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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LILLIAN HUGHES, an individual,

Plaintiff,

v.

EQUITY PLUS FINANCIAL, GOLDEN
WEST FINANCIAL, FSB, d/b/a WORLD
SAVINGS BANK, FSB, WACHOVIA,
FSB, WELLS FARGO, N.A., and DOES
1 through 20,

Defendants.

Case No. 09cv2927 BTM(RBB)

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Defendant Wachovia Mortgage (“Wachovia”) (a division of Wells Fargo Bank, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank FSB and named herein as “Golden West Financial, FSB, d/b/a World Savings Bank, FSB, Wachovia, FSB, Wells Fargo, N.A.”) has filed a motion to dismiss Plaintiff’s First Amended Complaint (“FAC”) for failure to state a claim. For the reasons discussed below, Wachovia’s motion is **GRANTED**.

I. BACKGROUND

On or about November 16, 2006, Plaintiff obtained a loan in the amount of \$540,000 from World Savings Bank, FSB (which changed its name in December, 2007, to Wachovia Mortgage, FSB (Def.’s RJN, Ex. 2)). The purpose of the loan was to refinance Plaintiff’s

1 home located at 993 Via Sinuoso, Chula Vista, CA 91910 (the "Property"). The note was
2 secured by a deed of trust on the Property.

3 According to the terms of the note, interest was to be paid at the yearly rate of 7.7%.
4 The initial monthly payments were in the amount of \$2,064.13. The monthly payment was
5 scheduled to change on January 1, 2008, and every twelve months thereafter, until the 121st
6 month, which would be the final payment change.

7 Plaintiff alleges that defendant Equity Plus Financial ("Equity"), Plaintiff's mortgage
8 broker, inflated Plaintiff's income on the loan application without the knowledge of Plaintiff.
9 (FAC ¶ 9.) According to Plaintiff, although her average monthly income for 2005 was
10 \$2,008.17, Equity stated that Plaintiff's monthly income was \$11,000.00. Equity falsely
11 represented to Plaintiff that she was "getting the best and only loan she qualified for." (FAC
12 ¶ 7.) Equity and World Savings Bank did not ask for proof of Plaintiff's stated income
13 because it would be evidence that Plaintiff was not qualified for the loan. (FAC ¶ 9.) Plaintiff
14 further alleges that Equity did not explain the loan's features to Plaintiff before Plaintiff
15 agreed to the loan. (FAC ¶ 10.)

16 Plaintiff claims that she qualified for the loan with a DTI ratio of 36/50, which "exceeds
17 the maximum allowed DTI ratio per all usual and customary underwriting guidelines for ALT-
18 A and/or subprime lending." (FAC ¶ 16.) Plaintiff also claims that the DTI was incorrectly
19 calculated by using the lowest payment on the loan instead of the highest payment. (FAC
20 ¶ 12.)

21 Additionally, Plaintiff alleges that World Savings Bank paid Equity a broker's fee of
22 \$11,528 and a yield-spread premium of \$5,400, "which was excessive, not justified, or
23 disclosed to the Plaintiff." (FAC ¶ 17.) Plaintiff also alleges that an audit "showed that an
24 accurate Good Faith Estimate, Truth in Lending and RESPA disclosures were not provided
25 to the Plaintiff." (Id.)

26 On or about August 5, 2009, Plaintiff sent a letter of rescission to Wachovia. (FAC
27 ¶ 20.)

28 Plaintiff's FAC asserts the following claims: (1) intentional misrepresentation; (2)

1 fraudulent concealment; (3) breach of fiduciary duty (against Equity only); (4) constructive
2 fraud (against Equity only); (5) violation of RESPA, 12 U.S.C. § 2607; (6) quiet title; (7)
3 violation of TILA; and (8) violation of RESPA, 12 U.S.C. § 2605, and accounting.

