

1 TIMOTHY L. MCCANDLESS, ESQ. SBN 147715
2 LAW OFFICES OF TIMOTHY L. MCCANDLESS
3 13240 Amargosa Road
4 Victorville, California 92392
5 (760) 951-3663 Telephone
6 (909) 382-9956 Facsimile

7 Attorney for Defendant ANTHONY J. MARTIN

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

10
11 U.S. BANK NATIONAL ASSOCIATION,
12 as successor in interest to the Federal
13 Deposit Insurance Corporation Including
Any Assignors or Successors In Interest,

14 Plaintiff,

15 vs.

16 ANTHONY J. MARTIN and DOES 1
17 through 50 inclusive,

18 Defendants.

Case No.: 645068

DEFENDANT ANTHONY MARTIN'S
SEPARATE STATEMENT OF DISPUED
FACTS IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENET

[Filed concurrently with Opposition to Motion
For Summary Judgment]

DATE: June 21, 2010

TIME: 8:30 a.m.

DEPT: D-22

19
20
21
22
23
24
25
26 Defendant Anthony J. Martin respectfully submits his Evidentiary Objection to the
27 Declaration of Mac Johnson filed in support of Plaintiff's Motion for Summary Judgment as
28 follows:

DISPUTE MATERIAL FACTS:

1
2
3 1. I am REO regional manager for
4 Plaintiff and I make this Declaration
5 from my own personal knowledge. If
6 called to testify I could and would
7 competently so testify. I have been in this
8 capacity for the past seven years.
9 I am also the custodian of records for
10 Plaintiff regarding properties that have
11 fallen into default status and these records
12 are kept in the normal course of business.

13 2. My job duties include, but are not
14 limited to, reviewing and managing all
15 mortgage loans that have fallen in a default
16 status from the time the Notice of Default
17 has been recorded until the time possession
18 of the subject property has been returned
19 to the bank. I have been so employed for
20 over seven years. In this position I have
21 become familiar with the general monthly
22 rental rates for similar properties to the
23 subject property in the general Los Angeles
24 area.

25 ///

26 ///

27 ///

28 ///

///

///

EVIDENTIARY SUPPORT:

1. Objection. Affiant makes statements regarding documents and events for which no evidentiary foundation has been laid that affiant in fact has personal knowledge as alleged. Hearsay. Lack of proper foundation. The fact that an affiant is the custodian of records does confer personal knowledge of the specific documents in issue.

2. Objection. Lack of proper foundation. Hearsay.

1 3. I have reviewed the file materials for
2 the real property located at 1312 Harbour
3 Town Lane, Modesto, CA 95357 and I make
4 this Declaration based on that review.
5 According to the file materials for the subject
6 property, Defendant had defaulted on a Note
7 that was secured by a Deed of Trust dated
8 2/9/09 that was recorded in the Office of the
9 County Recorder for the County of Stanislaus,
10 that contained a power of sale, by failing to pay
11 the regular monthly payments by the Note and
12 Deed of Trust.

13 4. Plaintiffs agent, FC1 Lender Services,
14 Inc., recorded, published, posted and served a
15 Notice of Default and Election to Sell Under
16 Deed of Trust, in accordance with the provisions
17 of Civil Code § 2924 et seq., due to Defendant's
18 failure to pay the monthly mortgage payments
19 that had become due under the Note Secured
20 by the Deed of Trust.

21 5. After the expiration of the statutory
22 period set forth in the Notice of Default, FCI
23 Lender Services, Inc., recorded, published and
24 posted and served a Notice of Trustee's Sale
25 on Defendant in accordance with Civil Code
26 § 2924 et seq.
27
28

3. Objection. Hearsay. Lack of proper
foundation. States an improper legal
conclusion as to the status of defendant's
loan.

4. Objection. Plaintiff's cannot established
ownership of the property, because Downey
Savings never assigned the deed of trust to
U.S. Bank. Pursuant to Civil Code §2932.5
Plaintiff never had the power of sale to
proceed under Civil Code section 2924.

5. Objection. Because Plaintiff was not
the lawful owner of the property pursuant to
Civil Code §2923.5, Plaintiff did not have
the power of sale, and therefore could not
proceed under Civil Code section 2924.

1 6. A public auction was held on 5/15/09,
2 in accordance with Civil Code § 2924h and
3 the Notice of Trustee's Sale. On that same
4 day, Downey Savings & Loan, acquired the
5 subject property at the public auction.
6 The Trustee's Deed Upon Sale was perfected
7 on 5/22/09 by recording the Trustee's Deed
8 Upon Sale in the County Recorder's Office of
9 the County of Sacramento. (A true and correct
10 copy of the Trustee's Deed Upon Sale is attached
11 hereto, marked Exhibit "1" and incorporated
12 herein by reference.)

13 7. In October 2008 Downey Savings &
14 Loan was taken over by the FDIC and in
15 November 2008 the FDIC sold the assets of
16 Downy Savings & Loan to Plaintiff, U.S.
17 Bank National Association.

18
19 8. On or about 05/23/09 a 3/90 Day
20 Foreclosure Notice to Quit, in accordance with
21 the provisions of California Civil Code Section
22 1161a, was served on Defendants. (A true and
23 correct copy of the 3/90 Day Notice to Vacate
24 is attached to the Declaration of Russ McCormic,
25 marked Exhibit "2" and incorporated herein by
26 reference.)

27 ///

28 ///

///

6. Objection. Because Plaintiff was not
the lawful owner of the property pursuant to
Civil Code §2932.5, Plaintiff did not have
the power of sale, and therefore could not
proceed under Civil Code section 2924.

7. Objection. Hearsay. Lack of Foundation.
Affiant makes no statement whatsoever
that the property at issue was conveyed to
U.S. Bank. U.S. Bank is not the record
owner of the property, prior to the
foreclosure.

8. Objection. Hearsay. Lack of Foundation.
U.S. Bank was not the owner of record
prior to the foreclosure, as such the
action to proceed pursuant to Civil Code
Section 1161a, was not lawful.

1 10. On 05/27/09, the 3/90 Day Notice to
2 Vacate expired, and Defendant(s) have
3 remained in possession of the subject property
4 ever since.

6 10. It is my opinion, based on my personal
7 knowledge of the general rental market for
8 properties similar to the subject property that
9 are situated in the general area of the subject
10 property, that the reasonable rental value of the
11 subject property is \$75.00 per day and Plaintiff
12 has incurred damages as a direct result of
13 Defendant(s) unlawful holding over after the
14 expiration of the notice to vacate.

15 11. Plaintiff has incurred court costs in a
16 sum that will be proven with the filing of a
17 timely cost bill.

18 **DISPUTED MATERIAL FACTS:**

20 12. I personally reviewed the public
21 records of the Office of the County Recorder
22 for Stanislaus County as it relates to the
23 property located at: 1312 Harbour Town Lane,
24 Modesto, California 95357, (hereinafter
25 “Subject Property”). Defendant Anthony J.
26 Martin was the title owner of the Subject
27
28

10. Objection. Hearsay. Lack of Foundation.
U.S. Bank was not the owner of record
prior to the foreclosure, as such the
Action to proceed pursuant to Civil Code
Section 1161a, was not lawful.

10. Objection. Relevance. Lack of
Foundation. U.S. Bank was not the owner
of record prior to the foreclosure, as such
the action to proceed pursuant to Civil Code
Section 1161a, was not law. As such, the
reasonable rental value of the property is
irrelevant.

11. Objection. Relevance. Lack of
foundation.

EVIDENTIARY SUPPORT:

12. Declaration of Timothy McCandless
¶2. Plaintiff never recorded its alleged
security interest in the Subject Property,
Plaintiff never entered into an agency
agreement with the trustee to continue
the foreclosure after Plaintiff acquired
the Subject Property.

1 Property until Plaintiff conducted an invalid
2 non-judicial foreclosure proceeding on May
3 15, 2009. Prior to the execution of a Trustee's
4 Deed After Sale against the Subject Property,
5 Plaintiff U.S. Bank, N.A. did not maintain a
6 secured interest in the Subject Property.
7

8 Although the Declaration of Mac Johnson
9 alleges in general that the assets of Downey
10 Savings & Loan (hereinafter "Downey") were
11 sold by the Federal Deposit Insurance
12 Corporation (hereinafter "FDIC" to Plaintiff
13 U.S. Bank, N.A., the public records do not
14 reflect that the Subject Property at issue in
15 this case was ever conveyed either by
16 Downey, and the Declaration of Mac
17 Johnson does not specifically state that the
18 Subject Property was conveyed by assignment
19 of the Deed of Trust to Plaintiff, and the
20 public records of Stanislaus County Recorder
21 do not show that an assignment of the Deed
22 of Trust was ever executed and recorded.
23
24
25
26
27
28

1 13. The ability to enforce the power of
2 sale of a secured instrument in real property is
3 controlled by Civil Code section 2932.5, which
4 allows an assignee to proceed with a non-
5 judicial foreclosure providing that the assignment
6 is properly acknowledged and recorded. Here,
7 no assignment was ever recorded by Downey,
8 the FDIC or Plaintiff U.S. Bank. Plaintiff did
9 not maintain a properly acknowledged and
10 recorded security instrument in the Subject
11 Property, at any time during the non-judicial
12 foreclosure process. Further, Plaintiff's only
13 claim in the Subject Property is the Trustee's
14 Deed After Sale.

13. Declaration of Timothy McCandless

¶3.

19 14. On February 23, 2006, Defendant
20 executed a deed of trust in the Subject Property
21 with Downey Savings and Loan listed as the
22 beneficiary, as Instrument No. 2006-0028155-00.

14. Declaration of Timothy McCandless

¶4.

