

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
	:	
WASHINGTON MUTUAL, INC., <i>et al.</i> , ¹	:	Case No. 08-12229 (MFW)
	:	
Debtors.	:	Jointly Administered
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WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP.,	:	
	:	Adv. Proc. No. 09-50934
Plaintiffs,	:	
	:	
v.	:	Oral Argument Requested
	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,	:	
	:	
Defendant.	:	Re: Docket Nos. 8, 14, 25 & 37
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**REPLY IN SUPPORT OF PLAINTIFFS’ MOTION FOR RECONSIDERATION
OF THE ORDER GRANTING EXPEDITED MOTION OF DEFENDANT
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION FOR ADDITIONAL
TIME TO RESPOND TO DEBTORS’ SUMMARY JUDGMENT MOTION**

1. Plaintiffs Washington Mutual, Inc. and WMI Investment Corp. (collectively, “Plaintiffs” or “Debtors”) submit this Reply in Support of their Motion for Reconsideration of the Order Granting Expedited Motion of JPMorgan Chase Bank, National Association (“JPMC”) for Additional Time to Respond to Debtors’ Summary Judgment Motion (the “Motion for Reconsideration”) (Docket No. 25). For the reasons set forth in the Motion for Reconsideration, JPMC should be directed to promptly submit its Opposition to Plaintiffs’ Motion for Summary Judgment (Docket No. 14) so that the Court can consider the Motion for Summary Judgment jointly

¹ The Debtors in these Chapter 11 cases and the last four digits of each Debtor’s federal tax identification numbers are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395).

with JPMC's Motion to Dismiss (Docket No. 8). Indeed, the two motions are closely related, such that logic and efficiency dictate that they be addressed together. In the Opposition of Defendant JPMorgan Chase Bank, National Association to the Debtors' Motion for Reconsideration ("Opposition to the Motion for Reconsideration") (Docket No. 37), however, JPMC persists in its request that the Court decide the Motion to Dismiss by itself, thereby enabling JPMC to avoid responding to Plaintiffs' Motion for Summary Judgment and to avoid providing any justification for its refusal to return Plaintiffs' deposits. JPMC's arguments must be rejected.

2. JPMC's primary argument in support of its position that the Court should decide the Motion to Dismiss without even considering the Motion for Summary Judgment is that the two motions depend on distinct and unrelated legal inquiries. (Opp. at ¶ 10.) That is wrong—the relevant analysis for resolving each motion is virtually identical. In order to support its Motion to Dismiss, JPMC must demonstrate that there is a genuine dispute as to ownership of the deposits, whereas, in order to prevail on their Motion for Summary Judgment, Plaintiffs must demonstrate that there is no genuine dispute as to ownership of the deposits. *Compare Levy v. Sterling Holdings Co., LLC*, 544 F.3d 493, 501 (3d Cir. 2008) (summary judgment appropriate if moving party demonstrates that there is “no genuine issue as to any material fact”) (quoting Fed. R. Civ. P. 56(c)) with *In re Lexington Healthcare Group*, 363 B.R. 713, 716 (Bankr. D. Del. 2007) (holding that moving party is entitled to dismissal of turnover action only if it can establish a “*bona fide*” dispute, which exists where “there is a ‘genuine issue of material fact . . . ’”) (quoting *B.D.W. Assocs. v. Busy Beaver Bldg. Ctrs.*, 865 F.2d 65, 66 (3d Cir. 1989)). These standards represent opposite sides of the same coin – indeed, the Third Circuit has specifically likened the “*bona fide* dispute” standard, which applies in turnover actions, to the “genuine dispute” standard applicable in the summary judgment context. *See B.D.W. Assocs.*, 865 F.2d at 66–67 (“The test to be applied in determining the

existence *vel non* of a *bona fide* legal dispute in this context has been described in various ways. For example . . . in *In re Stroop*, 51 B.R. 210 (D. Colo. 1985), the test was equated with the standards for granting summary judgment.”). Thus, the Motion to Dismiss and the Motion for Summary Judgment require the Court to make the same determination, *i.e.*, whether there is any genuine dispute as to ownership of Plaintiffs’ deposits, and logic dictates that the Court evaluate both motions together.

3. JPMC next invokes this Court’s decision in *In re Lexington Healthcare Group, Inc.* as support for the proposition that it would be improper for the Court to consider evidence submitted by Plaintiffs in support of their Motion for Summary Judgment in assessing whether a genuine dispute exists as to ownership of the deposits. (Opp. at ¶ 12.) In fact, the Court in *Lexington* performed exactly the analysis that Plaintiffs are requesting here. In order to determine whether there was a genuine dispute in that case concerning entitlement to a security deposit, the Court did not simply rely on the defendant’s assertion that there was such a dispute. Rather, the Court went beyond the pleadings, and inspected the underlying lease. The Court granted the defendant’s motion to dismiss, moreover, only upon concluding that the lease in fact supported competing claims by both sides to the same funds. *In re Lexington*, 363 B.R. at 717 (“[T]he Initial Lease is not so plain and unambiguous as to provide a clear, objective basis for concluding that the security deposit is property of the estate”). JPMC is asking that this Court now perform the opposite analysis and, rather than inspect the relevant documents and evidence for itself, JPMC asks the Court to employ a “take my word for it” approach to determining whether there is a genuine dispute that precludes turnover. That was not the Court’s approach in *Lexington*, and it would not be the right approach here.

