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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WENDY JOHANNSON,  
Plaintiff,

No. C 11-02822 WHA

v.

**ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

WACHOVIA MORTGAGE, FSB,  
formerly known as World Savings Bank  
FSB, DEREK WAYNE PHILIPS, doing  
business as DKP MORTGAGE, and  
JOSEPH STEVEN CANTER,  
Defendants.

**INTRODUCTION**

In this mortgage-loan dispute, one defendant moves for summary judgment against plaintiff. For the reasons stated below, the motion for summary judgment is **GRANTED**.

**STATEMENT**

Plaintiff Wendy Johannson has put in very little evidence into the summary-judgment record, although movant Wachovia Mortgage, FSB has submitted a considerable amount of evidence supporting its side. Specifically, plaintiff's evidentiary submissions include only a declaration of plaintiff and Attorney James Martinez, her counsel who filed the operative complaint in June 2011 and the opposition to the instant motion, a class-action notice from another action, a copy of the original complaint, and excerpts from relevant pages of plaintiff's expert's report. Thus, the facts are taken almost entirely from the evidence put forward by

1 defendant, which has gone almost completely un rebutted, and the complaint, where such facts  
2 were needed to present a clear understanding of the issues.

3 **1. ORIGINATION OF LOAN.**

4 Plaintiff acquired property located at 2419 Cathay Way, Sacramento in January 2006  
5 (Def. Exh. 1 at 12). She put down \$100,000 of her own money as payment on the property and  
6 obtained a loan through Option One Mortgage for the balance of the purchase price (*id.* at 12, 64,  
7 90).

8 In August 2006, plaintiff was cold-called by Joseph Canter, who she alleged to be “the  
9 employee of defendant Phelps.” Plaintiff has not put in any evidence to establish who employed  
10 Mr. Canter at the time he cold-called plaintiff (Sec. Amd. Compl. ¶ 5). Plaintiff claims that Mr.  
11 Canter convinced her to refinance her Option One Mortgage by telling her the new mortgage  
12 would have a fixed-interest rate of four percent, a 30-year term, and a payment of \$794 per  
13 month, including taxes and insurance (Def. Exh. 1 at 12, 18). Based on these assurances, plaintiff  
14 claims to have applied for a \$220,000 refinance loan through DKP Mortgage (Def. Exh. 2).  
15 Plaintiff testified she made no misrepresentations in her loan application (Def. Exh. 1 at 81). The  
16 loan application states that plaintiff’s current monthly impound for taxes and insurance was \$275  
17 and \$50, respectively (Def. Exh. 2 at 2). A substitute high school math teacher, plaintiff, did not  
18 calculate whether it was mathematically possible to have a \$794 monthly payment including  
19 interest, principal, taxes, and insurance on a \$220,000 loan with a fixed-interest rate of four  
20 percent (Def. Exh. 1 at 113–14). Based on the loan application, defendant sent plaintiff a  
21 conditional loan approval letter advising her that she was conditionally approved for an adjustable  
22 rate pick-a-payment loan with an initial interest rate of 7.510% (Def. Exh. 3 ). This was a higher  
23 interest rate than the four percent.

24 Plaintiff executed the loan documents on September 8, 2006. The loan documents  
25 contained a host of disclosures, including information about the prepayment penalty, the interest  
26 rate on the loan, and her right to cancel (Dolan Decl. ¶ 9; Def. Exhs. 8, 9, 10, 22). Plaintiff signed  
27 each of these documents (*ibid.*). The record includes an unsigned copy of the loan program  
28 disclosure form (Def. Exh. 11). Plaintiff, however, did sign an acknowledgment letter,

1 acknowledging receipt of the loan program disclosure form (Def. Exh. 12). Plaintiff testified she  
2 read the language telling her to read the entire note before signing it but did not do so. The  
3 minimum payment was listed as \$ 1,127.48, more than \$794 (Def. Exh. 1 at 70).

4 Defendant sent plaintiff monthly loan statements beginning with a statement dated  
5 September 16, 2006 (Dolan Decl. ¶ 10; Def. Exh. 13). The statement showed that the interest due  
6 was more than the minimum payment on the loan and listed the amount of deferred interest (Def.  
7 Exh. 13).

