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Attorney for Defendant ANTHONY J. MARTIN

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF STANISLAUS**

U.S. BANK NATIONAL ASSOCIATION,
as successor in interest to the Federal
Deposit Insurance Corporation Including
Any Assignors or Successors In Interest,

Plaintiff,

vs.

ANTHONY J. MARTIN and DOES 1
through 50 inclusive,

Defendants.

Case No.: 645068

DECLARATION OF ATTORNEY TIMOTHY
L. MCCANDLESS IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with Opposition to Motion
For Summary Judgment, Evidentiary Objection
to the Declaration of Mac Johnson]

DATE: June 21, 2010
TIME: 8:30 a.m.
DEPT: D-22

I, Timothy L. McCandless, declare:

1. I am an attorney duly licensed to practice before the courts of the State of California,

1 am attorney of record for Defendant Anthony J. Martin, have a personal knowledge of the facts
2 contained herein, could and would competently testify thereto, if called upon to do so.

3 2. I personally reviewed the public records of the Office of the County Recorder for
4 Stanislaus County as it relates to the property located at: 1312 Harbour Town Lane, Modesto,
5 California 95357, (hereinafter "Subject Property"). Defendant Anthony J. Martin was the title
6 owner of the Subject Property until Plaintiff conducted an invalid non-judicial foreclosure
7 proceeding on May 15, 2009. Prior to the execution of a Trustee's Deed After Sale against the
8 Subject Property, Plaintiff U.S. Bank, N.A. did not maintain a secured interest in the Subject
9 Property. Although the Declaration of Mac Johnson alleges in general that the assets of Downey
10 Savings & Loan (hereinafter "Downey") were sold by the Federal Deposit Insurance Corporation
11 (hereinafter "FDIC" to Plaintiff U.S. Bank, N.A., the public records do not reflect that the
12 Subject Property at issue in this case was ever conveyed either by Downey, and the Declaration
13 of Mac Johnson does not specifically state that the Subject Property was conveyed by assignment
14 of the Deed of Trust to Plaintiff, and the public records of Stanislaus County Recorder do not
15 show that an assignment of the Deed of Trust was ever executed and recorded.

16 3. The ability to enforce the power of sale of a secured instrument in real property is
17 controlled by Civil Code section 2932.5, which allows an assignee to proceed with a non-judicial
18 foreclosure providing that the assignment is properly acknowledged and recorded. Here, no
19 assignment was ever recorded by Downey, the FDIC or Plaintiff U.S. Bank. Plaintiff did not
20 maintain a properly acknowledged and recorded security instrument in the Subject Property, at
21 any time during the non-judicial foreclosure process. Further, Plaintiff's only claim in the
22 Subject Property is the Trustee's Deed After Sale.

23 4. On February 23, 2006, Defendant executed a deed of trust in the Subject Property
24 with Downey Savings and Loan listed as the beneficiary, as Instrument No. 2006-0028155-00.
25 See Exhibit "A" which is a true and correct copy of the Deed of Trust and which is incorporated
26 by this reference.

27 5. On November 29, 2007, Downey Savings & Loan Association caused its authorized
28 agent DSL Service Company to record a Notice of Default in the office of the County Recorder
for Stanislaus County as Instrument No. 2007-0143679-00. See Exhibit "B" which is a true and
correct copy of the Notice of Default and which is incorporated by this reference.

6. On September 8, 2008, The United States of America before the Office of Thrift

1 Supervision served an Order to Cease and Desist on Downey Saving & Loan Association,
2 precluding the bank from continuing its unsafe and unsound business practices. A true and
3 correct copy of the Order to Cease and Desist is attached hereto as Exhibit "C" and which is
4 incorporated by this reference.

5 7. On November 21, 2008, the Federal Deposit Insurance Corporation, was appointed as
6 receiver for Downey Savings & Loan. The FDIC then sold the assets of Downey Savings &
7 Loan to U.S. Bank, N.A. A true and correct copy of the Purchase and Assumption Agreement is
8 attached hereto as Exhibit "D" and which is incorporated by this reference.

