a management agreement with
10 Wyndham. The management agreement sets forth Wyndham’s obligations and rights as the managing
11 agent of the WorldMark resorts and provides that Wyndham will receive a significant management fee
12 from WorldMark in exchange for performing its management duties. The management fee for 2006 was
13 approximately \$8.3 million. The management agreement automatically renews each year. Despite the
14 fact that Wyndham has taken a number of actions contrary to the interests of WorldMark members and
15 breached its contract with WorldMark members, WorldMark’s Board of Directors, dominated and
16 controlled by Wyndham, has never sought to cancel or renegotiate the management agreement or to put
17 the agreement out for competitive bidding.

18 **B. Wyndham is Sued by the State Of California**

19 22. In October 2003, the California Attorney General and the District Attorney for the County
20 of San Mateo sued Wyndham in the Superior Court in San Mateo County (*The People of the State of*
21 *California v. Trendwest Resorts, Inc.*, CIV43529). The complaint, filed on behalf of the People of the
22 State of California, alleged that Wyndham engaged in the unauthorized sale of goods, products and
23 services in California, that Wyndham made material misrepresentations in the marketing of its products
24 and services, and that Wyndham engaged in unfair and unlawful sales practices.

25 23. Specifically, the complaint alleged that Wyndham made material misrepresentations to
26 lure consumers to attend WorldMark sales presentations, that during those sales presentations,
27 Wyndham materially misrepresented the nature, value, terms and conditions of WorldMark membership,
28 that Wyndham failed to disclose that consumers had a right to cancel their contract, and that Wyndham

1 engaged in coercive sales tactics. The complaint alleged violations of §§ 17200 and 17500 of the
2 California Business and Professions Code.

3 24. Simultaneous with the filing of the complaint, Wyndham consented to the entry of a Final
4 Judgment and Permanent Injunction. The Final Judgment permanently enjoins Wyndham from
5 engaging in any of the practices and acts alleged in the complaint and summarized above. The
6 settlement also required Wyndham to notify new WorldMark members of the Judgment and offer to
7 rescind their Vacation Credit purchases. Finally, Wyndham paid \$1.475 million to the Office of the
8 Attorney General and the San Mateo County District Attorney's office.

9 **C. How WorldMark Membership Works**

10 25. In a traditional timeshare, a participant typically purchases a fractional interest in a
11 specific piece of property. The participant owns the right to a specific week of occupancy in a specific
12 unit in a specific resort. While the participant may be entitled to trade that week for a week in some
13 other resort, what the participant is purchasing is a guaranteed week in a specific unit of a specific resort.

14 26. WorldMark is not a traditional timeshare. WorldMark members do not purchase the right
15 to usage for a specific week or a specific unit or a specific resort. Instead, WorldMark members
16 purchase Vacation Credits, which can be used (like currency) at any WorldMark resorts (and other
17 affiliated resorts throughout the world) at any time, depending only on availability and whether the
18 member possesses enough Vacation Credits to make the reservation.

19 27. A person who owns at least 5,000 WorldMark Vacation Credits is a WorldMark member.
20 However, the minimum initial purchase requirement for WorldMark Vacation Credits purchased from
21 Wyndham is 6,000 Vacation Credits. Most WorldMark members own substantially more than 5,000
22 Vacation Credits. There are two types of Vacation Credits – Standard and Premier. Standard Vacation
23 Credits renew annually for 40 years and then expire. They do not include Bonus Time (described
24 below). Premier Vacation Credits renew annually in perpetuity and include Bonus Time. Almost all
25 WorldMark members purchase Premier Vacation Credits. For the purpose of this Complaint, the term
26 “Vacation Credits” refers to Premier Vacation Credits and the term “WorldMark members” refers to
27 those members owning at least 5,000 WorldMark Premier Vacation Credits.

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1 28. One of the fundamental principles, and key selling points, of WorldMark membership is
2 that all members are treated equally in terms of the ability to make reservations, regardless of how many
3 Vacation Credits any particular member may own. While WorldMark members who own more
4 Vacation Credits may be able to book longer or more frequent vacations, no member has priority over
5 another member in making reservations.

6 29. This “first-come, first-served” policy has been in existence since WorldMark was founded
7 in 1989 and is presented as one of the key membership rights and benefits in all of the governing
8 documents available to prospective and current WorldMark members, including (a) the California
9 Permit filed with the California Department of Real Estate, (b) the official WorldMark Guidelines
10 (Rules), (c) the WorldMark Bylaws, (d) the Declaration of Vacation Owner Program (“Declaration”)
11 filed and recorded in every county in California (and elsewhere) where a WorldMark resort is located,
12 (e) the Management Agreement with Wyndham, (f) the Security Agreement (Retail Installment
13 Contract), (g) the Owner Understanding, and (h) the WorldMark Owner Education Guide. These
14 documents are hereinafter collectively referred to as the “Governing Documents.”

15 30. The Governing Documents form the basis of the bargain between Wyndham and
16 WorldMark members and are provided to all WorldMark members before the purchase of Vacation
17 Credits. The Governing Documents collectively form the contract between Wyndham and all
18 WorldMark members.

19 31. The Governing Documents state that WorldMark members can make only two types of
20 reservations – Vacation Credit Reservations and Bonus Time Reservations. Vacation Credit
21 Reservations can be booked up to 13 months in advance and must be reserved using annual Vacation
22 Credits. All WorldMark locations and dates are available on a first-come, first-served basis for Vacation
23 Credit Reservations. Bonus Time Reservations can be booked up to 14 days in advance and must be
24 reserved and paid for in cash based upon a formula established by WorldMark. The current formula is
25 \$.044 for each Vacation Credit that would be required to reserve the same unit under a Vacation Credit
26 Reservation.

27 32. Bonus Time Reservations serve two important purposes, and are a key membership right
28 and benefit. First, they enable WorldMark members to use WorldMark resorts on short notice and at a

1 discounted rate without using up their annual Vacation Credits. This is an important benefit because
2 most WorldMark resorts are within driving distance of major metropolitan regions and can be used by
3 members for short-notice vacations and weekend trips. In 2006, WorldMark estimated that Bonus Time
4 Reservations equivalent to more than 309 million Vacation Credits would be booked by WorldMark
5 members. Second, Bonus Time Reservations are paid for in cash, and the payments go directly to
6 WorldMark. These cash payments are mutually beneficial to WorldMark and WorldMark members
7 because the payments defray the operating costs of the resorts, help keep annual member dues down,
8 and fill rooms that would otherwise go unoccupied. In 2006, WorldMark estimated that Bonus Time
9 Reservations would result in revenues to WorldMark of approximately \$13 million. All WorldMark
10 locations and dates are available on a first-come, first-served basis for Bonus Time Reservations,
11 assuming that there is availability 14 days or less before travel.

12 33. Because WorldMark operates more like a hotel chain (with multiple resorts and different
13 types of accommodations available for reservation at any time), and less like a typical timeshare resort,
14 the rights, rules and regulations concerning the WorldMark reservation system are important to
15 WorldMark members.