8 In early January 2008, plaintiff “explicitly told Defendant Wachovia Mortgage that the  
9 loan was fraudulent” (Johansson Decl. ¶ 3). Plaintiff went into payment default in February 2008  
10 (Dolan Decl. ¶ 12). Plaintiff claims to have discovered that she had a negative-amortization loan  
11 in late December 2007, when she learned about such loans while at a gathering with friends. She  
12 subsequently reviewed her monthly loan statements, and based on this review concluded that her  
13 loan was a negative-amortization loan (Def. Exh. 1 at 28, 30–31).

14 **2. LOAN MODIFICATION AND FORECLOSURE.**

15 After defaulting on her loan, plaintiff began the process of trying to modify it. Plaintiff  
16 retained Attorney Brian Kucsan in September 2008 to assist her in modifying the loan (Def. Exh.  
17 1 at 45) (Attorney Martinez is plaintiff’s current counsel of record who filed the operative  
18 complaint and the opposition to the instant motion). Mr. Kucsan communicated with Attorney  
19 Mary-Kay Gaver, outside counsel for Wachovia, regarding the possibility of loan modification  
20 (Kucsan Decl. ¶ 3; Gaver Decl. ¶ 3). On September 18, 2008, Attorney Gaver sent Attorney  
21 Kucsan’s office an email stating that a legal hold had been placed on the files for all of his clients  
22 (Gaver Decl. ¶ 4; Def. Exh. 14). Neither plaintiff nor her attorney offered anything to defendant  
23 in exchange for this legal-hold status (Kucsan Decl. ¶ 6; Gaver Decl. ¶ 4).

24 On October 3, 2008, Attorney Gaver sent Attorney Kucsan an email informing him that  
25 plaintiff did not qualify for a PGE loan-modification program, and asked for updated financial  
26 information for “any of the borrowers who did not qualify for the PGE program” (Gaver Decl. ¶  
27 5; Def. Exh. 15). The requested information was not provided to Attorney Gaver before  
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1 December 4, 2008 (Gaver Decl. ¶ 6). On December 4, defendant foreclosed on the subject  
2 property (Dolan Decl. ¶ 14).

3 Despite the foreclosure, Attorney Gaver reviewed plaintiff for a loan modification yet  
4 again (Gaver Decl. ¶ 7). Attorney Gaver told Attorney Kucsan that if plaintiff qualified for loan  
5 modification, “Wachovia would rescind the foreclosure and return title to her pursuant to the  
6 terms of the modified loan . . . [and] would hold off the eviction process needed to obtain  
7 possession of the property unless and until it determined that Ms. Johansson did not qualify for a  
8 loan modification” (Gaver Decl. ¶ 7). Defendant conducted that loan-modification review  
9 between December 2008 and early 2009 (Dolan Decl. ¶ 15). Defendant determined that  
10 plaintiff’s debt-to-income ratio made her ineligible for a loan modification under the programs  
11 then in place (*ibid.*). Defendant’s underwriters determined that plaintiff’s sporadic  
12 unemployment did not indicate sufficient income to justify a modification under applicable  
13 guidelines (Dolan Decl. ¶ 15; Gaver Decl. ¶ 8). On February 3, 2009, Attorney Gaver informed  
14 Attorney Kucsan that plaintiff would not be offered a modification and that defendant would  
15 proceed with an action to obtain possession of the property (Gaver Decl. ¶ 9; Kucsan Decl. ¶ 8).  
16 Defendant never promised or guaranteed plaintiff that she would be provided a loan modification  
17 (Gaver Decl. ¶ 10; Kucsan Decl. ¶ 5). No Wachovia representative ever told Attorney Kucsan  
18 that plaintiff qualified for a loan modification (*ibid.*). Defendant began an unlawful detainer  
19 proceeding in May 2009 (Bailey Decl. ¶ 4). Plaintiff remained in possession of the property until  
20 late 2009, when defendant received a judgment in its favor in the unlawful detainer action (Def.  
21 Exh. 6).