9 8. The foregoing Purchase and Assumption Agreement sets forth on Page 11 at
10 Paragraph 3.3 as follows:

11 "THE CONVEYANCE OF ALL ASSETS, INCLUDING REAL AND PERSONAL
12 PROPERTY INTERESTS, PURCHASES BY THE ASSUMING BANK UNDER THIS
13 AGREEMENT SHALL BE MADE, AS NECESSARY, BY **RECEIVER'S DEED OR**
14 **RECEIVER'S BILL OF SALE**, "AS IS", "WHERE IS", WITHOUT RECOURSE
15 AND, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THIS
16 AGREEMENT, WITHOUT ANY WARRANTIES WHATSOEVER WITH RESPECT
17 TO SUCH ASSETS, EXPRESS OR IMPLIED, WITH RESPECT TO TITLE,
18 ENFORCEABILITY, COLLECTIBILITY, DOCUMENTATION OR FREEDOM
19 FROM LIENS OR ENCUMBRANCES (IN WHOLE OR IN PART), OR ANY OTHER
20 MATTERS." (Emphasis added.)

21 As such, since the Mac Johnson Declaration confirms that the FDIC sold the Subject
22 Property to Plaintiff U.S. Bank under the Purchase and Assumption Agreement of November 21,
23 2008, then U.S. Bank was conveyed either a Receiver's Deed or Receiver's Bill of Sale. That
24 Receiver's Deed or Receiver's Bill of Sale was never recorded with the Office of the County
25 Recorder in Stanislaus County. As of November 21, 2008, Downey Savings & Loan was no
26 longer the beneficiary of the Deed of Trust recorded on February 23, 2006.

27 9. No Receiver's Deed was ever recorded by U.S. Bank, N.A. as the new beneficiary of
28 the Deed of Trust executed by Defendants. In order to enforce the power of sale pursuant to
California Civil Code section 2924, the secured instrument must be properly acknowledged and
recorded pursuant to California Civil Code section 2932.5.

1 10. Downey Savings & Loan Association did not own a secured interest in the Subject
2 Property after November 11, 2008, but its agent DSL Service Company continued with the non-
3 judicial foreclosure, and ultimately the Trustee's Deed After Sale was executed as though
4 Downey Savings & Loan was the beneficiary, however, that was not the correct state of affairs.

5 11. Thus, Downey Savings did not have the power to continue with the foreclosure of the
6 Subject Property after it lost the asset to the FDIC.

7 12. Further, the agent of Downey Savings was not lawfully empowered to executed a
8 Trustee's Deed After Sale once Downey Savings no longer owned a security interest, and
9 U.S. Bank did not record the Receiver's Deed.

10 13. The Declaration of Mac Johnson does not state that U.S. Bank, N.A. entered into a
11 written agency agreement with DSL Services to proceed with the non-judicial foreclosure of the
12 Subject Property.

13 14. Plaintiff U.S. Bank did not give notice that it was the new beneficiary under the Deed
14 of Trust.

15 15. Plaintiff U.S. Bank failed to comply with California Civil Code section 2923.5, by
16 failing to contact Defendant to assess his options to foreclosure prior to selling the Subject
17 Property.

18 16. Given all the foregoing, the non-judicial foreclosure of the Subject Property was
19 invalid, Plaintiff U.S. Bank, N.A. is not the lawful owner of the Subject Property, and Plaintiff
20 U.S. Bank, N.A. is not entitled to obtain possession of the Subject Property pursuant to Code of
21 Civil Procedure section 1161a.

22 I make the foregoing declaration under penalty of perjury pursuant to the laws of the
23 State of California and do affix my signature here this 17th day of June, 2010, in Martinez,
24 California

25 _____
26 Timothy L. McCandless
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am over the age of 18 and not a party to this action. My business address is 15647 Village Drive, Victorville, California 92392, which is located in the county where the mailing described took place.

On June 18, 2010, I served the foregoing document(s) described: **DECLARATION OF TIMOTHY L. MCCANDLESS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** which were served upon:

ATTORNEYS FOR U.S. BANK

John E. Bouzane, Esq.
Law Offices of John E. Bouzane
634 Oak Court
San Bernardino, CA 92410

_____ I deposited the foregoing documents in the Federal Express Mail (FedEx). Executed on: in Victorville, California.

(State) XXXX I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) _____ I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

_____ BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the addressee(s) above.

BERNIE KIMMERLE