The relief described hereinbelow is SO ORDERED.

SIGNED this 30th day of April, 2012.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

MARTIN HUERTER,
Debtor.

Case No. 10-23175
Chapter 13

MARTIN HUERTER,
Plaintiff,

v.

Adv. No. 10-6147

CHASE HOME FINANCE, LLC, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff/Debtor Martin Huerter seeks a declaration invalidating a mortgage lien against his homestead because the note and mortgage are held by different parties and the note's ownership is unclear to Debtor. Defendants JP Morgan Chase Bank, National Association, successor by merger to Chase Home Finance LLC (JP Morgan Chase), and Mortgage Electronic Registration Systems, Inc. (MERS), move for summary judgment. The motion is granted

because Defendants present uncontroverted evidence establishing Federal National Mortgage Association (Fannie Mae) has an interest in the note; JP Morgan Chase holds and services the note; and MERS holds the mortgage as an agent of JP Morgan Chase and Fannie Mae, thereby defeating Plaintiff's claim the note is unsecured.

Findings of Fact

On December 14, 2005, Debtor borrowed $284,000 to apply toward his homestead. He executed a promissory note to American Mortgage Network, Inc. To secure the note, Debtor and his non-debtor wife signed a mortgage. The mortgage states MERS is the mortgagee and "is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Lender is defined as American Mortgage Network, Inc. The mortgage states Debtor "mortgages and warrants to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS" the property. The mortgage states the note "can be sold one or more times without prior notice" to Debtor, and the covenants and agreements in the mortgage "shall bind . . . and benefit the successors and assigns of Lender." The mortgage was recorded on December 21, 2005.

American sold the note to Morgan Stanley Mortgage Capital Holdings, LLC, and endorsed it in blank. Morgan Stanley sold the note to JP Morgan Chase. Fannie Mae is an investor on the note, but JP Morgan Chase is the holder of the note and, through its counsel, is in possession of the note. At all relevant times, American, Morgan Stanley, JP Morgan Chase, and Fannie Mae were MERS members, subject to membership agreements with MERS. Pursuant to the agreements, at the time they owned or held the note, American, Morgan Stanley, JP Morgan Chase, and Fannie Mae all appointed MERS to act as their agent to serve as mortgagee on their

behalf.

MERS's business is to hold record legal title to mortgages and deeds of trust on behalf of the beneficial owners. MERS is structured to allow its members, which include originators, lenders, servicers and investors, to track transfers of servicing rights and beneficial ownership interests in notes secured by the mortgages and deeds of trust held by MERS. MERS's membership agreements define the scope of its relationship with its members and require, among other things, (1) members to "cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System"; (2) MERS to serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners; and (3) MERS to comply with the instructions of the holder and beneficial owner of the notes.

Debtor filed for bankruptcy on September 14, 2010. Debtor is attempting to invalidate Defendants' security interest in his homestead.

Conclusions of Law

A. Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law.[1] All inferences are to be construed in favor of the non-moving party.[2] Only when reasonable minds could not differ as to the import of the proffered evidence is summary judgment proper.[3]

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[1] FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[2] *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).
[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

B. Defendants' Objection to Claim Alleged for the First Time in Summary Judgment Pleadings.

A complaint can not be amended to raise a new claim for relief by summary judgment pleadings. The Tenth Circuit requires a formal motion to amend under Rule 15(b).[4] In the complaint, Plaintiff alleges Defendants split the promissory note and mortgage between two separate and independent parties, rendering the note unsecured. Plaintiff cites K.S.A. § 58-2323. Defendants' motion addresses these allegations. In opposing summary judgment, Plaintiff raises a factual allegation regarding the acknowledgments of the signatures on the mortgage. Plaintiff does not deny he and his wife signed the mortgage, but he disputes it occurred in the presence of a notary on the date and in the county noted in the acknowledgments. Defendants object to the additional factual allegation. To the extent the fact is offered to defeat summary judgment on the claim the note is unsecured as between the Plaintiff and Defendants, the failure of a notary to properly authenticate the signatures is immaterial in light of Debtor's admission he and his wife signed the mortgage. The mortgage is valid between the parties thereto despite the lack of an acknowledgment.[5] This fact would be material in an 11 U.S.C. § 544 avoidance action, but such an action is not alleged, and the trustee is not a party to the lawsuit.