22 Plaintiff filed this action in Alameda County Superior Court *pro se* on November 3, 2009.  
23 After proceeding *pro se* with her original and first amended complaints, plaintiff retained counsel,  
24 who filed a second amended complaint in state court on June 9, 2011. The action was removed to  
25 federal court by defendant. The second amended complaint asserts seven claims for relief against  
26 defendant. Two claims were dismissed by prior order. Plaintiff was granted leave to file an  
27 amended complaint as to those claims but failed to do so. The following claims remain against  
28 defendant: (1) fraud by intentional misrepresentation; (2) fraud by suppression of fact;

1 (3) intentional infliction of emotional distress; (4) violation of California Business and  
2 Professions Code Section 17200; and (5) violation of the Truth in Lending Act. Defendant moves  
3 for summary judgment on each of these claims. No other defendant has moved for summary  
4 judgment as to the claims against them. This order follows full briefing and a hearing.

5 **ANALYSIS**

6 Summary judgment is proper when “there is no genuine dispute as to any material fact and  
7 the defendant is entitled to judgment as a matter of law.” FRCP 56(a). Where the party moving  
8 for summary judgment would bear the burden of proof at trial, that party bears the initial burden  
9 of producing evidence that would entitle it to a directed verdict if uncontroverted at trial. *See*  
10 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where  
11 the party moving for summary judgment would not bear the burden of proof at trial, that party  
12 bears the initial burden of either producing evidence that negates an essential element of the non-  
13 moving party’s claims, or showing that the non-moving party does not have enough evidence of  
14 an essential element to carry its ultimate burden of persuasion at trial. If the moving party  
15 satisfies its initial burden of production, then the non-moving party must produce admissible  
16 evidence to show there exists a genuine issue of material fact. *See Nissan Fire & Marine Ins. Co.*  
17 *v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000).

18 **1. STATUTE OF LIMITATIONS.**

19 Defendant seeks summary judgment on the following claims on the grounds that they are  
20 time-barred: (1) intentional misrepresentation based on alleged fraud at the time of the  
21 origination of the loan; (2) suppression of facts based on alleged fraud at the time of the  
22 origination of the loan; (3) intentional infliction of emotional distress, and (4) TILA. It should be  
23 noted at the outset that plaintiff’s claims for intentional misrepresentation and suppression of fact  
24 are each based on two separate instances of alleged fraud. As to both claims, plaintiff alleges that  
25 she was misled, namely by her real estate agent, about the terms of the loan at the time of  
26 origination. She also alleges, as to both claims, that defendant lied to her about a postponement  
27 of the foreclosure. Defendant only raises the time-bar challenge as to the fraud claims relating to  
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1 the loan origination. The fraud claims relating to the postponement of the foreclosure are  
2 challenged on other grounds and addressed below.

3 **A. Intentional Misrepresentation and Suppression of Facts Claims.**

4 Plaintiff obtained the allegedly fraudulent loan on September 8, 2006, and filed the instant  
5 action on November 3, 2009, approximately two months after defendant contends the statute of  
6 limitations ran on plaintiff's claims for intentional misrepresentation and suppression of facts,  
7 with regard to the origination of the loan. Both fraud claims have a three-year statute of  
8 limitations. The prior order of dismissal stated that plaintiff had alleged sufficient factual  
9 allegations regarding delayed discovery of her fraud claims, which could create a basis to toll the  
10 statute of limitations (Dkt. No. 32 at 5). Discovery is now complete. Plaintiff has failed to put  
11 forward evidence in the summary-judgment record to support her tolling allegations.

12 Generally, a cause of action accrues at the time when the cause of action is complete with  
13 all of its elements. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005). An exception  
14 to the accrual rule is the "discovery rule," which "postpones accrual of a cause of action until the  
15 plaintiff discovers, or has reason to discover the cause of action." *Id.* at 803, 807 ("under the  
16 delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when  
17 the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads  
18 and proves that a reasonable investigation at that time would not have revealed a factual basis for  
19 that particular cause of action"). Pursuant to state statute, an action for relief on the ground of  
20 fraud is "not deemed to have accrued until the discovery, by the aggrieved party, of the facts  
21 constituting the fraud." CAL. CIV. PROC. § 338(d).