16 34. The rights, rules and regulations concerning WorldMark reservations are detailed in the
17 Governing Documents. None of the Governing Documents allow for any type of reservation other than
18 a Vacation Credit Reservation or a Bonus Time Reservation. None of the Governing Documents allow
19 any person or entity to reserve time ahead of the schedules for Vacation Credit Reservations and Bonus
20 Time Reservations described above. The Governing Documents provide that only WorldMark's
21 members or its Board of Directors can change the reservation guidelines and rules and that Wyndham is
22 required to implement the reservation guidelines and rules established by WorldMark and its members.
23 The Governing Documents also provide that once Wyndham has transferred the properties to
24 WorldMark, Wyndham cannot enter into any transaction which can cause loss of usage at the properties
25 for WorldMark members. Finally, because Wyndham at all times retains a significant number of unsold
26 Vacation Credits, in order to ensure that Wyndham does not use its Vacation Credits for its own
27 purposes, to the detriment of WorldMark members, the Governing Documents specifically limit
28 Wyndham's right to use the WorldMark resorts for sales purposes.

1 35. Because Bonus Time is a key membership right and benefit, since WorldMark was
2 founded in 1989 until shortly after Wyndham acquired Trendwest, for every new resort transferred to
3 WorldMark from Wyndham, only 48 weeks of Vacation Credits were sold by Wyndham. The
4 remaining four weeks were set aside, with one week for maintenance and three weeks to ensure that
5 there would be some Bonus Time availability. With the exception of the WorldMark resorts in exotic
6 locations, all 46 WorldMark resorts from inception in 1989 through 2003, have set aside three weeks
7 worth of Vacation Credits which are not sold, to ensure Bonus Time availability for WorldMark
8 members. The number of weeks sold at each resort, and thus, the number of weeks set aside to ensure
9 Bonus Time availability for WorldMark members, is disclosed to both existing WorldMark members
10 and to prospective members. For example, Trendwest's 2001 report on Form 10-K states that: "At non-
11 exotic resorts (exotic resorts are Hawaii, Mexico and Fiji), only 48 weeks of time of each unit are
12 available for sale to Owners leaving 4 weeks for Bonus Time and maintenance and upkeep on the units."

13 36. Another fundamental principle, and key selling point, of WorldMark membership is that
14 WorldMark members are "buying tomorrow's vacation at today's price." There are two elements to this
15 concept. First, credit values for each new resort are established before the resort is transferred from
16 Wyndham to WorldMark. Once the credit values for the resort have been established, under the
17 Governing Documents, they can never be changed (the total credit value for the resort must remain
18 constant, though the values can be adjusted within the resort). What this means is that a resort
19 transferred to WorldMark in 1990, for example, will cost WorldMark members the same amount of
20 Vacation Credits per night regardless of whether a vacation is booked in 1991 or 2007. Second, the
21 Governing Documents require that Wyndham allocate credit values for each new resort based on the
22 relative use-value of the new resort compared to existing resorts. For example, if existing resorts value a
23 one bedroom at peak time at 8,000 Vacation Credits for a week, then a new resort with the same relative
24 use-value must also value its one bedroom units at 8,000 Vacation Credits for a week during peak time.
25 This ensures that as new resorts are added to WorldMark, existing members who purchased Vacation
26 Credits based on credit values for resorts already operating will also have sufficient Vacation Credits to
27 use all of the new resorts as well.

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1 37. From WorldMark's inception in 1989 until shortly after Wyndham acquired Trendwest,
2 47 resorts were added to WorldMark (with the exception of the exotic locations), and they all had the
3 same or essentially the same credit values, reflecting the fact that every resort, regardless of location,
4 had the same relative use-value to WorldMark members. This was true even though these resorts were
5 located in Canada, throughout the United States and in Mexico, and even though these resorts were built
6 over a period of more than 14 years.

7 **D. The Resale and Rental Market for WorldMark Vacation Credits**

8 38. Vacation Credits may be transferred entirely or partially at any time and without
9 limitation to the number of transfers, through sale, gift, inheritance, dissolution of marriage, or by any
10 operation of law. Since WorldMark was founded in 1989, WorldMark members who purchased
11 Vacation Credits on the open market have had the same rights and privileges as members who purchased
12 Vacation Credits directly from Wyndham. With the advent of the Internet and the increase in the
13 number of WorldMark members in the United States over the years, an active resale market has arisen
14 for WorldMark Vacation Credits. There are a number of websites devoted exclusively to the resale of
15 WorldMark Vacation Credits.

16 39. Because (at least in part) those WorldMark members selling Vacation Credits on the
17 resale market do not have the significant overhead and marketing expenses that Wyndham has, the price
18 per Vacation Credit on the resale market is significantly lower than the price per Vacation Credit
19 purchased from Wyndham. Currently, Wyndham sells Vacation Credits for approximately \$1.77 per
20 Credit, while a Vacation Credit can be purchased on the resale market for about \$0.70. This significant
21 price differential, coupled with the fact that Vacation Credits purchased on the resale market are no
22 different than those purchased from Wyndham, has had a material negative impact on sales of Vacation
23 Credits by Wyndham.

24 **E. Wyndham Acquires Trendwest and Uses its Control of WorldMark's Board of**
25 **Directors to Enrich Itself to the Detriment of WorldMark Members**

26 40. Since Wyndham has acquired Trendwest and assumed control of WorldMark's Board of
27 Directors, Wyndham and the Director Defendants have taken a number of actions that are contrary to the
28 interests of WorldMark members and violate the Governing Documents. Since Wyndham acquired
Trendwest in 2002, membership dues for WorldMark members have increased five times.

1 Housekeeping fees, which had remained constant from the inception of WorldMark in 1989 through
2 2003, have increased twice since then. Wyndham has instituted a new program, called TravelShare, to
3 force existing WorldMark members to purchase additional Vacation Credits from Wyndham and to
4 destroy the thriving resale market for Vacation Credits, because the resale market takes sales away from
5 Wyndham. Wyndham unilaterally has abandoned several fundamental principles guaranteed to all
6 WorldMark members by the Governing Documents, including first-come, first-served reservations, the
7 availability of Bonus Time reservations and the application of relative use-values to set credit values at
8 every new resort being transferred from Wyndham to WorldMark. Wyndham also has begun setting
9 aside hundreds of WorldMark units at popular resorts during peak seasons to use for its own purposes, in
10 direct violation of the Governing Documents, which limit Wyndham's use of existing resorts for sales
11 purposes.

12 **1. Wyndham Implements the TravelShare Program to Force Existing Members**
13 **to Purchase Additional Vacation Credits and Destroy the Resale Market for**
14 **Vacation Credits**

15 41. In November 2006, Wyndham implemented a program called "TravelShare." In order to
16 join Travelshare, existing WorldMark members must purchase an additional 5,000 Vacation Credits
17 directly from Wyndham, while new WorldMark members must purchase at least 6,000 Vacation Credits
18 directly from Wyndham. Once in TravelShare, the annual dues payable to Wyndham are anywhere
19 from \$74 to \$530, depending on the number of Vacation Credits owned. This is over and above the
20 annual WorldMark membership dues payable to WorldMark.

21 42. The TravelShare program purports to contain a number of benefits for WorldMark
22 members. TravelShare benefits include the ability to make "Fun Time" reservations between 15 and 42
23 days prior to arrival, membership in RCI (a resort exchange club owned by Wyndham's parent
24 company), access to various travel-related services offered by other Wyndham companies, and other
25 incidental benefits such as e-mail reservation reminders and complimentary movie rentals. There are
26 four tiers of membership in TravelShare: Standard, Elite, Diamond Elite and Platinum Elite. All of the
27 tiers include the basic TravelShare benefits.

28 43. Virtually all of the benefits offered by TravelShare already are available to WorldMark
members without the significant expense and restrictions imposed by the TravelShare program. For

1 example, membership in RCI is available to all existing and new WorldMark members for an \$89
2 annual fee, which in most instances is significantly less than the annual fee for TravelShare. Similarly,
3 existing WorldMark members already have access to the various travel-related services offered by other
4 Wyndham companies.

5 44. The one benefit not available to existing WorldMark members is “Fun Time.” Fun Time
6 is substantially similar to Bonus Time, with one significant exception. Fun Time reservations can be
7 booked up to 42 days before arrival, as opposed to 14 days before arrival under Bonus Time. Because
8 the ability to make short-term reservations in most of the WorldMark resorts is limited by demand,
9 particularly at the popular resorts near metropolitan regions, the ability of a WorldMark member to
10 make a short-term reservation up to 42 days before arrival is a valuable benefit, as it gives those
11 WorldMark members who join TravelShare a priority over all other WorldMark members in terms of
12 booking short-term reservations.

13 45. Fun Time represents a material and detrimental change in WorldMark’s fundamental
14 guarantee, namely, the right to reservations on a first-come, first-served basis. This change was
15 instituted unilaterally by Wyndham (with the knowledge and assistance of the Director Defendants)
16 without the consent of WorldMark members and violates the provisions in the Governing Documents
17 setting forth the relative rights and obligations of Wyndham, WorldMark and WorldMark members.
18 Fun Time does not benefit WorldMark or its members. Instead, Fun Time was implemented solely to
19 benefit Wyndham at the expense of existing WorldMark members.

20 46. TravelShare benefits Wyndham, to the detriment of WorldMark members, in a number of
21 ways. First, proceeds from the sale of Fun Time go to Wyndham, not WorldMark. As a result,
22 WorldMark will see decreased revenues from the sale of Bonus Time reservations, which may in turn
23 increase the annual dues for existing WorldMark members to compensate for the lower Bonus Time
24 revenues. Second, while Wyndham claims that none of the expenses required to implement TravelShare
25 will be paid by WorldMark, in fact, in order to provide TravelShare benefits at the various WorldMark
26 resorts, Wyndham uses WorldMark-funded employees and has not hired separate employees at its own
27 expense. Wyndham also appears to have covered the cost of the free housekeeping provided for Fun
28 Time reservations by implementing a general increase in housekeeping charges for all WorldMark

1 members. This increase was announced the same time that TravelShare was announced and represents
2 only the second increase in housekeeping charges in WorldMark's 18 year history (the first increase was
3 only a few years earlier). Third, Fun Time places Wyndham and TravelShare members ahead of
4 WorldMark members in terms of making short-term reservations, in violation of the longstanding
5 WorldMark guarantee and right of first-come, first-served reservations. Fourth, there are no provisions
6 in any of the Governing Documents allowing for another form of reservation other than either a
7 Vacation Credit reservation or a Bonus Time reservation. In other words, Fun Time reservations are
8 neither contemplated nor permitted under the Governing Documents. Fifth, Wyndham has designed
9 TravelShare to create an artificial distinction between Vacation Credits purchased from Wyndham and
10 those purchased on the resale market. This was done intentionally to force potential Vacation Credit
11 purchasers to pay more for Vacation Credits from Wyndham, rather than less on the resale market. This
12 artificial distinction created by TravelShare will further diminish the value of the Vacation Credits held
13 by existing WorldMark members.

14 47. TravelShare (i) forces existing WorldMark members to incur significant one-time and
15 recurring costs to maintain their first-come, first-served access to short-term reservations, and (ii)
16 imposes retroactive restrictions on the resale and use of Vacation Credits to the detriment of
17 existing WorldMark members.

18 48. Regardless of how many Vacation Credits an existing WorldMark member currently
19 owns, to become a member of TravelShare and continue to have first-come, first-served access to short-
20 term reservations, the WorldMark member must purchase an additional 5,000 Vacation Credits directly
21 from Wyndham. This essentially forces existing WorldMark members to purchase an entirely new
22 membership at the inflated Wyndham price rather than the reduced resale market price. Once a
23 WorldMark member has purchased the 5,000 additional Vacation Credits from Wyndham and become a
24 member of TravelShare, the member must pay a monthly "TravelShare" fee to Wyndham on top of the
25 regular monthly WorldMark dues. If a WorldMark member fails at any time to pay the monthly
26 TravelShare fee, the member loses his membership in TravelShare. If the member then wants to rejoin
27 TravelShare again, the member must purchase another 5,000 Vacation Credits directly from Wyndham.

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1 49. While Vacation Credits are freely transferable, TravelShare is not. A WorldMark
2 member who has purchased 5,000 additional Vacation Credits from Wyndham to join TravelShare loses
3 the right to sell, rent, borrow or otherwise transfer those Vacation Credits to anyone but a family
4 member, without losing membership in TravelShare. Thus, a WorldMark member who must go to the
5 significant expense of joining TravelShare simply to maintain his or her right to have first-come, first-
6 served access to short-term reservations is, as a result, giving up the right to sell or rent all of his/her
7 Vacation Credits on the open-market.

8 50. Future potential WorldMark members who purchase Vacation Credits on the open market
9 also cannot join TravelShare, even if they thereafter purchase additional Vacation Credits directly from
10 Wyndham.

11 51. In short, the restrictions in the TravelShare program will destroy the resale market for
12 Vacation Credits and impede existing WorldMark members from freely transferring their Vacation
13 Credits, as they have the right to do. The restrictions force prospective purchasers of Vacation Credits
14 to purchase Vacation Credits exclusively from Wyndham (at a considerably higher price), rather than on
15 the resale market. As a result of TravelShare, the Vacation Credits owned by existing WorldMark
16 members now are worth less than those sold by Wyndham.

17 **2. In Order to Sell More Vacation Credits, Wyndham Improperly Limits the**
18 **Availability of Bonus Time and Increases Usage at WorldMark Resorts**

19 52. From WorldMark's inception in 1989 through 2003, when each new resort (excluding the
20 exotic resorts) was transferred from Wyndham to WorldMark, three weeks' worth of Vacation Credits
21 were set aside and not sold, to ensure the availability of Bonus Time for WorldMark members.
22 However, when Wyndham acquired Trendwest, it unilaterally decided to ignore this key right and
23 benefit, and began setting aside only one week worth of Vacation Credits for Bonus Time availability at
24 all new WorldMark resorts. This is true not only for the 15 new WorldMark resorts added since 2004,
25 but even for the additional units added to some of the existing WorldMark resorts for which only 48
26 weeks worth of Vacation Credits were sold.

27 53. Wyndham's unilateral decision to set aside only one week for Bonus Time violates the
28 Governing Documents and is contrary to the interests of WorldMark members, as it allows Wyndham to
sell more Vacation Credits, thus increasing the usage of and decreasing the availability at all WorldMark

1 resorts. Of course, Wyndham profits from this by being able to sell 4% more Vacation Credits than it
2 otherwise would be entitled to (without any offsetting increase in cost) for each new resort or additional
3 units added to an existing resort.

4 **3. Wyndham Abandons the Relative Use-Value Provisions of the Governing**
5 **Documents in Order to Sell More Vacation Credits**

6 54. The Governing Documents require that Wyndham allocate credit values for each new
7 resort based on the relative use-value of the new resort compared to existing resorts. From
8 WorldMark's inception in 1989 until shortly after Wyndham acquired Trendwest, 47 resorts were added
9 to WorldMark (with the exception of the exotic locations), and they all had the same or essentially the
10 same credit values, reflecting the fact that every resort, regardless of location, had the same relative use-
11 value to WorldMark members. This was true even though these resorts were located in Canada,
12 throughout the United States and in Mexico, and even though these resorts were built over a period of
13 more than 14 years.

14 55. Trendwest, the developer at the time, was compensated for any increases in development
15 and construction costs, not by increasing credit values over time and then selling more Vacation Credits
16 as a result, but by increasing the costs of the Vacation Credits sold over time. This also benefited
17 existing members by increasing the value of their Vacation Credits and ensuring that new resorts would
18 "cost" the same to use as existing resorts.

19 56. Wyndham quickly abandoned the relative use-value concept when it acquired Trendwest.
20 Because Wyndham cannot increase the cost of Vacation Credits to pay for any increased development
21 and construction costs (due in part to competition from the resale market), it has instead unilaterally
22 decided to ignore the key provisions of the Governing Documents and set credit values at new resorts
23 based on the purported development costs of those resorts rather than the relative use-value of the new
24 resorts compared to existing resorts. As a result, most of the new resorts that have been developed by
25 Wyndham since the acquisition have had substantially higher credit values than all of the existing
26 resorts. For example, all of the non-exotic resorts added between 1989 and 2003 set the credit value for
27 a one bedroom at peak time at either 8,000 or 9,000 Vacation Credits for a week. The San Diego
28 location, added in 2006, set the value of a one bedroom at 15,000 Vacation Credits for a week, while the

1 Taos location, to be added in 2008, will value a one bedroom at 13,000 Vacation Credits for a week.
2 Many existing WorldMark members, who purchased based upon a well-established history of consistent
3 relative use-values for all resorts, will either have to purchase more Vacation Credits to be able to use
4 these new resorts or simply avoid the new resorts. This violates the Governing Documents and
5 representations made by Wyndham to prospective purchasers that by joining WorldMark, they are
6 purchasing tomorrow's vacation at today's prices.

7 **4. Wyndham Prematurely Reserves Hundreds of Units at WorldMark Resorts**
8 **for Sales Purposes in Violation of the Governing Documents**

9 57. The Governing Documents place many restrictions on Wyndham's ability to use existing
10 WorldMark resorts for its own purposes, particularly sales purposes. Wyndham generally cannot enter
11 into any transaction which can cause a loss of usage at the resorts for WorldMark members.
12 Specifically, Wyndham cannot make reservations using its Vacation Credits more than 45 days before
13 arrival, and must otherwise comply with all of the restrictions on reservations that apply to WorldMark
14 members. One of these restrictions is that for a reservation made during the peak periods (red weeks),
15 the reservation must be for a full week if booked more than 90 days before arrival.

16 58. Wyndham recently began reserving for its own sales purposes hundreds of units at
17 popular resorts during peak periods. The units are blocked months in advance and for weekends only.
18 These reservations were made by Wyndham more than 45 days before arrival and are for less than one
19 week, but booked more than 90 days before arrival. While denominated as "Party Weekends" on
20 WorldMark's website, these weekends are in fact sales presentations whereby an existing WorldMark
21 owner can bring up to 12 other prospective members (couples) to a popular WorldMark resort for a
22 modest cost. The weekends always include a tour, sales presentation and usually some other activity.

23 59. Wyndham's use of WorldMark resorts in this manner for sales purposes violates the
24 Governing Documents and limits the ability of existing WorldMark members to book reservations
25 (using either Vacation Credits or Bonus Time) at popular destinations.

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1 **5. The Director Defendants, Beholden to and Controlled by Wyndham, Assist**
2 **Wyndham in Violating the Governing Documents and Maintaining its**
3 **Control of WorldMark's Board**

4 60. WorldMark's Board is responsible for overseeing WorldMark and ensuring that its
5 operations conform to the Governing Documents. The Board is vested with sole authority to exercise
6 WorldMark's corporate powers and control its business and affairs. The Board also is vested with the
7 power and responsibility to enforce the provisions of the Governing Documents and any other
8 instruments affecting membership and management and control of the resorts.

9 61. The Director Defendants have failed to properly exercise their powers and responsibilities
10 as Directors of WorldMark consistent with their obligations under the Governing Documents and under
11 California law. The Director Defendants have either assisted Wyndham in its violation of the Governing
12 Documents and other actions contrary to the interests of WorldMark members, or have failed to take any
13 action on behalf of WorldMark members to enforce their rights under the Governing Documents and to
14 force Wyndham to refrain from violating the Governing Documents and harming the interests of
15 WorldMark members.

16 62. Defendants Herrick and Fry participated in the creation of TravelShare, and they and the
17 other Director Defendants have assisted Wyndham in the implementation of TravelShare. The Director
18 Defendants also have taken no action against Wyndham to protect WorldMark members from
19 Wyndham's decision to abandon the Governing Documents and sell more Vacation Credits than it is
20 entitled to by decreasing the availability of Bonus Time and inflating credit values at new resorts and
21 existing resorts where additional units are added. Finally, the Director Defendants have taken no action
22 to prevent Wyndham from improperly reserving hundreds of units at popular WorldMark resorts for its
23 own sales purposes.

24 63. Instead, the Director Defendants have taken actions to perpetuate Wyndham's domination
25 and control of WorldMark and its Board by manipulating the election process and improperly limiting
26 the ability of WorldMark members to obtain information about WorldMark that they are entitled under
27 the Governing Documents.

28 64. In order to ensure that Wyndham can continue to dominate and control WorldMark for its
own benefit rather than for the benefit of WorldMark members, Wyndham and the Director Defendants

1 have taken a number of steps to prevent any serious challenges to Wyndham's control of the WorldMark
2 Board. They shut down the owners' forum on the WorldMark website after WorldMark members
3 started to complain about changes being implemented when Wyndham took over. While a new forum
4 now is available for WorldMark owners, it is actively monitored by Wyndham employees and negative
5 comments or discussion about WorldMark's Board or Wyndham are not permitted.

6 65. The Governing Documents provide that any WorldMark member may request and review
7 a copy of the membership register for any purpose reasonably related to the member's interests as a
8 WorldMark member. However, the Director Defendants unilaterally have decided that the membership
9 register will not be provided to any WorldMark member, regardless of the purpose for which it is
10 sought. This prevents WorldMark members from communicating directly with other members in an
11 effort to challenge the actions of the Director Defendants.

12 66. The Board has avoided the election process entirely for new Wyndham executives
13 joining the Board, by having a Wyndham executive on the Board run for reelection as an incumbent and
14 then resign shortly after reelection, to be replaced (by appointment, not election) by the new Wyndham
15 executive, who can then run in the next election as an incumbent. The Board has never appointed
16 anyone other than a Wyndham executive when an incumbent Wyndham executive resigns from the
17 Board. Three of the Director Defendants (Herrick, McConnell and Fry) all obtained appointment to the
18 Board in this manner.

19 67. As discontent has grown among WorldMark members, the Director Defendants have
20 faced more organized election challenges. In order to ensure Wyndham's continued dominance, the
21 Director Defendants have taken a number of actions in response to these challenges that are contrary to
22 the interests of WorldMark and its members. The Governing Documents provide that any WorldMark
23 member in good standing can run for election to the Board. However, the Board has decided to pre-
24 screen applicants so that the Board unilaterally may decide which members can run against the
25 incumbent Director Defendants in future elections. The Board's stated screening criteria includes:
26 "Does the [candidate] understand the value of the relationship between [Wyndham] and WorldMark,
27 The Club?" While the Board historically has allocated proxy votes in accordance with the popular vote,
28 it now allocates the votes in a manner that will ensure the re-election of incumbent directors beholden to

1 Wyndham, rather than independent directors.

2 **IV.**

3 **TOLLING OR NON-ACCRUAL OF STATUTE OF LIMITATIONS**

4 68. Any applicable statutes of limitations have been tolled or have not run because
5 Defendants knowingly and actively concealed and denied the facts as alleged herein. Defendants had
6 actual or constructive knowledge of the wrongful courses of action alleged here. Plaintiffs and Class
7 members have been kept in ignorance of information essential to the pursuit of their claims, without any
8 fault or lack of diligence on their part. Plaintiffs and Class members did not discover the facts
9 constituting Defendants' unlawful business practices until a date within the limitations period governing
10 this action, and promptly exercised due diligence by filing this complaint. Plaintiffs and Class members
11 were not at fault for failing to discover Defendants' misconduct sooner, and had no actual or
12 presumptive knowledge of the facts of Defendants' misconduct to put them on inquiry notice. Plaintiffs
13 and Class members could not reasonably have discovered Defendants' misrepresentations and/or
14 material omissions before November 5, 2006. Therefore, their claims accrued on that date, and/or any
15 applicable statutes of limitations were tolled until that date.

16 69. Defendants were and are under a continuing duty to disclose all material facts concerning
17 ownership interests in WorldMark to Plaintiffs and Class members. Because of Defendants'
18 concealment of material information concerning WorldMark, Defendants are estopped from relying on
19 any statute of limitations defense.

20 **V.**

21 **CLASS ACTION ALLEGATIONS**

22 70. Plaintiffs bring this action on behalf of themselves and all other similarly situated persons
23 as members of a Class defined as follows: All persons who purchased WorldMark Premier Vacation
24 Credits before November 5, 2006 and who reside in the State of California or who purchased Vacation
25 Credits in California (the "Class"). Excluded from the Class are Defendants, any entity in which any
26 Defendant has or had a controlling interest, any entity which has or had a controlling interest in
27 Wyndham, any officers or directors of Wyndham, the legal representatives, heirs, successors, and
28 assigns of Defendants, and any judge assigned to this action and his or her immediate family.

1 71. This action has been brought and may be properly maintained pursuant to the provisions
2 of Rule 23 of the Federal Rules of Civil Procedure.

3 72. **Numerosity** -- Fed. R. Civ. P. 23(a)(1): Members of the Class are so numerous and
4 widely dispersed that joinder of them in one action is impracticable. Wyndham promotes, markets and
5 sells WorldMark Vacation Credits to consumers throughout California and manages fifteen WorldMark
6 resorts in California, many of which have Wyndham sales offices. While the precise number of Class
7 members is unknown to Plaintiffs at this time, the Class is believed to number in the tens of thousands.
8 Because Wyndham manages WorldMark, and WorldMark maintains a list of all of its current members
9 and their mailing addresses, the identity of each and every Class member is readily ascertainable from
10 information and records in Defendants' possession or control. Class members may be notified of the
11 pendency of this action by first-class or electronic mail, supplemented (if deemed necessary or
12 appropriate by the Court) by published notice.

13 73. **Common Questions of Fact and Law** -- Fed. R. Civ. P. 23(a)(2), (b)(3): Common
14 questions of law and fact exist as to all members of the Class and predominate over any questions
15 affecting only individual Class members. These common legal and factual questions include, but are not
16 limited to, the following:

- 17 (a) Whether the Governing Documents create a contract between Wyndham and
18 WorldMark members;
- 19 (b) Whether Wyndham has the right under the Governing Documents to unilaterally
20 impose TravelShare upon existing WorldMark members;
- 21 (c) Whether Wyndham's unilateral imposition of TravelShare on existing WorldMark
22 members constitutes a breach of contract by Wyndham;
- 23 (d) Whether Wyndham's unilateral imposition of TravelShare on existing WorldMark
24 members constitutes a breach of the covenant of good faith and fair dealing by
25 Wyndham;
- 26 (e) Whether TravelShare causes a loss of usage of WorldMark resorts by WorldMark
27 members;

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- 1 (f) Whether TravelShare reduces the availability of Bonus Time reservations for
2 existing WorldMark members;
- 3 (g) Whether TravelShare restricts the free transfer of Vacation Credits by WorldMark
4 members;
- 5 (h) Whether TravelShare diminishes the value of Vacation Credits owned by existing
6 WorldMark members;
- 7 (i) Whether Wyndham has the right under the Governing Documents to unilaterally
8 abandon the practice of setting aside three weeks at each new resort to ensure
9 Bonus Time availability;
- 10 (j) Whether Wyndham's unilateral abandonment of the practice of setting aside three
11 weeks at each new resort to ensure Bonus Time availability constitutes a breach
12 of contract by Wyndham;
- 13 (k) Whether Wyndham's unilateral abandonment of the practice of setting aside three
14 weeks at each new resort to ensure Bonus Time availability constitutes a breach
15 of the covenant of good faith and fair dealing by Wyndham;
- 16 (l) Whether Wyndham has the right under the Governing Documents to unilaterally
17 abandon the relative use-value concept;
- 18 (m) Whether Wyndham's unilateral abandonment of the relative use-value concept
19 constitutes a breach of contract by Wyndham;
- 20 (n) Whether Wyndham's unilateral abandonment of the relative use-value concept
21 constitutes a breach of the covenant of good faith and fair dealing by Wyndham;
- 22 (o) Whether Wyndham's use of WorldMark resorts for sales purposes as described
23 herein violates the Governing Documents;
- 24 (p) Whether the Governing Documents are materially misleading and/or conceal
25 material information concerning WorldMark membership;
- 26 (q) Whether Wyndham failed to disclose, inadequately disclosed, or concealed
27 material information concerning WorldMark membership and the purchase and/or
28 ownership of WorldMark Vacation Credits;

- 1 (r) Whether Wyndham's sales, advertising and marketing practices in connection
2 with the sale of WorldMark Vacation Credits are likely to deceive a reasonable
3 person;
- 4 (s) Whether Defendants' business practices, as described herein, are unlawful, unfair
5 and/or fraudulent;
- 6 (t) Whether Wyndham's business practices, as described herein, violate the Final
7 Judgment and Permanent Injunction entered in *The People of the State of*
8 *California v. Trendwest Resorts, Inc.*, CIV43529, in November, 2003;
- 9 (u) Whether the Director Defendants have violated their fiduciary duties;
- 10 (v) Whether Defendants' wrongful conduct damaged Plaintiffs and Class members;
11 and
- 12 (w) Whether Plaintiffs and Class members are entitled to declaratory, injunctive
13 and/or equitable relief.

14 74. **Typicality** -- Fed. R. Civ. P. 23(a)(3): Plaintiffs' claims are typical of the claims of the
15 members of the Class in that Plaintiffs and all Class members purchased Premier Vacation Credits
16 pursuant to uniform offering documents prior to November 5, 2006, and currently own those Vacation
17 Credits.

18 75. **Adequacy** -- Fed. R. Civ. P. 23(a)(4): Plaintiffs will fairly and adequately protect the
19 interests of the Class in that Plaintiffs have no interests that are adverse or antagonistic to those of the
20 Class. Plaintiffs have retained counsel competent and experienced in complex class action litigation,
21 and Plaintiffs intend to prosecute this action vigorously.

22 76. **Superiority** -- Fed. R. Civ. P. 23(b)(3): A class action is superior to all other available
23 means for the fair and efficient adjudication of this controversy. The economic harm suffered by each
24 individual Class member may be limited. Given the size of individual Class members' claims, the
25 expense and burden of individual litigation make it economically infeasible and procedurally
26 impracticable for Class members to seek redress individually for the wrongs done to them. The
27 likelihood of individual Class members prosecuting separate claims is exceedingly remote, and even if
28 the members of the Class could afford individual litigation, given the size of the Class, the court system

1 could not. Individual litigation increases the delay and expense to all parties and the court system
2 presented by the complex legal and factual issues of the case. By contrast, a class action will present far
3 fewer management difficulties, promote an orderly and expeditious administration and adjudication of
4 the class claims, foster economies of scale, ensure uniformity of decisions, and provide comprehensive
5 supervision by a single court.

6 77. In the alternative, the Class may be certified because:

- 7 (a) The prosecution of separate actions by the individual members of the Class would
8 create a risk of inconsistent or varying adjudication with respect to individual
9 Class members which would establish incompatible standards of conduct for
10 Defendants;
- 11 (b) the prosecution of separate actions by individual Class members would create a
12 risk of adjudications with respect to them which would, as a practical matter, be
13 dispositive of the interests of other Class members not parties to the adjudications
14 or substantially impair or impede their ability to protect their interests; and
- 15 (c) Defendants have acted or refused to act on grounds generally applicable to the
16 Class, thereby making appropriate final and injunctive relief with respect to the
17 members of the Class as a whole.

18 **VI.**

19 **DERIVATIVE ALLEGATIONS**

20 78. Plaintiffs bring this action, in part, derivatively for the benefit of WorldMark and its
21 members to redress injuries suffered and to be suffered by WorldMark and its members as a direct result
22 of the breach of fiduciary duties by the Director Defendants.

23 79. Plaintiffs have owned Vacation Credits and have been members of WorldMark during the
24 wrongful course of conduct by Defendants as alleged herein, and Plaintiffs continue to own Vacation
25 Credits and continue to be members of WorldMark.

26 80. Plaintiffs will adequately and fairly represent the interests of WorldMark and its members
27 in enforcing and prosecuting their rights and have retained counsel competent and experienced in class
28 action and derivative litigation.

VII.

DEMAND ON WORLDMARK IS EXCUSED

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3 81. Plaintiffs have not made a demand on the WorldMark Board to bring suit asserting the
4 claims set forth herein, because a majority of the WorldMark Board suffers from conflicts of interest and
5 divided loyalties which preclude them from exercising independent business judgment.

6 82. At the time of the alleged wrongdoing, four members of the five-member WorldMark
7 Board – Defendants Hensley, McConnell, Henley and Fry – served as paid executives of Wyndham, its
8 parent, Wyndham Vacation Ownership, Inc., or a Wyndham affiliate, Wyndham South Pacific.
9 Likewise, at the time this action was commenced, a majority of the five-member WorldMark Board –
10 Defendants Hensley, Henley, Fry and Herrick – served as paid executives of Wyndham or its affiliate.
11 Thus, a majority of the WorldMark Board receives compensation from and owes loyalties to Defendant
12 Wyndham, an entity that is not disinterested in the wrongful actions alleged herein. Defendant
13 Wyndham controls the WorldMark Board, has engaged in conduct adverse to the interests of
14 WorldMark and its members, and has obtained the benefit of the wrongful conduct alleged herein.

15 83. Demand on the WorldMark Board would be futile and useless, because, at all relevant
16 times, a majority of the WorldMark Board knew of and participated in the wrongs alleged, and because
17 this majority permitted their financial interests and loyalties to Defendant Wyndham (their employer) to
18 supercede their duties of loyalty, care and good faith to WorldMark and its members.

19 84. As alleged herein, a majority of the WorldMark Board violated their fiduciary duties to
20 WorldMark and its members, by refusing to take action on behalf of WorldMark and its members to
21 enforce their rights under the Governing Documents, and by failing to prevent Defendant Wyndham
22 from engaging in conduct that violates the Governing Documents. The alleged wrongdoing by the
23 Director Defendants harms the interests of WorldMark and its members, but provides significant
24 financial benefits to Wyndham and, indirectly, to the Director Defendants who are or were employed as
25 senior executives of Wyndham.

26 85. Under these circumstances, the WorldMark Board could not be expected to sue itself or to
27 bring the derivative claims asserted herein.

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1 **FIRST CAUSE OF ACTION**

2 **Breach of Contract**

3 86. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.
4 This claim is brought on behalf of Plaintiffs and the Class against Wyndham.

5 87. At all relevant times, a contract existed between Plaintiffs and Class members, on the one
6 hand, and Wyndham, on the other. The contract is embodied in writing in the Governing Documents,
7 which are uniform in all material respects for Plaintiffs and Class members.

8 88. Pursuant to the Governing Documents, Wyndham agreed, among other things, to:

- 9 (a) Enter into no transaction which would cause a loss of usage of the WorldMark
10 resorts by WorldMark members;
- 11 (b) Maintain no ownership interest in the WorldMark resorts once they are
12 transferred to WorldMark;
- 13 (c) Manage the WorldMark resorts for the benefit of WorldMark members;
- 14 (d) Honor all advance and short-term reservations on a first-come, first-served
15 basis;
- 16 (e) Honor only two types of reservations (Vacation Credits and Bonus Time),
17 unless directed to do otherwise by WorldMark and its members;
- 18 (f) Implement the reservation guidelines and rules established by WorldMark and
19 its members;
- 20 (g) Allocate credit values for new resorts based on the relative use-value of new
21 resorts compared to existing resorts;
- 22 (h) Set aside at each resort (except exotic resorts) the Vacation Credit equivalent
23 of three weeks per year which cannot be sold or offered for sale or rented
24 (until after WorldMark members have an opportunity to make Bonus Time
25 reservations) so that time is available for Bonus Time reservations by
26 WorldMark members;
- 27 (i) Permit the free transferability of Vacation Credits by WorldMark members;
- 28 (j) Provide for only two forms of ownership of Vacation Credits; and

1 (k) Manage and operate WorldMark in manner consistent with the Governing
2 Documents.

3 89. By its actions alleged herein, Wyndham breached its contract with Plaintiffs and Class
4 members by unilaterally imposing Travelshare on WorldMark members, impairing the ability of
5 WorldMark members to use WorldMark resorts, exercising a continued ownership interest in the
6 WorldMark properties, managing the WorldMark resorts for its own benefit rather than for the benefit of
7 WorldMark members, giving priority to TravelShare members for short-term reservations, honoring
8 more than two types of reservations without the approval of WorldMark and its members, implementing
9 a reservations system not consistent with the guidelines and rules established by WorldMark and its
10 members, inhibiting the free transfer of Vacation Credits by WorldMark members, taking actions to
11 diminish the value of the Vacation Credits owned by WorldMark members, failing to allocate credit
12 values at new resorts based on the relative use-value of new resorts compared to existing resorts, failing
13 to set aside weeks to ensure availability of Bonus Time reservations, and generally managing and
14 operating WorldMark for its own benefit rather than for the benefit of WorldMark and its members in a
15 manner inconsistent with the Governing Documents.

16 90. At all times, Plaintiffs and Class members fully performed under the Governing
17 Documents.

18 91. Because of Wyndham's breach of its contract with Plaintiffs and Class members,
19 Plaintiffs and Class members have suffered damage, in an amount to be determined at trial.

20 **SECOND CAUSE OF ACTION**

21 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

22 92. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.
23 This claim is brought on behalf of Plaintiffs and the Class against Wyndham.

24 93. Under an implied term of the contract between Wyndham and Plaintiffs and Class
25 members, identical in all material respects and necessary to carry out the intent of the parties, Plaintiffs
26 and Class members reasonably expected that they would always have access to WorldMark's
27 reservation system on a first-come, first-served basis for all reservations, that there would never be more
28 than two types of reservations unless agreed to by a majority of the WorldMark members, that

1 Wyndham would take no action that might cause a loss of usage by WorldMark members, that their
2 Vacation Credits would be equal in all respects to the Vacation Credits offered for sale by Wyndham,
3 that new resorts would have the same relative use-value as existing resorts, and that for each new resort,
4 time would be set aside to ensure the availability of Bonus Time reservations.

5 94. By its actions, described above, Wyndham has deprived Plaintiffs and Class members of
6 the benefit of their bargains, and breached the implied covenant of good faith and fair dealing inherent in
7 the contracts between Wyndham and all WorldMark members. Wyndham has unilaterally imposed
8 Travelshare on WorldMark members, impaired the ability of WorldMark members to use WorldMark
9 resorts, exercised a continued ownership interest in the WorldMark properties, managed the WorldMark
10 resorts for its own benefit rather than for the benefit of WorldMark members, given priority to
11 TravelShare members for short-term reservations, honored more than two types of reservations without
12 the approval of WorldMark and its members, implemented a reservations system not consistent with the
13 guidelines and rules established by WorldMark and its members, inhibited the free transfer of Vacation
14 Credits by WorldMark members, taken actions to diminish the value of the Vacation Credits owned by
15 WorldMark members, failed to allocate credit values at new resorts based on the relative use-value of
16 new resorts compared to existing resorts, failed to set aside weeks to ensure availability of Bonus Time
17 reservations, and generally managed and operated WorldMark for its own benefit rather than for the
18 benefit of WorldMark and its members in a manner inconsistent with the Governing Documents.

19 95. Because of such breach, Plaintiffs and Class members have suffered damages, in an
20 amount to be determined at trial.

21 **THIRD CAUSE OF ACTION**

22 **Unlawful, Unfair and Fraudulent Business Practices in Violation of**
23 **Cal. Bus. & Prof. Code §§ 17200, et seq.**

24 96. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.
25 This claim is brought on behalf of Plaintiffs and the Class against Wyndham.

26 97. The acts and practices engaged in by Wyndham, and described herein, constitute
27 unlawful, unfair and/or fraudulent business practices, in that: (a) Wyndham's practices violate the letter
28 and policy of the Consumers Legal Remedies Act; and/or (b) Wyndham's practices violate the Final
Judgment and Permanent Injunction entered in *The People of the State of California v. Trendwest*

1 *Resorts, Inc.*, CIV43529, in November, 2003; and/or (c) the justification for Wyndham's conduct is
2 outweighed by the gravity of the consequences to Plaintiffs and Class members; and/or, (d) Wyndham's
3 conduct is immoral, unethical, oppressive, unscrupulous or substantially injurious to Plaintiffs and Class
4 members; and/or, (e) the conduct of Wyndham constitutes fraudulent, untrue or misleading actions in
5 that such conduct has a tendency to deceive Plaintiffs and Class members, and/or (f) Wyndham's
6 conduct violates and contradicts California's prohibition and policies against bad faith and unfair
7 dealing, and/or (g) Wyndham's practices violate the letter and policy of the Vacation Ownership and
8 Time-Share Act of 2004. Such conduct violates California Business & Professions Code §§ 17200, *et*
9 *seq.*

10 98. Plaintiffs and Class members have suffered injury in fact and have lost money or property
11 as a result of Wyndham's unlawful, unfair and fraudulent business practices, as described herein.

12 99. Pursuant to California Business and Professions Code § 17203, Plaintiffs and Class
13 members therefore are entitled to equitable relief, including restitution, disgorgement of all profits
14 accruing to Wyndham because of its unlawful, unfair, and fraudulent business practices, and a
15 permanent injunction enjoining Wyndham from engaging in the unlawful, unfair, and fraudulent acts
16 and practices described herein.

17 (a) Wyndham's unlawful, unfair and fraudulent business acts and practices are described
18 herein and include, but are not limited to, the following: Wyndham misrepresented and/or
19 failed to disclose material facts concerning WorldMark and WorldMark Vacation Credits;

20 (b) Wyndham unilaterally imposed additional obligations upon existing WorldMark
21 members;

22 (c) Wyndham unilaterally altered the terms and features of WorldMark membership;

23 (d) Wyndham breached its contract with existing WorldMark members, as described in
24 Paragraphs 88 and 89 above;

25 (e) Wyndham diluted the use and value of WorldMark Vacation credits owned by existing
26 WorldMark members who have not signed up for the TravelShare program;

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- 1 (f) Wyndham falsely represented that all WorldMark members held equal rights to make
2 Vacation Credit Reservations and Bonus Time Reservations on a first-come, first-
3 reserved basis within time periods that applied to all WorldMark members equally;
- 4 (g) Wyndham falsely represented that credit values would be allocated at all new resorts
5 based on the relative use-value as compared to existing resorts;
- 6 (h) Wyndham falsely represented that weeks would be allocated in a manner so as to ensure
7 the availability of Bonus Time reservations for WorldMark members; and
- 8 (i) Wyndham violated Paragraphs 3(K), 3(M), 3(N), and 3(O) of the Final Judgment and
9 Permanent Injunction entered in *The People of the State of California v. Trendwest*
10 *Resorts, Inc.*, CIV43529, in November, 2003, which forbids: “failing to disclose that an
11 association decision could result in a diminution of vacation credit values,” materially
12 misrepresenting the “availability of services,” “materially misrepresenting the quantity of
13 vacation credits sufficient to obtain any other benefit or service,” and “materially
14 misrepresenting the ability or ease with which an owner may make a reservation.”

15 **FOURTH CAUSE OF ACTION**

16 **Breach of Fiduciary Duty**

17 100. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.
18 This claim is brought on behalf of Plaintiffs and derivatively on behalf of WorldMark and its members
19 against the Director Defendants.

20 101. The Director Defendants are fiduciaries and owe the highest duty of loyalty, care and
21 good faith to WorldMark and its members. As fiduciaries, the Director Defendants are required to place
22 the interests of WorldMark and its members ahead of their own self-interests and the interests of their
23 employer, Defendant Wyndham.

24 102. The Director Defendants owe a duty to WorldMark and its members to enforce the
25 covenants, conditions, provisions, terms and rights afforded to WorldMark and its members under the
26 Governing Documents, and to prevent or restrain violations of the conditions, provisions, terms and
27 rights afforded under the Governing Documents.

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1 members, or prevent Wyndham (WorldMark's managing agent) from implementing programs that
2 violate or are contrary to the provisions of these documents.

3 110. A declaratory judgment is necessary to determine the parties' respective rights under the
4 Governing Documents including, among other things, a declaration that the Director Defendants owe a
5 duty to Plaintiffs and WorldMark members to enforce the covenants, terms, provisions or rights under
6 these Documents for the benefit of WorldMark Members, and a declaration that the Director Defendants
7 may not alter the rights or benefits afforded Plaintiffs and other WorldMark members under these
8 Documents without the consent of the WorldMark membership.

9 111. Plaintiffs, on behalf of themselves and the Class, and derivatively on behalf of
10 WorldMark and its members, seek an order for declaratory relief together with any other relief the Court
11 deems proper.

12 **SIXTH CAUSE OF ACTION**

13 **Violation of the Vacation Ownership and Time-Share Act of 2004,**
14 **Cal. Bus. & Prof. Code § 11210, et seq.**

15 112. Plaintiffs incorporate by reference and reallege all paragraphs previously alleged herein.
16 This claim is brought on behalf of Plaintiffs and the Class against Wyndham.

17 113. Plaintiffs are owners of time-share interests purchased in California and are permitted to
18 sue under the Time-Share Act by California Business & Professions Code § 11285.

19 114. Wyndham is a developer and a marketer of time-share interests as well as a manager of
20 time-share interests and, therefore, a proper defendant under the Time-Share Act, Cal. Bus. & Prof.
21 Code § 11285.

22 115. As set forth herein, Wyndham's acts, practices, representations, omissions, and courses of
23 conduct with respect to the marketing and sale of WorldMark Vacation Credits and management of
24 WorldMark violate § 11245(a)(3) of the Vacation Ownership and Time-Share Act of 2004 in that
25 Wyndham materially misrepresented the nature, qualities, or characteristics of the offered time-share
26 plan by describing memberships in WorldMark as holding equal rights to all other memberships with
27 respect to the use of Bonus Time.

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1 116. Pursuant to the provisions of Civil Code § 11285, Plaintiffs and Class members seek an
2 order for declaratory relief, an order enjoining the methods, acts and practices complained of herein, and
3 any other relief the Court deems proper.

4 **VIII.**

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated pray for
7 judgment against Defendants as follows:

8 a. For an order certifying the proposed Class herein under Rule 23 of the Federal Rules of
9 Civil Procedure, and appointing Plaintiffs and their counsel of record to represent said Class;

10 b. For an order that Defendants be permanently enjoined from engaging in the unlawful
11 activities and practices complained of herein;

12 c. For an order awarding restitution and disgorgement of all money paid by Plaintiffs and
13 Class members because of Defendants' unlawful, unfair, and/or fraudulent business practices
14 complained of herein;

15 d. For an order imposing a constructive trust for the benefit of Plaintiffs and Class members
16 upon all money collected by Wyndham from the unlawful, unfair, and/or fraudulent business practices
17 and activities complained of herein;

18 e. For declaratory relief as this Court deems appropriate;

19 f. For actual damages;

20 g. For attorneys' fees and costs of suit, including expert witness fees;

21 h. For an order awarding pre-judgment and post-judgment interest as prescribed by law; and

22 i. For such other and further relief as this Court may deem just and proper

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JURY DEMAND

Plaintiffs hereby demand a trial by jury on all claims so triable.

DATED: May 16, 2007

Respectfully submitted,

GIRARD GIBBS LLP

By: /s/ Jonathan K. Levine
Jonathan K. Levine

Elizabeth C. Pritzker
Daniel T. LeBel
601 California Street
San Francisco, California 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846

Attorneys for Individual and Representative
Plaintiffs Clarke and Rebecca Wixon and Norman
and Barbara Wixon

VERIFICATION

I am a named plaintiff in this action. I was a member of WorldMark, The Club during relevant times, and I am still a member. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have. I have read a copy of this Complaint, have been advised by counsel, and based upon my personal knowledge and in reliance upon the investigation of my counsel, I believe the allegations of the complaint to be true.

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

Executed on May 15, 2008 at San Mateo, California.

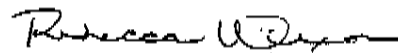

Clarke Wixon

VERIFICATION

I am a named plaintiff in this action. I was a member of WorldMark, The Club during relevant times, and I am still a member. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have. I have read a copy of this Complaint, have been advised by counsel, and based upon my personal knowledge and in reliance upon the investigation of my counsel, I believe the allegations of the complaint to be true.

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

Executed on May 15, 2008 at San Mateo, California.



Rebecca Wixon

VERIFICATION

I am a named plaintiff in this action. I was a member of WorldMark, The Club during relevant times, and I am still a member. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have. I have read a copy of this Complaint, have been advised by counsel, and based upon my personal knowledge and in reliance upon the investigation of my counsel, I believe the allegations of the complaint to be true.

I declare under penalty of perjury of the laws of the State of Colorado the foregoing is true and correct.

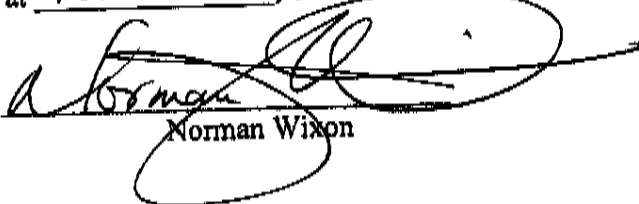
Executed on May 14, 2008 at Parker, Colorado.


Barbara Wixon

VERIFICATION

I am a named plaintiff in this action. I was a member of WorldMark, The Club during relevant times, and I am still a member. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have. I have read a copy of this Complaint, have been advised by counsel, and based upon my personal knowledge and in reliance upon the investigation of my counsel, I believe the allegations of the complaint to be true.

I declare under penalty of perjury of the laws of the State of Colorado the foregoing is true and correct.

Executed on 14 May, 2008 at Parker, Colorado.

Norman Wixon