4. It is clear why JPMC is seeking to avoid making an evidentiary showing in opposition to the Motion for Summary Judgment—it is incapable of doing so. Rather than point to any facts whatsoever in support of its claim that there is a genuine dispute as to ownership of the deposits, JPMC relies entirely on the fact that various entities have filed claims to those funds. (Opp. at ¶ 13.) The mere fact that parties have filed claims, however, does not indicate that those claims represent a “genuine dispute.” Indeed, while the Court can take notice of other court actions, it plainly has no basis to assume that there is any merit to the allegations underlying those actions. *See In re Beltrami*, 324 B.R. 255, 259 (Bankr. M.D. Pa. 2005) (“The Court’s purpose in taking judicial notice of these [court records in other proceedings] is ‘not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.’”). The Court can only truly assess whether there is a genuine dispute by conducting its own review of the relevant evidence based on its consideration of a fully briefed Motion for Summary Judgment.

5. By insisting that the Court ignore the Motion for Summary Judgment, JPMC is also asking that the Court perform a feat that is logically impossible. Plaintiffs expressly incorporated their Motion for Summary Judgment, and the evidence submitted in support of that motion, into their Opposition to the Motion to Dismiss. (Plaintiffs’ Opp. to Motion to Dismiss at 4, 8.) It is therefore impossible and unnecessary for the Court to parse Plaintiffs’ arguments in Opposition to the Motion to Dismiss from its arguments in support of the Motion for Summary Judgment. Those arguments are inextricably linked, and incorporated into both briefs. Furthermore, the Federal Rules of Civil Procedure specifically authorize the Court to convert a motion to dismiss into a motion for summary judgment where one or both parties submit outside materials to support their position. Fed. R. Civ. P. 12(d); *see also Naghiu v. Inter-Cont’l Hotels Group, Inc.*, 165 F.R.D. 413, 418 (D. Del. 1996) (“When both parties present extraneous materials as part of a Rule 12(b)(6) motion or in opposition

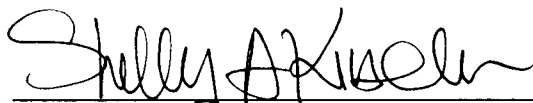
thereto, the Court has discretion to accept the extraneous material and convert the motion to one for summary judgment pursuant to Fed. R. Civ. P. 56.”). In essence, by submitting an Opposition to JPMC’s Motion to Dismiss that expressly incorporates the Motion for Summary Judgment, Plaintiffs have presented the Court with evidence, as they are entitled to do, in order to demonstrate the absence of any genuine dispute. The Court should now exercise its discretion, as it did in *Lexington*, to consider the pertinent evidence in deciding whether there is such a dispute.

6. Even if the Court were to resolve the Motion to Dismiss without also considering the related Motion for Summary Judgment, Plaintiffs have fully demonstrated in their Opposition to the Motion to Dismiss that there is no *bona fide* dispute and, therefore, no basis for this action to be dismissed. Indeed, Plaintiffs have asserted an "unquestionable right to their deposits," and JPMC is plainly wrong to contend that Plaintiffs' complaint somehow demonstrates that those funds are in genuine dispute. (Comp. ¶ 5.) Furthermore, virtually all of the documents that Plaintiffs have incorporated from their Motion for Summary Judgment into their Opposition to the Motion to Dismiss—*e.g.*, account statements, account opening documents, the Purchase & Assumption Agreement—are cited in, and integral to, the complaint. It is therefore appropriate for the Court to consider all of those materials even if it limits its review to the Motion to Dismiss. *See In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (“[A]n exception to the general rule is that a ‘document integral to or explicitly relied upon in the complaint’ may be considered ‘without converting the motion [to dismiss] into one for summary judgment.’”) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). For reasons set forth in Plaintiffs’ Opposition to the Motion to Dismiss, those materials show conclusively that Plaintiffs are entitled to their deposits, and, at a minimum, further refute JPMC's conclusory assertion that those funds are somehow subject to genuine dispute.

7. It is disturbingly clear that JPMC's ultimate goal is to retain Debtors' deposits for the indefinite future while avoiding any decision on the merits as to whether JPMC is actually entitled to those funds.² JPMC even suggests that it may *never* be necessary for the Court to make a determination as to ownership of the funds, and offers the feeble assurance that, "if Debtors present legally cognizable claims, JPMC will present what it believes to be compelling evidence in support of its claims." (Opp. at ¶ 14.) It does not matter that JPMC apparently "believes" that it is entitled to Plaintiffs' deposits: Plaintiffs have asserted a "legally cognizable claim" for those funds, as specifically authorized under the turnover provision of the bankruptcy code, 11 U.S.C. § 542, and it is time for JPMC to provide the Court with more than vague assurances that it can justify its refusal to release those funds. Plaintiffs therefore respectfully request that the Court direct that JPMC promptly submit its Opposition to the Motion for Summary Judgment, and, upon joint consideration of that motion with the Motion to Dismiss, direct that JPMC remit Plaintiffs' deposits.

Dated: June 19, 2009
Wilmington, Delaware

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² It is absurd for JPMC to claim that Plaintiffs are in favor of delay. (Opp. at 4, n. 4.) In fact, Plaintiffs have been taking all appropriate steps to secure the prompt return of their deposits, whereas JPMC has sought to erect procedural obstacles to put off that result and thereby retain the use of Plaintiffs' funds. JPMC's effort to avoid presenting evidence in support of its position, and to have the Court resolve its Motion to Dismiss without even considering Plaintiffs' Motion for Summary Judgment, is a clear example of this strategy.

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