22 But the courts have read into the statute a duty to exercise  
23 diligence to discover the facts. The rule is that the plaintiff must  
24 plead and prove the facts showing: (a) Lack of knowledge. (b)  
25 Lack of means of obtaining knowledge (in the exercise of  
26 reasonable diligence the facts could not have been discovered at an  
27 earlier date). (c) How and when [s]he did actually discover the  
28 fraud or mistake. Under this rule constructive and presumed notice  
or knowledge are equivalent to knowledge. So, when the plaintiff  
has notice or information of circumstances to put a reasonable  
person on inquiry, or has the opportunity to obtain knowledge from  
sources open to [her] investigation (such as public records or  
corporation books), the statute commences to run.

*Parsons v. Tickner*, 31 Cal. App. 4th 1513, 1525 (1995).

1           “One who fails to act diligently cannot invoke equitable principles to excuse that lack of  
2 diligence.” *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). Defendant  
3 contends that plaintiff did not act reasonably as she failed to read a host of loan disclosure  
4 documents prior to signing them on September 8, 2006. Plaintiff urges for application of the  
5 relaxed-discovery rule, claiming that her failure to read the loan documents was reasonable  
6 because she was in a fiduciary relationship with Mr. Canter, her real estate agent and broker. *See*  
7 *Brown v. Wells Fargo Bank, N.A.*, 168 Cal. App. 4th 938 (2008). “A person in a fiduciary  
8 relationship may relax, but not fall asleep. If she became aware of facts which would make a  
9 reasonably prudent person suspicious, she had had a duty to investigate further.” *Alfaro v. Cmty*  
10 *Housing Imp. Sys. & Planning Ass’n, Inc.*, 171 Cal. App. 4th 1356, 1394 (2009).

11           To support her tolling claim, plaintiff puts forward only her own declaration, which states  
12 that “Joseph Canter, my real estate agent represented to me that my new loan would have a 4%  
13 interest rate, payments would be approximately \$794, and would include principal, interest,  
14 property taxes, and insurance” (Johansson Decl. ¶ 5). This is the entirety of plaintiff’s statement  
15 in the declaration relating to this representation. No more is said. Plaintiff does not put forward  
16 any evidence to show that she was unable to discover her claim for relief at some time before the  
17 statute of limitations ran.

18           Even assuming plaintiff did not read any of the loan origination documents, which showed  
19 an interest rate of more than four percent and monthly payments higher than \$794, defendant  
20 mailed her a loan statement dated September 16, 2006, reflecting that the interest rate for her loan  
21 was 7.510% and that her minimum payment due October 15, 2006, was for \$1,127.48 (Def. Exhs.  
22 11, 13; Dolan Decl. ¶ 10). Indeed, plaintiff stated it was her review of her loan statements in  
23 December 2007, which caused her to discover the alleged fraud (Def. Exh. 1 at 31). Plaintiff does  
24 not put forward evidence showing that she did not receive the loan statement dated September 16.  
25 It is plaintiff’s burden to put forward evidence sufficient to invoke the delayed-discovery rule to  
26 toll the statute of limitations. Plaintiff has failed to meet her burden.

27           The dismissal order stated that “[b]ecause this order finds that plaintiff has not pled facts  
28 sufficient to establish a fiduciary relationship [between plaintiff and defendant Wachovia],

1 plaintiff's suppression of fact claim will be treated in conjunction with her intentional  
2 misrepresentation claim" (Dkt. No. 32 at 8) (citing *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal.  
3 App. 4th 282, 291 (2004) (stating "[a]ctive concealment or suppression of facts by a nonfiduciary  
4 is the equivalent of a false representation, *ie.*, actual fraud"). Plaintiff asserts that defendants  
5 (presumably including Wachovia) made false statements to her on August 16, 2006, regarding the  
6 terms of her loan, amounting to intentional misrepresentation and suppression of facts regarding  
7 the actual terms of the loan (Sec. Amd. Compl. ¶ 40). The alleged falsity of any representations  
8 would have been discoverable through reasonable diligence and reading any one of the various  
9 loan documents, signed by plaintiff on September 8, 2006, or by reviewing her monthly statement  
10 dated September 16, 2006. Plaintiff's claims for intentional misrepresentation and suppression of  
11 facts, as they relate to the origination of the loan are time-barred. Summary judgment as to those  
12 claims is **GRANTED**.

13 **B. Intentional Infliction of Emotional Distress Claim.**

14 Defendant seeks summary judgment as to plaintiff's claim for intentional infliction of  
15 emotional distress relating to the alleged misrepresentations at the time of the origination of the  
16 loan. The order of dismissal stated that "[t]o the extent plaintiff's claim [for intentional infliction  
17 of emotional distress] is based only on defendant's foreclosure action, it cannot support the  
18 "outrageous prong" (Dkt. No. 32 at 6). Thus, the claim remains only to the extent it relates to the  
19 alleged misrepresentation at the time of the origination of the loan. The statute of limitations for  
20 intentional infliction of emotional distress is two years. CAL. CIV. PROC. § 335.1. As stated  
21 above, plaintiff has not offered any evidence to support tolling of the statute of limitations on her  
22 claims regarding fraud at the time of the origination of the loan, the same fraud, which forms the  
23 basis for this claim.

24 To state a claim for intentional infliction of emotional distress, a plaintiff must prove: (1)  
25 outrageous conduct; (2) an intent to cause or a reckless disregard of the possibility of causing  
26 emotional distress; (3) severe or extreme emotional distress; and (4) that the outrageous conduct  
27 proximately caused the emotional distress. *Symonds v. Mercury Sav. & Loan Ass'n*, 225 Cal.  
28 App. 3d 1458, 1468 (1990). Plaintiff has failed to put into the summary-judgment record any



1 evidence to rebut defendant's evidence and prove this claim, much less tolling of the statute of  
2 limitations. Thus, summary judgment on plaintiff's claim for intentional infliction of emotional  
3 distress is **GRANTED**.

4 **C. TILA Claim.**

5 Plaintiff appears to have abandoned her claim under the Truth in Lending Act. The  
6 subject property was sold at a trustee's sale. The right to rescind under TILA ends when the  
7 property is sold. *See* 15 U.S.C. 1635(f). Thus, plaintiff cannot seek rescission at this time. A  
8 TILA claim for damages has a one-year statute of limitations. 15 U.S.C. 1640(e). This means  
9 plaintiff's damage claim expired in September 2007, one year after she executed the allegedly  
10 fraudulent loan (and even if plaintiff had been able to establish tolling, the claim would have  
11 expired in December 2008, one year after the date plaintiff alleges to have discovered the fraud).  
12 Because plaintiff did not file her claim until November 3, 2009, it is time-barred. Defendant's  
13 motion for summary judgment on plaintiff's TILA claim is **GRANTED**.

14 **2. INTENTIONAL MISREPRESENTATION AND SUPPRESSION**  
15 **OF FACT CLAIMS BASED ON LEGAL HOLD.**

16 Defendant moves for summary judgment on plaintiff's claims for intentional  
17 misrepresentation and suppression of facts based on her allegations that defendant lied to her and  
18 told her that there would be a legal hold on her property while defendant was considering her  
19 loan-modification request.

20 To prove fraud, plaintiff must prove: (1) a knowingly false misrepresentation by the  
21 defendant; (2) made with the intent to deceive or to induce reliance by the plaintiff; (3) justifiable  
22 reliance by the plaintiff; and (4) resulting damage. *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192,  
23 1202 (9th Cir. 2001).

24 As stated above, pursuant to the dismissal order, plaintiff's suppression claim will be  
25 treated in conjunction with her intentional misrepresentation claim (Dkt. No. 32 at 8). Plaintiff  
26 alleges that on September 18, 2008, defendant's outside counsel, Attorney Gaver, "sent an email  
27 to plaintiff's attorney at the time, Brian Kucsan," stating that defendant "placed a legal hold on  
28 the files of each of the borrowers [defendant is] working with and so no collection actions will be  
taken at this time" (Sec. Amd. Compl. ¶ 19). On October 3, 2008, Ms. Gaver sent an email to

1 Attorney Kucsan informing him that plaintiff did not qualify for the PGE loan-modification  
2 program (Gaver Decl. ¶ 5; Def. Exh. 15).

