

1 **I. FACTUAL BACKGROUND**

2 On or about November 16, 2006, Plaintiff obtained a loan in the amount of \$540,000
3 from World Savings Bank, FSB (which changed its name in December, 2007, to Wachovia
4 Mortgage, FSB (Wachovia's RJN, Ex. 2)). The purpose of the loan was to refinance
5 Plaintiff's home located at 993 Via Sinuoso, Chula Vista, CA 91910 (the "Property"). The
6 note was secured by a deed of trust on the Property.

7 Plaintiff claims that she was emotionally distraught during the loan application process
8 and that Defendants, through fraud and concealment, tricked her into entering into a loan she
9 could not actually afford. Plaintiff alleges that defendant Equity Plus Financial ("Equity"),
10 Plaintiff's mortgage broker, inflated her income on the loan application without her
11 knowledge. (SAC ¶ 10.) According to Plaintiff, although her average monthly income for
12 2005 was \$2,008.17, Equity stated that her monthly income was \$11,000.00. (SAC ¶ 16.)
13 Equity and World Savings Bank did not ask for proof of Plaintiff's stated income because it
14 would be evidence that Plaintiff was not qualified for the loan. (SAC ¶ 10.) Plaintiff alleges
15 that Equity did not explain the loan's features to her before she agreed to the loan, and that
16 Defendants failed to include accurate initial disclosures and final disclosures. (SAC ¶¶ 11-
17 12.) Plaintiff entered into the loan based on the false representations that she qualified for
18 the loan and Defendants' concealment of the truth. (SAC ¶ 14.)

19 Additionally, Plaintiff alleges that World Savings Bank paid Equity an undisclosed
20 yield-spread premium ("YSP") in the amount of \$5,400 as an incentive to place Plaintiff in a
21 non-conventional "Fixed Rate Pick-A-Payment" loan instead of a conventional but less
22 profitable loan. (SAC ¶ 15.) Under the terms of the note (Wachovia's RJN Ex. 5), interest
23 was to be paid at the yearly rate of 7.7%. The initial monthly payments were in the amount
24 of \$2,064.13. The monthly payment was scheduled to change on January 1, 2008, and
25 every twelve months thereafter, until the 121st month, which would be the final payment
26 change.

27 On or about August 5, 2009, Plaintiff sent a letter of rescission to Wachovia. (SAC
28 ¶ 29.)

1 Plaintiff's SAC asserts the following claims: (1) intentional misrepresentation (against
2 Equity only); (2) fraudulent concealment (against Equity only); (3) breach of fiduciary duty
3 (against Equity only); (4) constructive fraud (against Equity only); (5) violation of RESPA, 12
4 U.S.C. § 2607; (6) quiet title; and (7) violation of Cal. Civ. Code § 2923.5 (against Wachovia
5 only).

6 7 **II. DISCUSSION**

8 A. Wachovia

9 Wachovia moves to dismiss Plaintiff's claims against it for failure to state a claim. The
10 Court agrees that Plaintiff has failed to state a claim against Wachovia.

11 Plaintiff's fifth cause of action alleges that the YSP was an unlawful kickback in
12 violation of RESPA, 12 U.S.C. § 2607. In an order filed on July 19, 2010, the Court
13 dismissed Plaintiff's claim under 12 U.S.C. § 2607 on the ground that the claim appeared to
14 be barred by RESPA's one-year statute of limitations. 12 U.S.C. § 2614. Plaintiff's SAC
15 adds some allegations regarding misleading statements by Equity. However, these
16 allegations are not sufficient to show that Plaintiff is entitled to equitable tolling of the
17 limitations period.

18 According to the SAC, at the time of the transaction, Plaintiff expressed her concern
19 to her mortgage broker regarding the amount of the monthly payment. (SAC ¶ 8.) The agent
20 for the mortgage broker reassured Plaintiff that she would be fine because she had been
21 placed into a three payment option plan, and she could choose the lowest payment option.
22 When Plaintiff saw her first monthly payment amount, Plaintiff asked the agent why the
23 amount was so high, and he reiterated his explanation regarding her ability to choose
24 between three different monthly amounts. (SAC ¶ 17.) Plaintiff did not understand his
25 explanation and was unable to get in touch with him from that time forward. (SAC ¶ 18.)
26 Plaintiff sought legal advice in early 2009, and, after an audit of her loan transaction was
27 performed, discovered the violations of law that occurred. (SAC ¶¶ 24-25.)

