



## PRELIMINARY STATEMENT

1. The principal holding in the Court's May 28, 2009 order ("May 28 Order") should not be overturned. JPMC's time to respond to the Debtors' pending motion for summary judgment ("Debtors' Summary Judgment Motion") should be adjourned until twenty-one days after resolution of JPMC's pending motion to dismiss ("JPMC's Motion to Dismiss").

2. JPMC's Motion to Dismiss is fully briefed and ready for decision. That motion should result in Debtors' turnover action being dismissed in its entirety, without any need to consider evidence beyond what is already before the Court and available for judicial notice. There is no sound reason for further time or effort to be dedicated to a summary judgment motion that may never be heard. Accordingly, the Court should deny Debtors' Motion for Reconsideration.

## BACKGROUND

3. On May 13, 2009, JPMC moved to dismiss this turnover action. On May 19, 2009, Debtors moved for summary judgment in this action.

4. The May 28 Order granted JPMC's motion to extend its time to oppose the Summary Judgment Motion ("JPMC's Extension Motion") on the ground that "sufficient cause" had been established in support of an extension. (May 28 Order at 2.) The May 28 Order stated: "JPMC's time to respond . . . is extended until twenty-one days after the Court's ruling on the Motion to Dismiss [twenty-one days from the date hereof] . . ." <sup>2</sup> (May 28 Order at 2.)

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<sup>2</sup> The bracketed language in this paragraph—" [twenty-one days from the date hereof]"—was included in the proposed form of order as alternative relief that the Court could have entered in granting the JPMC Extension Motion.

5. One day later, on May 29, 2009, Debtors filed the Motion for Reconsideration, asking this Court to reconsider and withdraw its May 28 Order. The Court subsequently scheduled a hearing on the Debtors' Motion for Reconsideration for June 24, 2009.

6. JPMC's Motion to Dismiss is fully briefed and ready for argument, if necessary, at the hearing on June 24. Accordingly, the issue on reconsideration, as JPMC understands it, is whether JPMC's Motion to Dismiss should be ruled upon before the parties expend time and effort to complete briefing on the Summary Judgment Motion.<sup>3</sup>

7. Debtors offer two reasons for the Court not to first rule on JPMC's Motion to Dismiss: (1) the Motion to Dismiss and the Debtors' Summary Judgment Motion are "nearly identical" and therefore should not be considered independently of one another and (2) it would be more efficient to consider the two motions at the same time. (Debtors' Motion for Reconsideration ("Debtors' Recons.") ¶ 4; *see id.*, Ex. A ¶¶ 16, 21.)

### ARGUMENT

8. Although bankruptcy courts have the authority to reconsider interlocutory orders, *In re Global Link Telecom Corp.*, No. 99-3923 (MFW), 2002 WL 31385814, at \*2 & n.3 (Bankr. D. Del. Oct. 22, 2002), the Court should not exercise its authority here because the Debtors fail to present any sound basis to delay a ruling on JPMC's Motion to Dismiss until the parties complete briefing a summary judgment motion that may never have to be considered.

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<sup>3</sup> At the hearing on June 24, 2009, the Court will also consider motions to stay this action and JPMC's Adversary Proceeding in favor of Debtors' first-filed action, currently pending in the U.S. District Court for the District of Columbia, *Washington Mutual, Inc., et al. v. FDIC*, Civil Action No. 1:09-cv-0533 (RMC) (Mar. 20, 2009) (the "D.C. Action"). The Court need not resolve Debtors' Motion for Reconsideration in the event that it stays the present adversary proceeding.

9. JPMC's Motion to Dismiss is fully briefed and ready for decision *right now*.<sup>4</sup> That motion should result in Debtors' turnover action being dismissed in its entirety, thus eliminating the need to consider Debtors' Summary Judgment Motion. JPMC's motion seeks dismissal of this action, as a matter of law, for lack of subject matter jurisdiction and based on this Court's recent decision in *In re Lexington Healthcare Group*—holding that turnover under 11 U.S.C. § 542 is inappropriate where “[t]here is a legitimate dispute about the ownership of property.” 363 B.R. 713, 716 (Bankr. D. Del. 2007). If Debtors were right that their separate summary judgment arguments defeat JPMC's Motion to Dismiss (they are not), then Debtors will prevail on the Motion to Dismiss. As a result, there is no legitimate need or reason to insist that Debtors' Motion for Summary Judgment be heard at the same time. Debtors' Motion for Reconsideration is thus a bald attempt to prevent the Court from resolving ripe legal issues. The motion should be denied.

10. Debtors' arguments to the contrary do not alter this conclusion. First, Debtors assert that JPMC's Motion to Dismiss and Debtors' Motion for Summary Judgment should be resolved together because they ask the Court to “make the identical determination.” (Debtors' Recons., Ex. A ¶ 16.) This assertion is wrong. The pending Motion to Dismiss requires the Court to determine, as a matter of law, whether it has subject matter jurisdiction to hear Debtors' claims and whether turnover under 11 U.S.C. § 542 is inappropriate given pending disputes. Debtors' Summary Judgment Motion seeks to pass over these determinations and asks the Court to adjudicate the merits of the turnover action.

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<sup>4</sup> Notwithstanding Debtors' “Objection” to JPMC's request to argue the Motion to Dismiss at the June 24 hearing (*see* Docket No. 36), there is no reasonable justification for any party to arrive at that hearing unprepared to argue a dispositive motion that, at the time of the hearing, will have been fully briefed and *sub judice* for three weeks. Like the instant Motion for Reconsideration, Debtors' “Objection” is yet another attempt to needlessly delay this Court's resolution of JPMC's Motion to Dismiss.

11. Likewise, with respect to the materials properly before the Court, these motions are not “virtually the same.” (Debtors’ Recons., Ex. A ¶ 16.) In order to resolve JPMC’s Motion to Dismiss, the Court is restricted to examining the parties’ pleadings and matters of which the Court may take judicial notice.<sup>5</sup> Fed. R. Bankr. Proc. 7012(b) (incorporating Fed. R. Civ. P. 12(b)).<sup>6</sup> By contrast, Debtors supported their Summary Judgment Motion with a significant amount of *evidence*, and JPMC will oppose the motion, if needed, in similar fashion. *See* Fed. R. Bankr. Proc. 7056 (incorporating Fed. R. Civ. P. 56).

12. Moreover, the Debtors cannot argue that dismissing their turnover action implicates the same analysis as resolving their Summary Judgment Motion. The Debtors’ turnover action is subject to dismissal as a matter of law because of the *existence* of legitimate disputes regarding the ownership of the Disputed Accounts. *See, e.g., In re Student Fin. Corp.*, 335 B.R. 539, 554 (D. Del. 2005) (holding that a turnover action only lies against property that is not in dispute). In a summary judgment context, the Court will need to weigh the evidence presented by the parties to determine whether the merits of the case lean so overwhelmingly in

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<sup>5</sup> Contrary to Debtors’ assertion, JPMC has not “adopt[ed] a broad view as to how far judicial notice extends in the context of a motion to dismiss.” (Debtors’ Recons., Ex. A at 7 n.4.) JPMC’s view of judicial notice is precisely in line with the binding authority cited in JPMC’s opening brief in support of the Motion to Dismiss. (*See* JPMC Mem. at 9 & n.2 (citing, *inter alia*, *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) and *United States ex rel. Geisler v. Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975)).) Thus, it is not surprising that Debtors have failed to cite *any* case law, statute or rule in support of their criticism of JPMC’s purportedly “broad view” of judicial notice. (*See* Debtors’ Recons., Ex. A at 7 n.4.) Debtors supply no reason to doubt that, in seeking to dismiss the turnover action, JPMC has “refrained from delving into the facts” of the parties’ dispute and has addressed “only matters properly considered by the Court on a motion to dismiss.” (JPMC Reply Mem. at 1 n.2.)

<sup>6</sup> Given the unambiguous instruction in Rule 12(b)(6) concerning the items that may be considered by the Court in resolving the Motion to Dismiss, one can only guess at what has led the Debtors to assert that “[t]here is simply no reason whatsoever that [the Debtors] should be restricted in their ability to respond [to the Motion to Dismiss] with affidavits and evidence. . . .” (Debtors’ Recons., Ex. A ¶ 18.)

the Debtors' favor that their motion should be granted. This is why, in *In re Lexington Healthcare Group*, this Court rejected the Trustee's argument that the movant's Rule 12(b)(6) motion to dismiss the turnover action should be tested under the Rule 56 summary judgment standard:

“The Trustee’s argument misses the mark. The Defendants are not seeking summary judgment on the merits of their entitlement to the security deposit. Instead, they argue that because title to the security deposit is in dispute, the Trustee cannot even seek a turnover of those funds.

The Court agrees with the Defendants.”

363 B.R. at 716.

13. The same analysis applies here. The Motion to Dismiss the turnover action should be granted because (i) the Debtors have advanced the same claims in the D.C. Action and as a counterclaim in JPMC's adversary proceeding, (ii) the FDIC and certain bank bondholders have filed proofs of claim in these Chapter 11 proceedings claiming an interest in the Deposit Accounts, and (iii) the FDIC has asserted a counterclaim in the D.C. Action disputing the Debtors' entitlement to the Deposit Accounts. It is the existence of these very legitimate claims, not the merits of the Debtors' supposed arguments, that precludes the Debtors' action *as a matter of law* and requires that the Motion to Dismiss be decided first, before briefing on the disputed factual merits of a summary judgment motion that may well prove unnecessary.<sup>7</sup>

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<sup>7</sup> The Debtors concede in their Motion for Reconsideration that “[e]ven if [JPMC] prevails in dismissing this action,” “it is inevitable that JPMC will have to make a factual showing” in support of its claims to the Disputed Accounts in JPMC's own “pending adversary complaint.” (Debtors' Recons., Ex. A ¶ 23.) Although Debtors omit that JPMC's adversary proceeding raises subject matter jurisdiction and other issues that could result in dismissal of their claims as a matter of law, the Debtors' concession makes it clear that, at this point, even they must acknowledge the existence of a *bona fide* dispute concerning the Disputed Accounts that makes this turnover action inappropriate.

14. Debtors further argue that ruling on JPMC's Motion to Dismiss before turning to summary judgment briefing is "nonsensical . . . in the extreme" because JPMC is "trying to put off the inevitable"—*i.e.*, to delay its need "to make a factual showing" in response to Debtors' Summary Judgment Motion. (Debtors' Recons., Ex. A ¶¶ 16, 23.) Debtors' overheated rhetoric does not provide any reason for the Court to reconsider the May 28 Order. It is not "inevitable" that JPMC will be required to submit a "factual showing" in opposition to the Summary Judgment Motion. (*Id.* ¶ 23.) As much as Debtors wish it were not so, there is a substantial likelihood that the Motion to Dismiss will be granted, thus mootng the Debtors' Summary Judgment Motion.

15. Debtors, however, are correct that their claims can be adjudicated on the merits in other proceedings. Debtors may pursue their claims in the D.C. Action, although they would have to contend with the FDIC's counterclaim challenging the Debtors' purported interests in the Disputed Accounts. Debtors could also pursue their claims in JPMC's adversary proceeding, although they once again would have to contend with related claims they wish to avoid, including an interpleader claim that would allow the Court to resolve all parties' competing claims to and asserted interests in the Disputed Accounts. However, let there be no doubt: if Debtors present legally cognizable claims, JPMC will present what it believes to be compelling evidence in support of its claims to the Disputed Accounts. Debtors do not get to shirk their burden of "stat[ing] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see* Fed. R. Bankr. Proc. 7012(b).

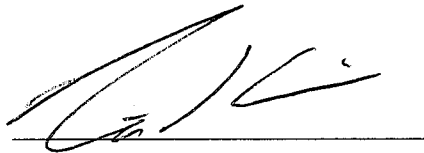
16. Accordingly, JPMC respectfully submits that Debtors' Motion for Reconsideration should be denied.<sup>8</sup>

### CONCLUSION

WHEREFORE, JPMC requests that this Court deny Debtors' Motion for Reconsideration and re-affirm that JPMC's time to respond to the Debtors' Summary Judgment Motion is extended until twenty-one days after the Court's ruling on the Motion to Dismiss, should that motion be denied.<sup>9</sup>

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Respectfully submitted,



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<sup>8</sup> Although Intervenor the Official Committee of Unsecured Creditors (the "Committee") has filed a *pro forma* joinder in support of the Debtors' Motion for Reconsideration, it fails to assert any independent grounds for the Court to grant the Debtors' motion. JPMC has explained *supra* the reasons why Debtors' motion must be denied and reserves its right to respond to any additional comments by the Committee with respect to the pending litigation. In addition, JPMC gave the Committee notice of its motion by informing an attorney who appears on the Committee's papers that there was a dispute regarding the summary judgment briefing that would be brought to the Court's attention.

<sup>9</sup> In any event, if the Court does not adhere to its prior ruling, JPMC respectfully requests, for the reasons set forth *supra* and in the JPMC Extension Motion, that the Court adjourn JPMC's time to oppose Debtors' Summary Judgment Motion until twenty-one days after resolution of the instant Motion for Reconsideration.



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