3 Indeed, on December 12, 2008, when plaintiff informed Attorney Kucsan that her property  
4 had gone into foreclosure, Attorney Kucsan informed Attorney Gaver of that fact, and Attorney  
5 Gaver stated that defendant would “still consider Ms. Johannson for a loan modification despite  
6 the foreclosure” (Gaver Decl. ¶ 7; Kucsan Decl. ¶ 7). Defendant then agreed to forestall any legal  
7 action to obtain possession of the property “unless and until it determined that Ms. Johannson did  
8 not qualify for the loan modification” (Gaver Decl. ¶ 7). Attorney Kucsan and plaintiff continued  
9 to provide documentation to Wachovia from December 2008 to January 2009 to assist with the  
10 loan-modification review (Gaver Decl. ¶ 8). On February 3, 2009, defendant informed Mr.  
11 Kucsan that no modification would be offered and that it would proceed with action to obtain  
12 possession of the subject property (Gaver Decl. ¶ 9; Def. Exh. 16; Kucsan Decl. ¶ 8). Defendant  
13 did not initiate unlawful detainer proceedings until May 2009 (Bailey Decl. ¶ 4). Plaintiff’s  
14 attorney admitted that neither he nor plaintiff offered consideration for the alleged promise to  
15 postpone the foreclosure sale; plaintiff does not provide evidence of any consideration offered to  
16 Wachovia (Kucsan Decl. ¶ 6). *See Altman v. PNC Mortg.*, 2012 U.S. Dist. LEXIS 6460, \*42–43  
17 (E.D. Cal. Jan. 19, 1012) (“In the absence of consideration, a gratuitous oral promise to postpone  
18 a sale of property pursuant to the terms of a trust deed ordinarily would be unenforceable under  
19 Section 1698, the statute of frauds”).

20 Plaintiff has put forward no evidence to rebut defendant’s showing and to make a showing  
21 as to essential elements of her intentional misrepresentation and suppression of facts claims  
22 regarding the legal hold. Thus, defendant’s motion for summary judgment on these claims is

23 **GRANTED.**

24 **3. CALIFORNIA BUSINESS AND PROFESSIONS**  
25 **CODE SECTION 17200.**

26 Defendant moves for summary judgment on plaintiff’s Section 17200 claim on the ground  
27 that defendant cannot be held vicariously liable for alleged unlawful acts of plaintiff’s broker. To  
28 demonstrate a Section 17200 violation, plaintiff must show that defendant engaged in an  
“unlawful, unfair, or fraudulent business acts or practice” or in “unfair, deceptive, untrue, or

1 misleading advertising.” Plaintiff alleges that her “fraud causes of action against defendant  
2 Wachovia are based on it own has [sic] acts of ratification of the fraud perpetuated by Ms.  
3 Johansson’s real estate agent and broker.” Plaintiff argues that having benefitted from the fraud,”  
4 defendant is now liable (Opp. 8).

5 Our court of appeals has held that Section 17200 cannot be used to impose vicarious  
6 liability absent “unbridled control” over the other actor. *Perfect 10 Inc. v. Visa Int’l Serv. Ass’n*,  
7 494 F.3d 788, 808 (9th Cir. 2007). Plaintiff contends generally, that “one who accepts the fruits  
8 of a fraud with knowledge of the misrepresentations of concealments by which the fraud was  
9 perpetrated, ratifies the fraud and is liable even though they did not personally participate in the  
10 fraud and apart from any theory of agency.” *McClung v. J.N. Watt*, 190 Cal. 155, 161–62 (1922).  
11 Plaintiff does not explain why this general principle should apply in the face of *Perfect 10*. It  
12 does not. Mr. Canter was plaintiff’s broker. Mr. Canter was not an agent of defendant or  
13 employed by defendant (Dolan Decl. ¶ 4). Plaintiff has not put forward evidence to show that Mr.  
14 Canter was an employee or agent of defendant or that defendant exercised unbridled control over  
15 Mr. Canter. Thus, defendant’s motion for summary judgment as to this claim is **GRANTED**.\*

#### 16 4. RES JUDICATA.

17 In addition to the above-stated grounds, defendant seeks summary judgment on plaintiff’s  
18 loan origination claims for intentional misrepresentation, suppression of facts, violation of  
19 Section 17200, and violation of TILA on the ground that these claims could have been raised in *In*  
20 *re Wachovia Corp.*, a class action certified by Judge Jeremy Fogel (Def. Exhs. 20, 21). Judge  
21 Fogel approved a settlement class in that action that included borrowers under pick-a-payment  
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23 \* Plaintiff objects to the following statement in paragraph 4 of Mr. Dolan’s declaration: “DKP  
24 Mortgage and its employee, including Mr. Canter, were not agents or employees of Wachovia.” Plaintiff  
25 objects on the ground that Mr. Dolan lacks personal knowledge and that his statement is an improper legal  
26 conclusion (Dkt. No. 49-5 at 2). Mr. Dolan currently works as an operations analyst in Wachovia’s Mortgage  
27 Lending Operations Department. He was previously vice president in the portfolio retention department at  
28 Wachovia and vice president of loan services at World Savings Banks. He has held various positions in  
financial planning, mergers and acquisitions, and loan services. He has full access to the bank records  
concerning the subject loan transaction. He has “personal familiarity with all bank customs, practices, and  
protocols, both generally as to its lending operations and specifically concerning mortgage loan origination and  
servicing issues” (Dolan Decl. ¶¶ 1–2). Mr. Dolan’s experience, background, and position provide an adequate  
basis for him to state that Mr. Canter was not an employee or agent of Wachovia. The objection is  
**OVERRULED**.

1 loans issued by World Savings Bank, FSB between August 1, 2003 and December 31, 2008.  
2 Plaintiff claims the only class-action notice she ever received required her to opt in to the class,  
3 but she did not (Johansson Decl. ¶ 7). Because the order grants summary judgment on these  
4 claims based on other grounds, it does not consider whether summary judgment should be granted  
5 on this alternative ground.

6 **5. EVIDENTIARY OBJECTIONS.**

7 Defendant objected to plaintiff Johansson’s declaration as inadmissible because it was not  
8 signed by plaintiff or attested to by her attorney. As initially submitted, the declaration had an  
9 “/s/” above the signature line. Plaintiff is not a registered ECF filer. Pursuant to General Order  
10 45, Sec. X.B., plaintiff either had to physically sign the declaration or her attorney had to attest  
11 that plaintiff concurred in the filing of the document. Plaintiff’s counsel was ordered to bring a  
12 signed copy of plaintiff Johansson’s declaration to the motion hearing. Plaintiff’s counsel  
13 complied with the order. Thus, the declaration will not be deemed inadmissible on that ground.  
14 Defendant raised additional evidentiary objections to certain parts of plaintiff’s declaration. The  
15 order need not rule on those objections as it does not rely on those portions of plaintiff’s  
16 declaration in reaching its holdings.

17 Plaintiff objected to the declaration of Michael Dolan. Plaintiff lodged a general objection  
18 to Mr. Dolan’s declaration as “containing hearsay and lacking in personal knowledge” (Dkt. No.  
19 49-5 at 1). The declaration is five pages in length. Such a general objection cannot be sustained  
20 without specific evidentiary objections. Plaintiff does raise specific evidentiary objections to  
21 three paragraphs in the declaration. With the exception of the objection to paragraph four, which  
22 was overruled, the order need not rule on the remaining objections as it does not rely on the  
23 evidence to which plaintiff objected (*see* Part 3).

24 **6. REQUEST FOR JUDICIAL NOTICE.**

25 Defendant requests judicial notice of four documents in support of its motion for summary  
26 judgment. The documents are not relied on in this order. Thus, the request for judicial notice is

27 **DENIED AS MOOT.**

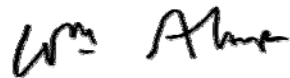
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**CONCLUSION**

For the reasons stated above, the motion for summary judgment is **GRANTED**.

**IT IS SO ORDERED.**



Dated: May 4, 2012.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE