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:

MARK ROBERT WILKINSON and
THERESA JEAN WILKINSON,
Debtors.

Case No. 09-24357
Chapter 11

MARK WILKINSON, et al.,
Plaintiffs,

v.

Adv. No. 10-6251

BAC HOME LOANS SERVICING, LP, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs/Debtors Mark and Theresa Wilkinson seek a declaration invalidating a mortgage lien against their homestead because the note and mortgage are held by different parties and the note's ownership is unclear to Debtors. Defendants BAC Home Loans Servicing, LP, now known as Bank of America, N.A., 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) owns the note, BAC holds and services the note, and MERS holds the mortgage as an agent of BAC and Fannie Mae, thereby defeating Plaintiff's claim the note is unsecured.

Findings of Fact

On August 4, 2003, Debtors borrowed $82,000 to apply toward their homestead. They executed a promissory note to Sterling Capital Mortgage Company, now known as RBC Mortgage Company. To secure the note, Debtors 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 Sterling. The mortgage states Debtors "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 Debtors, and the covenants and agreements in the mortgage "shall bind . . . and benefit the successors and assigns of Lender." The mortgage was recorded on August 8, 2003.

Sterling sold the note to Countrywide Home Loans, Inc. Countrywide sold the note to BAC and endorsed it in blank. BAC sold the note to Fannie Mae, but BAC retained possession of the note as servicer for Fannie Mae. Following BAC's merger with Bank of America, Bank of America became the current servicer and holder of the note. At all relevant times, Sterling, Countrywide, BAC 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, Sterling, Countrywide, BAC 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.

Debtors filed for bankruptcy on December 31, 2009. Debtors are attempting to invalidate Defendants' security interest in their 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. 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.[4] Even so, a note holder may appoint another to hold and enforce the mortgage on its behalf.[5] A note and mortgage are not split when the note is held by the principal and the mortgage is held by its agent.[6] Kansas statutory law is the complement to the general, common law rule.[7] 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.[8] *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 stating Fannie Mae owns the note, BAC holds and possesses the note, and MERS holds the mortgage as an agent of BAC and Fannie Mae. Plaintiffs/Debtors offer no evidence to raise a triable issue of fact over the agency

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[4] *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).

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

[6] *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).

[7] *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.

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

relationship between MERS, Fannie Mae, and BAC.[9] Debtors make 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. Debtors do not distinguish, discuss, or even mention *Martinez* and *Williams.* Accordingly, Defendants have 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

[9] Debtors' counsel was also debtors' counsel in *Williams* and raised the same disjointed argument regarding Red Oak Merger Corporation and an alleged broken chain of title. Even after Judge Karlin characterized the argument as "throw - as - much - mud - against - the - wall - as - you - can - and - hope - some - of - it - sticks," counsel made no effort to amend this complaint or more fully address the significance, or even the relevance, of Red Oak. *Id.*, at *4-*5. For the same reasons stated in *Williams*, Debtors' argument does not raise a triable issue of fact in this case.