23 ///

24 ///

25 ///

26 ///

1 15. On November 29, 2007, Downey Savings
2 & Loan Association caused its authorized
3 agent DSL Service Company to record a Notice
4 of Default in the office of the County Recorder
5 for Stanislaus County as Instrument
6
7 No. 2007-0143679-00.
8

15. Declaration of Timothy McCandless
¶5.

9 16. On September 8, 2008, The United States
10 of America before the Office of Thrift Supervision ¶6.
11 served an Order to Cease and Desist on Downey
12 Saving & Loan Association, precluding the bank
13 from continuing its unsafe and unsound business
14 practices.
15
16

16. Declaration of Timothy McCandless

17 17. On November 21, 2008, the Federal
18 Deposit Insurance Corporation, was appointed
19 as receiver for Downey Savings & Loan. The
20 FDIC then sold the assets of Downey Savings
21 & Loan to U.S. Bank, N.A.
22
23

17. Declaration of Timothy McCandless
¶7.

24 ///

25 ///

26 ///

27 ///

1 18. The foregoing Purchase and Assumption 18. Declaration of Timothy McCandless
2 Agreement sets forth on Page 11 at Paragraph 3.3 ¶18.
3 as follows: “THE CONVEYANCE OF ALL
4 ASSETS, INCLUDING REAL AND PERSONAL
5 PROPERTY INTERESTS, PURCHASES BY
6 THE ASSUMING BANK UNDER THIS
7 AGREEMENT SHALL BE MADE, AS
8 NECESSARY, BY RECEIVER’S DEED OR
9 RECEIVER’S BILL OF SALE, “AS IS”,
10 “WHERE IS”, WITHOUT RECOURSE AND,
11 EXCEPT AS OTHERWISE SPECIFICALLY
12 PROVIDED IN THIS AGREEMENT,
13 WITHOUT ANY WARRANTIES
14 WHATSOEVER WITH RESPECT TO SUCH
15 ASSETS, EXPRESS OR IMPLIED, WITH
16 RESPECT TO TITLE, ENFORCEABILITY,
17 COLLECTIBILITY, DOCUMENTATION
18 OR FREEDOM FROM LIENS OR
19 ENCUMBRANCES (IN WHOLE OR IN PART),
20 OR ANY OTHER MATTERS.” (Emphasis added.)
21
22
23
24

25
26 As such, since the Mac Johnson Declaration confirms
27 that the FDIC sold the Subject Property to Plaintiff
28

1 U.S. Bank under the Purchase and Assumption
2 Agreement of November 21, 2008, then U.S.
3 Bank was conveyed either a Receiver's Deed
4 or Receiver's Bill of Sale. That Receiver's
5 Deed or Receiver's Bill of Sale was never
6 recorded with the Office of the County Recorder
7 is Stanislaus County. As of November 21, 2008,
8 Downey Savings & Loan was no longer the
9 beneficiary of the Deed of Trust recorded on
10 February 23, 2006.
11
12
13

14 19. No Receiver's Deed was ever recorded
15 by U.S. Bank, N.A. as the new beneficiary of the
16 Deed of Trust executed by Defendants. In order
17 to enforce the power of sale pursuant to California
18 Civil Code section 2924, the secured instrument
19 must be properly acknowledged and recorded
20 pursuant to California Civil Code section 2932.5.
21
22
23
24
25
26
27
28

19. Declaration of Timothy McCandless
¶9.

1 20. Downey Savings & Loan Association did 20. Declaration of Timothy McCandless
2 not own a secured interest in the Subject Property ¶10.
3 after November 11, 2008, but its agent DSL Service
4 Company continued with the non-judicial foreclosure,
5 and ultimately the Trustee's Deed After Sale was
6 executed as though Downey Savings & Loan was
7 the beneficiary, however, that was not the correct
8 state of affairs.
9

10
11 21. Thus, Downey Savings did not have the 21. Declaration of Timothy McCandless
12 power to continue with the foreclosure of the ¶11.
13 Subject Property after it lost the asset to the FDIC.
14

15
16 22. Further, the agent of Downey Savings was 22. Declaration of Timothy McCandless
17 not lawfully empowered to executed a Trustee's ¶12.
18 Deed After Sale once Downey Savings no
19 longer owned a security interest, and U.S. Bank
20 did not record the Receiver's Deed.
21

22
23 23. The Declaration of Mac Johnson does not 23. Declaration of Timothy McCandless
24 state that U.S. Bank, N.A. entered into a written ¶13.
25 agency agreement with DSL Services to proceed
26 with the non-judicial foreclosure of the Subject
27
28

Property.

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

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

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

Dated: June 17, 2010

**LAW OFFICES OF
TIMOTHY MCCANDLESS ESQ.**

Timothy L. McCandless, Esq.,
Attorney for Defendants
ANTHONY J. MARTIN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: **DEFENDANT ANTHONY MARTIN SEPARATE STATEMENT OF DISPUTED MATIERAL FACTS** 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