

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

In re:)	Chapter 11
)	Case No. 08-12229 (MFW)
WASHINGTON MUTUAL, INC., <i>et al.</i> ,)	Jointly Administered
)	
)	Objections Due: 05/13/11 at 4:00 p.m.
)	Hearing Date: 06/06/11 at 9:30 a.m.
Debtors.)	Related to Docket No. 6696

**OBJECTION OF STEPHEN J. ROTELLA TO THE
MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS
PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

Stephen J. Rotella (“Rotella”), by and through his undersigned counsel, hereby objects to confirmation of the *Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 6696] (“Plan”), and in support thereof, respectfully states as follows:

BACKGROUND

1. On September 26, 2008 (“Petition Date”), the above-captioned debtors (“Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Bankruptcy Code (“Bankruptcy Code”).

2. Prior to the Petition Date, Rotella was employed by debtor Washington Mutual, Inc. (“WMI”) pursuant to an Employment Agreement dated as of January 10, 2005, as amended (“Agreement”).

3. Pursuant to the Agreement, the Restated Bylaws of Washington Mutual, Inc., the Amended and Restated Articles of Incorporation of Washington Mutual, Inc., 12 CFR § 545.121, and Chapter 23B.08 of the Washington Business Corporation Act, the Debtors are obligated to indemnify and hold Rotella harmless from and against any and all liability, expenses, etc. arising



from or relating to Rotella's service as an officer and director of WMI ("Indemnity Obligations").

4. Pursuant to Section 36.6 of the Plan, the Debtors are seeking to "reject," *inter alia*, "the obligations of the Debtors to indemnify and reimburse their directors or officers that were directors or officers, respectively, on or prior to the Petition Date." The sources from which the to-be-rejected "obligations" arise are not specifically identified by the Plan.

OBJECTION

5. Rotella objects to the proposed rejection of the Debtors' Indemnity Obligations. There is no section of the Bankruptcy Code that authorizes the rejection of "obligations." The Bankruptcy Code only permits rejection of executory contracts. However, neither the Debtors' governing corporate documents, nor the applicable statutes are executory contracts, and they cannot be rejected by the Debtors under the Bankruptcy Code.

6. Further, the Agreement is not an executory contract. The only obligations remaining due under the Agreement are the Debtors' obligations to, *inter alia*, (i) make payments due to Rotella; and (ii) indemnify and hold Rotella harmless. A contract is not considered executory where only mere payment remains due and owing on the part of the debtor. *Phillip Servs. Corp. v. Luntz (In re Phillip Servs. Inc.)*, 284 B.R. 541, 545 (Bankr. D. Del. 2002).¹ An indemnification agreement is not considered executory where the only remaining obligation under the agreement is for the debtor to continue to reimburse the officer or director for defense costs. *Id.* Thus, a debtor may not reject an indemnification agreement with a former officer or director. *In re THC Fin. Corp.*, 446 F. Supp. 1329, 1332 (D. Hi. 1977), affirmed by *Employees*

¹ See also, Vern Countryman, *Executory Contracts in Bankruptcy Part I*, 57 Minn. L.Rev. 439, 460 (1973) (An executory contract is "one under which the obligations of both the debtor and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.").

Ret. Sys. of Hi. v. Osborne (In re THC Fin. Corp.), 686 F.2d 799, 804 (9th Cir. 1982). Accordingly, the Agreement is not executory, and it cannot be rejected.


7. Finally, the Debtors' Indemnity Obligations to Rotella are covered by certain insurance policies ("D&O Policies"). Rotella objects to the Plan to the extent that any provision of the Plan and/or any purported rejection of the Indemnity Obligations is deemed to have any effect on the D&O Policies or the obligations of the insurers under the D&O Policies.

8. To the extent not inconsistent with the arguments raised herein, Rotella joins in the objections filed by other creditors and/or parties-in-interest to the Plan.

WHEREFORE, Rotella respectfully requests that this Court deny confirmation of the Plan to the extent inconsistent herewith, and further respectfully requests that the Court grant such additional and further relief as it may deem just and proper.

Dated: May 13, 2011

CONNOLLY BOVE LODGE & HUTZ LLP



Jeffrey C. Wisler (No. 2975)
Christina M. Thompson (No. 3976)
The Nemours Building
1007 N. Orange Street
P.O. Box 2207
Wilmington, Delaware 19801
(302) 658-9141
Counsel for Stephen J. Rotella

#4320276

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of May, 2011, a copy of the **Objection of Stephen J. Rotella to the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code** was served as indicated upon the following counsel.

BY HAND DELIVERY

Mark D. Collins, Esq.
Chun I. Jang, Esq.
Richards, Layton & Finger, P.A.
920 N. King Street
Wilmington, DE 19801

David B. Stratton, Esq.
Pepper Hamilton LLP
Hercules Plaza, Suite 5100
1313 N. Market Street
Wilmington, DE 19801

William P. Bowden, Esq.
Ashby & Geddes, P.A.
500 Delaware Avenue, 8th Floor
Wilmington, DE 19801

Adam G. Landis, Esq.
Landis Rath & Cobb LLP
919 Market Street, Suite 1800
Wilmington, DE 19801

Jane Leamy, Esq.
Office of the United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19801

BY TELEFAX AND FIRST CLASS U.S. MAIL

Brian S. Rosen, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Peter Calamari, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
55 Madison Avenue, 22nd Floor
New York, NY 10036

Fred S. Hodara, Esq.
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036

Stephen D. Susman, Esq.
Susman Godfrey LLP
654 Madison Avenue, 5th Floor
New York, NY 10065

Stacey R. Friedman, Esq.
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

BY FIRST CLASS U.S. MAIL

Washington Mutual, Inc.
925 Fourth Avenue
Seattle, WA 98104
Attn: Charles Edward Smith, Esq.



Jeffrey C. Wisler