4 5 6 **II. STANDARD**

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted
8 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to
9 support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th
10 Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's
11 complaint are taken as true and construed in the light most favorable to the plaintiff. See
12 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although
13 detailed factual allegations are not required, factual allegations "must be enough to raise a
14 right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct.
15 1955, 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to
16 relief' requires more than labels and conclusions, and a formulaic recitation of the elements
17 of a cause of action will not do." Id. "[W]here the well-pleaded facts do not permit the court
18 to infer more than the mere possibility of misconduct, the complaint has alleged - but it has
19 not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct.
20 1937, 1950 (2009) (internal quotation marks omitted).

21 22 **III. DISCUSSION**

23 Wachovia moves to dismiss Plaintiff's claims against it for failure to state a claim. As
24 discussed below, the Court agrees that Plaintiff's claims against Wachovia are deficient.

25 **A. Intentional Misrepresentation, Fraudulent Concealment, and Quiet Title Causes** 26 **of Action**

27 Plaintiff's state claims against Wachovia fail to state a claim because they are
28 preempted by the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1641, et seq., and

1 the regulations issued thereunder by the Office of Thrift Supervision (“OTS”).

2 Through HOLA, “OTS . . . occupies the entire field of lending regulation for federal
3 savings association.” 12 C.F.R. § 560.2(a). Section 560.2(b) lists specific types of state
4 laws that are preempted, including:

5 [S]tate laws purporting to impose requirements regarding:

6 (4) The terms of credit, including amortization of loans and the deferral and
7 capitalization of interest and adjustments to the interest rate, balance,
8 payments due, or term to maturity of the loan, including the circumstances
9 under which a loan may be called due and payable upon the passage of time
10 or a specified event external to the loan;

11 . . .

12 (5) Loan-related fees, including without limitation, initial charges, late charges,
13 prepayment penalties, servicing fees, and overlimit fees;

14 . . .

15 (9) Disclosure and advertising, including laws requirement specific statements,
16 information, or other content to be included in credit application forms, credit
17 solicitations, billing statements, credit contracts, or other credit-related
18 documents and laws requiring creditors to supply copies of credit reports to
19 borrowers or applicants.

20 (10) Processing, origination, servicing, sale or purchase of, or investment or
21 participation in, mortgages.

22 State laws are not preempted if they “only incidentally affect the lending operations of
23 Federal savings associations or are otherwise consistent with the purposes” of 12 C.F.R. §
24 560.2(a). 12 C.F.R. § 560.2(c).

25 In Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001 (9th Cir. 2008), the Ninth Circuit
26 held that the plaintiff’s unfair advertising and unfair competition claims (Cal. Bus. & Prof.
27 Code §§ 17200, 17500), which were based on E-Trade’s policy of refusing to refund lock-in
28 fees upon cancellation of a mortgage transaction and E-Trade’s alleged misrepresentations
regarding consumer rights regarding lock-in fees, were preempted because they fell within
§ 560.2(b)(9) and § 560.2(b)(5). The Silvas court “did not look merely to the abstract nature
of the cause of action allegedly preempted but rather to the functional effect upon lending
operations of maintaining the cause of action, as required by paragraph (b). . . . The question
was . . . whether an application of a given state law to the activities of federal savings
associations would ‘impose requirements’ regarding the various activities broadly regulated

1 by the OTS.” Naulty v. Greenpoint Mortgage Funding, Inc., 2009 WL 2870620, at * 4 (N.D.
2 Cal. Sept. 3, 2009).

3 Plaintiff does not dispute that World Savings Bank was, and Wachovia is, a federal
4 savings association regulated by the OTS pursuant to HOLA. (Def. RJN, Exs. 1-4.)
5 Therefore, the Court must determine whether Plaintiff’s state claims are preempted by
6 HOLA.

7 Plaintiff’s claim of intentional misrepresentation alleges that Wachovia consented to
8 qualify Plaintiff for the loan based on the falsely inflated stated income even though Plaintiff
9 was in fact not qualified for the loan. (FAC ¶¶ 23-24.) Plaintiff also alleges that World
10 Savings Bank paid Equity an illegal yield spread premium so that Equity would refer clients
11 like Plaintiff to the bank. (FAC ¶ 28.) According to Plaintiff, World Savings Bank concealed
12 these material facts to induce Plaintiff to enter into the loan. (FAC ¶ 30.)

13 Plaintiff’s claim for fraudulent concealment alleges that World Savings Bank
14 fraudulently concealed knowledge that Plaintiff was not qualified for the loan and used
15 improper underwriting practices to fraudulently qualify Plaintiff for the loan. (FAC ¶ 38.)
16 Plaintiff also alleges that World Savings bank failed to provide accurate disclosures required
17 by federal and state laws. (FAC ¶ 39.)

18 Plaintiff’s quiet title action appears to be based in part upon the theory that Plaintiff
19 has a right to rescind as a result of the intentional misrepresentation and fraudulent
20 concealment.

21 The Court concludes that Plaintiff’s intentional misrepresentation and fraudulent
22 concealment claims are preempted by HOLA. The claims fall within § 560.2(b)(4), (5), (9),
23 and (10), because they directly concern and seek to regulate the terms of credit, the
24 processing and origination of the loan, disclosures, and loan-related fees. See Naulty, 2009
25 WL 2870620, at * 4 (holding that HOLA preempted plaintiffs’ state law claims regarding the
26 terms of credit that Wachovia provided to plaintiffs, disclosures that Wachovia did or did not
27 give to plaintiffs, Wachovia’s underwriting standards, and Wachovia’s marketing and
28 servicing of the loans); Andrade v. Wachovia Mortgage, FSB, 2009 WL 1111182 (S.D. Cal.

1 Apr. 21, 2009) (holding that HOLA preempted plaintiff's state law claims alleging that
2 defendants induced her to enter into the loan through inadequate disclosures and
3 misrepresentations about her ability to pay). The quiet title action is also preempted to the
4 extent it is based on the intentional misrepresentation and fraudulent concealment claims.
5

6 **B. Violation of RESPA, 12 U.S.C. § 2607**

7 Plaintiff alleges that Wachovia violated RESPA, 12 U.S.C. § 2607, by paying Equity
8 an illegal yield spread premium ("YSP") that was not reasonably related to any services
9 provided by Equity. (FAC ¶ 66.)

10 It appears that Plaintiff's claim is barred by RESPA's one-year statute of limitations.
11 12 U.S.C. § 2614. Plaintiffs' loan closed in November, 2006. This action was filed on
12 December 30, 2009.

13 District courts within the Ninth Circuit, have held that RESPA claims are subject to
14 equitable tolling. See, e.g., Ferrari v. U.S. Bank. N.A., 2009 WL 3353028, at *2 (N.D. Cal.
15 Oct. 16, 2009); Brewer v. Indymac Bank, 609 F. Supp. 2d 1104, 1118 (E.D. Cal. 2009).
16 Generally, equitable tolling may be applied "if, despite all due diligence, a plaintiff is unable
17 to obtain vital information bearing on the existence of his claim." Santa Maria v. Pacific Bell,
18 202 F.3d 1170, 1178 (9th Cir. 2000).

19 Plaintiff contends that the statute of limitations should be equitably tolled because
20 even if the YSP was disclosed in loan documentation, Plaintiff did not discover that the YSP
21 was being used as a kickback until 2009, when her loan documents were reviewed by
22 mortgage professionals. (Opp. at 5.) However, Plaintiff has not explained why she could
23 not have instigated an investigation regarding the propriety of all aspects of the loan within
24 the limitations period. See Lyman v. Loan Correspondents, Inc., 2009 WL 3757398 (C.D.
25 Cal. Nov. 6, 2009) (holding that plaintiffs had failed to plead a sufficient basis for equitable
26 tolling of their RESPA claim because they offered no explanation as to why they could not
27 have investigated the legality of the YSP within the limitations period). Plaintiff should have
28 known right away that something was amiss when the amount of her initial monthly

1 payments was more than her monthly income in 2005. It seems that this fact alone would
2 prompt a reasonable person to look into all facets of the loan transaction.

3 Furthermore, Plaintiff's claim that the YSP was tantamount to an illegal kickback is
4 conclusory. HUD does not consider YSPs to be per se legal or illegal. Geraci v. Homestreet
5 Bank, 347 F.3d 749, 751 (9th Cir. 2003). To determine whether a YSP is reasonable or
6 unreasonable under RESPA, a court is to consider (1) whether goods or facilities were
7 actually furnished or services were actually performed for the compensation paid; and if so,
8 (2) whether the payments are reasonably related to the value of the goods or facilities that
9 were actually furnished or services that were actually performed. Id. Although Plaintiff
10 claims that the YSP "was not reasonably related to any services provided by Defendant
11 Equity," Plaintiff does not set forth any *factual allegations* supporting this conclusion.
12 Therefore, Plaintiff has failed to state a claim for violation of 12 U.S.C. § 2607. See Geraci,
13 347 F.3d at 751-52 (RESPA claim was dismissed because FAC made no specific factual
14 allegations in support of plaintiffs' claim that the YSP was unreasonable); Naulty, 2009 WL
15 2870620 at * 5 (dismissing RESPA claim for failure to allege any particular basis for finding
16 the use of yield spread percentages to be unlawful or improper).

17
18 **C. Violation of RESPA, 12 U.S.C. § 2605(e) & Accounting**

19 Plaintiff alleges that Wachovia violated RESPA, 12 U.S.C. § 2605(e), by failing to
20 provide information in response to a Qualified Written Request.

21 The provision of RESPA at issue provides:

22 (e) Duty of loan servicer to respond to borrower inquiries

23 (1) Notice of receipt of inquiry

24 (A) In general

25 If any servicer of a federally related mortgage loan receives a qualified
26 written request from the borrower (or an agent of the borrower) for
27 information relating to the servicing of such loan, the servicer shall
28 provide a written response acknowledging receipt of the
correspondence within 20 days (excluding legal public holidays,
Saturdays, and Sundays) unless the action requested is taken within
such period.

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(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--

- (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
- (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall--

....

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

- (i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and
- (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

12 U.S.C. § 2605(e).

Plaintiff alleges that on or about January 29, 2009, Plaintiff sent a QWR, which sought information including:

whether or not the loan was in lawful compliance with all federal and state laws regarding disclosure, the identity of all holders of the note secured by the deed of trust, the calculation of the principal and interest, information on the appointment of the trustee and all substitute trustees, documentation of all assignments, transfers or sale of the note, copies of all checks or other evidence of payments made by the Plaintiff, all debits and credits to the Plaintiff's accounts, documentation of all mortgage assignments, accounting of all attorney fees, costs and foreclosure fees, and all late charges assessed to the balance of the loan, an accounting of all monies applied to suspended or forbearance accounts, an accounting of all monies applied to suspended or forbearance accounts, an accounting of all impounds including taxes and insurance and the fees, charges and commissions paid to all servicers of the account.

(FAC ¶ 93.)

1 Plaintiff alleges that Wachovia “did not fully provide the requested information.” (FAC
2 ¶ 94.) Plaintiff does not attach a copy of the request or the response(s).

3 It is unclear from the FAC whether Wachovia failed to respond to a legitimate QWR.
4 The request itself was ridiculously overbroad and sought all sorts of information pertaining
5 to the note and deed of trust. A QWR must request information regarding the *servicing* of
6 the loan. 12 U.S.C. § 2605e(1)(A). “Servicing” means “receiving any scheduled periodic
7 payments from a borrower pursuant to the terms of any loan, including amounts for escrow
8 accounts described in section 2609 of this title, and making the payments of principal and
9 interest and such other payments with respect to the amounts received from the borrower
10 as may be required pursuant to the terms of the loan.” 12 U.S.C. § 2605(i). A demand
11 disputing the validity of a loan, not its servicing, does not constitute a QWR. Keen v.
12 American Home Mortgage Servicing, Inc., 2009 WL 3380454, at * 7 (E.D. Cal. Oct. 21, 2009).

13 Much of the information sought by Plaintiff does not pertain to the servicing of the
14 loan. Although Plaintiff probably would be entitled to payment and balance information and
15 information regarding the calculation of principal and interest, Plaintiff would not be entitled
16 to information regarding whether the loan was in compliance with all federal and state laws
17 regarding disclosure, the identity of all holders of the note, information on the appointment
18 of the trustee and all substitute trustees, documentation of all assignments, transfers, or sale
19 of the note, or documentation of all mortgage assignments. Based on Plaintiff’s allegation
20 that Wachovia “did not fully provide the requested information,” the Court cannot determine
21 whether Wachovia failed to adequately respond to legitimate inquiries or whether Wachovia
22 just refused to respond to Plaintiff’s request for information to which she was not entitled.

23 It is also unclear what Plaintiff means when she says that Wachovia “did not fully
24 provide the requested information.” Under the statute, in lieu of providing the requested
25 information, the servicer can provide an explanation of why the information requested is
26 unavailable or cannot be obtained by the servicer, and the name and telephone number of
27 an individual employed by, or the office or department of, the servicer who can provide
28 assistance to the borrower. 12 U.S.C. § 2605(e)(2)(C). Accordingly, the failure to provide

1 requested information does not necessarily violate Section 2605(e).

2 Plaintiff has not alleged sufficient facts to establish a violation of 12 U.S.C. § 2605(e).
3 Therefore, Plaintiff's claim is dismissed. Plaintiff's accounting claim, which is based on the
4 violation of 12 U.S.C. § 2605(e), also fails.

5
6 **D. Violations of TILA**

7
8 **1. Rescission**

9 Plaintiff alleges that World Savings Bank failed to provide her with two copies of the
10 Notice of Right to Cancel. Under TILA, borrowers ordinarily have three business days to
11 rescind a consumer loan that uses their principal dwelling as security. 15 U.S.C. § 1635(a).
12 However, if a lending institution fails to deliver two copies of the notice of the right to rescind,
13 the borrower may rescind the loan within three years after it was consummated. 15 U.S.C.
14 § 1635(f).

15 Although Plaintiff alleges that World Savings Bank did not provide her with two "Right
16 to Cancel" forms, Wachovia has provided the Court with a copy of a document titled "Notice
17 of Right to Cancel." (Def. RJN, Ex. 7.) At the bottom of the document is a box containing
18 the following text:

19 **ACKNOWLEDGEMENT OF RECEIPT OF COPIES**

20 **BY MY SIGNATURE WHICH FOLLOWS**, I acknowledge that I received two
21 copies of this Notice of Right to Cancel to keep (plus one to sign and return to
22 World)

23 Below this text is a signature of Lillian C Hughes dated November 16, 2006.

24 Plaintiff does not challenge the authenticity of this document, which shows that in fact
25 Plaintiff did receive copies of the Notice of Right to Cancel.¹ Therefore, Plaintiff's attempt

26 _____
27 ¹A document is not "outside" the complaint for purposes of a Rule 12(b)(6) motion if
28 the complaint specifically refers to the document and if its authenticity is not questioned. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). Because the complaint refers to the notice of right to cancel, or lack thereof, and Plaintiff does not dispute the authenticity

1 to rescind was untimely, and Plaintiff's rescission claim fails. Plaintiff's quiet title claim also
2 fails to the extent it is based on rescission under TILA.

3 4 **2. HOEPA Disclosures & Violations**

5 Plaintiff alleges that World Savings Bank failed to make certain disclosures required
6 by HOEPA and Regulation Z. (FAC ¶ 85.) However, Plaintiff has not alleged any facts
7 showing that HOEPA applies to Plaintiff's loan.

8 To be subject to HOEPA a mortgage must have an APR that will "exceed by more
9 than 10 percentage points the yield on Treasury securities having comparable periods of
10 maturity on the fifteenth day of the month immediately preceding the month in which the
11 application for the extension of credit is received by the creditor," or total points and fees
12 payable by the consumer that exceed the greater of 8 percent of the total loan amount or
13 \$400. The FAC does not contain any factual allegations establishing that HOEPA applies.

14 Plaintiff also alleges that World Savings Bank violated HOEPA, 15 U.S.C. § 1639(h),
15 by extending credit without regard to the consumer's ability to pay. This claim also fails due
16 to the lack of allegations establishing HOEPA's applicability.

17 Furthermore, Plaintiff's HOEPA claims are barred by TILA's one-year statute of
18 limitations. 15 U.S.C. § 1640(e). Although equitable tolling of TILA cases is available in
19 some cases, see King v. State of California, 784 F.2d 910, 915 (9th Cir. 1986), Plaintiff has
20 not alleged any facts suggesting that the doctrine of equitable tolling is applicable here.

21 Plaintiff has not alleged that World Savings Bank engaged in conduct to prevent Plaintiff
22 from discovering her claim. "In order for the doctrine of equitable tolling to be applied in a
23 TILA action, the Plaintiff must show that his creditor fraudulently concealed the violation."

24 Kelley v. Galveston Autoplex, 196 F.R.D. 471, 478 (S.D. Tex. 2000). See also Hubbard v.
25 Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996) (holding that one-year statute of
26 limitations was not tolled as to initial TILA disclosures because "nothing prevented [plaintiff]

27 _____
28 of the document, the Court may properly consider it in deciding this motion. See Curcio v.
Wachovia Mortgage Corp., 2009 WL 3320499, at * 6 (S.D. Cal. Oct. 14, 2009) (dismissing
TILA rescission claim based on signed acknowledgment on Notice of Right to Cancel).

1 from comparing the loan contract, Fidelity's initial disclosures, and TILA's statutory and
2 regulatory requirements.""). During the limitations period, nothing prevented Plaintiff from
3 looking into whether World Savings Bank made all of the required disclosures. Similarly,
4 there is no apparent reason why Plaintiff could not have timely discovered her claim that
5 credit was extended without regard to her ability to pay. Indeed, according to the facts
6 alleged in the FAC, it was immediately apparent that the monthly payments on her loan
7 exceeded her 2005 monthly income.

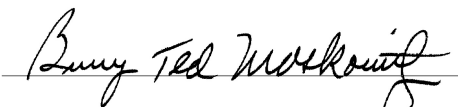
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9 **IV. CONCLUSION**

10 For the reasons discussed above, Wachovia's motion to dismiss the First Amended
11 Complaint is **GRANTED**. Plaintiff's claims against Wachovia (sued as "Golden West
12 Financial, FSB, d/b/a World Savings Bank, FSB, Wachovia, FSB, Wells Fargo, N.A.") are
13 **DISMISSED** for failure to state a claim. The Court grants Plaintiff leave to file an amended
14 complaint within 15 days of the entry of this Order.

15 The Court also **ORDERS** Plaintiff to show cause why this case should not be
16 dismissed against Equity Plus Financial for failure to serve it with the summons and
17 complaint within 120 days of the filing of this action. Plaintiff's response to the OSC is due
18 on or before **August 2, 2010**. The Court calendars the OSC for hearing on **August 6, 2010**
19 **at 11:00 a.m.** Unless otherwise directed by the Court, there shall be no oral argument, and
20 no personal appearances are necessary.

21 **IT IS SO ORDERED.**

22 DATED: July 19, 2010

23 
24 Honorable Barry Ted Moskowitz
25 United States District Judge
26
27
28