28 These additional facts do not establish that Plaintiff is entitled to equitable tolling.

1 “Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain
2 vital information bearing on the existence of his claim.” Santa Maria v. Pacific Bell, 202 F.3d
3 1170, 1178 (9th Cir. 2000). Absent an explanation as to why Plaintiff could not have
4 instigated an investigation into the propriety of the YSP within the limitations period, Plaintiff
5 has failed to plead a sufficient basis for equitable tolling. See Lyman v. Loan
6 Correspondents, Inc., 2009 WL 3757398, at *2 (C.D. Cal. Nov. 6, 2009) (“Accordingly, the
7 Lymans have not pleaded a sufficient basis for equitable tolling, as they have not pleaded
8 facts to suggest that despite all due diligence, they did not have a reasonable opportunity to
9 discover the violations that now form the basis of their RESPA claims.”)

10 Plaintiff has not alleged facts explaining why she could not have looked into the
11 propriety of the loan, including the YSP within the limitations period. Plaintiff does not explain
12 how the allegedly illegal YSP was discovered through the audit and does not claim that these
13 facts could not have been uncovered earlier.¹ Furthermore, as discussed by the Court
14 previously, based on the facts alleged by Plaintiff, it should have been clear to her almost
15 immediately that something was amiss with the loan.

16 The amount of the initial payment (due in January 2007) was more than Plaintiff’s
17 monthly income in 2005. According to the SAC, when Plaintiff raised her concern regarding
18 the amount of the payment, the agent for the mortgage broker gave Plaintiff an
19 incomprehensible explanation regarding the option to choose from three different payments.
20 Plaintiff did not understand the explanation and tried to have further discussions with the
21 agent. However, Plaintiff was unable to get in touch with the agent. The amount of the initial
22 payment coupled with the fact that Plaintiff was getting the run-around should have spurred
23 Plaintiff to look into the legality of the loan. Instead, Plaintiff waited until 2009 to seek legal
24 advice.

25 Absent facts showing that Plaintiff is entitled to equitable tolling, Plaintiff’s RESPA
26 claim is time-barred. Therefore, Wachovia’s motion to dismiss is granted as to Plaintiff’s fifth
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28 ¹ Plaintiff claims that the YSP was “undisclosed,” but does not specify whether the
YSP was disclosed on Plaintiff’s HUD-1 Settlement Statement.

1 cause of action.

2 Plaintiff's seventh cause of action alleges a violation of Cal. Civ. Code § 2923.5.
3 Section 2923.5 provides that a mortgagee, trustee, beneficiary, or authorized agent may not
4 file a notice of default pursuant to Section 2924 until 30 days after initial contact is made or
5 30 days after failing to contact the borrower despite the exercise of due diligence as defined
6 in subsection (g). "Initial contact" is governed by the following requirements:

7 A mortgagee, beneficiary, or authorized agent shall contact the borrower in
8 person or by telephone in order to assess the borrower's financial situation and
9 explore options for the borrower to avoid foreclosure. During the initial contact,
10 the mortgagee, beneficiary, or authorized agent shall advise the borrower that
11 he or she has the right to request a subsequent meeting and, if requested, the
12 mortgagee, beneficiary, or authorized agent shall schedule the meeting to
13 occur within 14 days. The assessment of the borrower's financial situation and
14 discussion of options may occur during the first contact, or at the subsequent
15 meeting scheduled for that purpose. In either case, the borrower shall be
16 provided the toll-free telephone number made available by the United States
17 Department of Housing and Urban Development (HUD) to find a HUD-certified
18 housing counseling agency. Any meeting may occur telephonically.

19 Plaintiff claims that Wachovia failed to comply with the requirements of § 2923.5 prior to filing
20 a Notice of Default. According to Plaintiff, she "is entitled to certain amounts already paid,
21 including interest, finance charges and closing costs, as an offset against amounts owing on
22 the loan, and collect statutory damages and attorney fees as well." (SAC ¶ 95.)

23 In Mabry v. Superior Court, 185 Cal. App. 4th 208 (2010), the court addressed the
24 issue of whether there is a private right of action under § 2923.5. Upon examination of the
25 language of § 2823.5 and the other statutory provisions governing foreclosure sales, the
26 court concluded that borrowers have a private right of action under § 2923.5. However, the
27 court also held that the right conferred by § 2923.5, a right to be contacted to assess and
28 explore alternatives to foreclosure prior to the filing of a notice of default, is enforced *by the*
postponement of a foreclosure sale. Postponement of the sale before it occurs is "the *only*
remedy provided." *Id.* at 235.

As explained by Mabry, section 2923.5 does not provide for the recovery of damages.
Therefore, Plaintiff's claim for damages under the statute is dismissed. If Plaintiff wishes to

1 bring a claim under § 2923.5 to postpone the sale, Plaintiff has leave to do so.²

2 Plaintiff's sixth cause of action is to quiet title. Because Plaintiff has failed to state a
3 claim under RESPA or Cal. Civ. Code § 2923.5, Plaintiff's quiet title claim fails as well.
4 Accordingly, Wachovia's motion to dismiss is granted as to Plaintiff's sixth cause of action.

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6 B. Equity Plus Financial

7 Equity moves for dismissal based on improper service of process, or, in the
8 alternative, for failure to state a claim. As discussed below, the Court finds that Equity was
9 not properly served. Therefore, the Court quashes the service and denies the motion to
10 dismiss as moot.

11 In an order filed on July 19, 2010, the Court dismissed Plaintiff's FAC against
12 Wachovia for failure to state a claim and ordered Plaintiff to show cause why this case should
13 not be dismissed as against defendant Equity for failure to serve it with the summons and
14 complaint within 120 days of the filing of the action. In an order filed on August 4, 2010, the
15 Court explained that if Plaintiff did not effect service on Equity by September 13, 2010, the
16 Court would dismiss the action against Equity. On August 9, 2010, Plaintiff filed a proof of
17 service, which indicates that the summons and complaint were personally served upon Emil
18 Ibrahim Jabre, an agent for service for Equity.

19 In a declaration filed in support of Equity's motion, Jabre explains that he was not
20 personally served and that he discovered the documents attached as Exhibit A to his
21 declaration lying in the shrubs adjacent to his front door. (Jabre Decl. ¶¶ 4-6.) Exhibit A
22 consists of the proof of service, a summons, and the original complaint filed by Plaintiff on
23 December 30, 2009. No other documents were included in the packet. (Jabre Decl. ¶ 6.)

24 Based on Jabre's declaration, Equity was not properly served. In addition to the fact
25 that Jabre was not personally served, Jabre was not served with the Second Amended
26 Complaint (which was filed on August 4, 2010). If an initial complaint has been superseded

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28 ² The Court does not know when the Notice of Default was filed and is unaware of the status of the foreclosure proceedings.

1 by an amended complaint, service is ineffective if a defendant is served with the original
2 complaint rather than the amended complaint. See Patel v. Dameron Hospital, 2000 WL
3 35619441, at * 4 (E.D. Cal. 2000).

4 Accordingly, the Court **QUASHES** service on Equity. Equity's motion to dismiss is
5 **DENIED AS MOOT.**

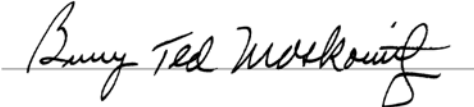
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7 **III. CONCLUSION**

8 For the reasons discussed above, Wachovia's motion to dismiss the Second
9 Amended Complaint [Doc. No. 19] is **GRANTED**. Plaintiff's claims against Wachovia are
10 **DISMISSED**. However, the Court will give Plaintiff one more chance to amend her claims
11 against Wachovia. Any amended complaint must be filed within 15 days of the entry of this
12 Order.

13 The Court also **QUASHES** service on Equity Plus Financial. Plaintiff must properly
14 serve the operative complaint and a summons on Equity Plus Financial and file a proof of
15 service within 30 days of the entry of this Order. Failure to do so will result in the entry of
16 judgment dismissing the case against Equity Plus Financial.

17 Equity Plus Financial's motion to dismiss [Doc. No. 20] is **DENIED** as moot.
18 **IT IS SO ORDERED.**

19 DATED: November 15, 2010

20 
21 Honorable Barry Ted Moskowitz
22 United States District Judge

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24 cc: Lilian Hughes
25 993 Via Sinuoso
26 Chula Vista, CA 91910
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