C. The Evidence of an Agency Relationship between MERS and Its Members Demonstrates the Note and Mortgage Were Not Severed and Remain Valid and Enforceable.

Under Kansas law, a promissory note and the mortgage securing it are, as a general rule, inseparable.[6] Even so, a note holder may appoint another to hold and enforce the mortgage on its

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[4] *Green Country Food Market, Inc., v. Bottling Group, LLC*, 371 F.3d 1275, 1280-81 (10th Cir. 2004).

[5] K.S.A. § 58-2223.

[6] *Hamilton v. CitiMortgage, Inc. (In re Lieurance)*, 458 B.R. 757, 761-62 (Bankr. D. Kan. 2011); *Bank Western v. Henderson*, 255 Kan. 343 (1994), citing *Middlekauff v. Bell*, 111 Kan. 206, 207 (1922); *Kurtz v. Sponable*, 6 Kan. 395, 396 (1870).

behalf.[7] A note and mortgage are not split when the note is held by the principal and the mortgage is held by its agent.[8] Kansas statutory law is the complement to the general, common law rule.[9] The MERS system has been scrutinized and analyzed by other courts, and, provided MERS can produce a complete evidentiary record, its system has been upheld as a valid way to hold and enforce promissory notes secured by mortgages and deeds of trust.[10] *Williams*, and its predecessor, *Martinez*, are well-reasoned, well-supported, and directly on point. This Court adopts the reasoning of these opinions and so holds in this case.

Defendants present uncontroverted testimony JP Morgan Chase holds and possesses the note, which is endorsed in blank. The uncontroverted testimony is MERS holds the mortgage as an agent of JP Morgan Chase. Defendants' uncontroverted testimony responds to Debtor's assertion Fannie Mae owns the note by averring Fannie Mae has an investment interest in the note, and Fannie Mae also has an agency relationship with MERS. Plaintiff/Debtor offers no evidence to raise a triable issue of fact over JP Morgan Chase's possession of the note and the agency relationship between MERS, Fannie Mae, and JP Morgan Chase. Debtor makes no effort to address the case law cited by Defendants which holds the note and mortgage may be held by separate entities, provided an agency relationship exists between the two. Debtor does not distinguish, discuss, or even mention *Martinez* and *Williams.* Accordingly, Defendants have

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[7] *Martinez v. Mortgage Electronic Registration Systems, Inc. (In re Martinez)*, 444 B.R. 192, 203-04 (Bankr. D. Kan. 2011).

[8] *Williams v. BAC Home Loans Servicing, LP (In re Williams)*, slip copy, 2012 WL 695832, at *3 (Bankr. D. Kan. 2012); *In re Tucker*, 441 B.R. 638, 643-44 (Bankr. W.D. Mo. 2010).

[9] *Williams*, slip copy, 2012 WL 695832, at *3, citing *Bank Western v. Henderson*, 255 Kan. 343, 354 (1994); *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 17 (1989) (holding that "[o]ur view is that the mortgage follows the note"); *Kurtz v. Sponable*, 6 Kan. 395, 396 (1870) ("Under our laws, the mortgage is but appurtenant to the debt,-- a mere security; and, under ordinary circumstances, whoever owns the debt owns the mortgage."); and K.S.A. § 58–2323. Also worth noting, K.S.A. § 84-9-203(g) codifies the common law rule that a transfer of a note secured by a lien on real property also transfers the lien.

[10] *Williams*, slip copy, 2012 WL 695832.

sustained their burden of establishing they are entitled to judgment as a matter of law.

Conclusion

IT IS THEREFORE ORDERED Defendants' Motion for Summary Judgment is GRANTED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS