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Hearing Date: July 9, 2012
Time: 11:00 a.m.

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Unions and Participating Employers Pension Fund*

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

FILENE'S BASEMENT, LLC, *et al.*,

Debtors.

)
) Chapter 11
)

) Case No. 11-13511 (KJC)
)

) Jointly Administered
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**OBJECTION OF THE UNITED FOOD AND COMMERCIAL WORKERS UNIONS
AND PARTICIPATING EMPLOYERS PENSION FUND TO CONFIRMATION OF
DEBTORS' JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF
THE UNITED STATES BANKRUPTCY CODE**

The United Food and Commercial Workers Unions and Participating Employers Pension Fund (the "Pension Fund"), by and through its counsel, hereby files this objection to confirmation of the debtors' (the "Debtors") joint plan of reorganization pursuant to Chapter 11 of the United States Bankruptcy Code (the "Plan"). In support of its Objection, the Pension Fund respectfully states as follows:



1. The Pension Fund is a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301(a)(3). The plan sponsor within the meaning of ERISA Section 3(16)(B), 29 U.S.C. §§ 1002(16)(B) is the Board of Trustees (“Trustees”). The Pension Fund is administered at 911 Ridgebrook Road, Sparks, Maryland 21142-9459.

2. Debtor Syms Corp. (“Syms”) is a signatory to a collective bargaining agreement with United Food and Commercial Workers’ International Union Local 400 (the “CBA”), pursuant to which Syms is obligated to make contributions to the Pension Fund for covered employees.

3. On or about February 1, 2012, Syms permanently ceased all covered operations under the Pension Fund, and consequently incurred a complete withdrawal under ERISA Section 4203(2), 29 U.S.C. § 1385. As a result, the Pension Fund assessed withdrawal liability against Syms in accordance with ERISA Section 4201, 29 U.S.C. § 1381. The total amount of the withdrawal liability is estimated at \$500,077, but this is subject to revision once the information necessary to complete the calculation becomes available to the Pension Fund.

4. The Pension Fund timely filed proofs of claim against each of the Debtors for the estimated amount of withdrawal liability, since each of the Debtors is under common control within the meaning of ERISA Section 4001(b)(1), 29 U.S.C. § 1301(b)(1). With respect to each Debtor, the Pension Fund filed (1) a Proof of Claim and (2) a Proof of Chapter 11 Administrative Claim, each for the total amount of estimated withdrawal liability.¹ Because Syms’s complete withdrawal in February 2012 occurred after the November 2, 2011 petition date, the Pension

¹ The claims were recorded as proofs of claim numbered 2639, 2641, 2645, 2647, 2648, 2660, 2664, and 2665.

Fund is entitled to treatment of its claim as an administrative expense of the Debtors' reorganization.

5. The Pension Fund intends to file an amended Proof of Claim and Proof of Chapter 11 Administrative Claim reflecting delinquent contributions owed by Syms for the period January 2010 to December 2011 to the Pension Fund, which were discovered by a regular payroll audit of Sym's records completed March 7, 2012, after the original claims bar date. Of the total delinquent amount of \$2,285.88, \$190.49 is attributable to covered work performed on or after the petition date, and therefore the Pension Fund is entitled to administrative treatment of that portion of this claim.

6. The Debtors seek approval of a Plan that appears to characterize all pension withdrawal liability claims as general unsecured claims. Although the Plan and related disclosure statement ("Disclosure Statement") do not specifically mention the Pension Fund's claim, nor have the Debtors objected to the Pension Fund's characterization of its withdrawal liability and delinquent contribution as administrative, the Disclosure Statement implies that withdrawal liability will be treated only as a general unsecured claim, and not an administrative claim. (D.N. 1364 at 17)

7. The Bankruptcy Code grants priority to "administrative expenses," which are defined as "the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case." 11 U.S.C. §§ 503, 507. Administrative expenses are designed to allow the debtor in possession or bankruptcy trustee rehabilitate the business for the benefit of the estate's creditors. *Trs. of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1985). To qualify as an administrative

expense, an expense must: (1) arise from a post-petition transaction between the creditor and the debtor; and (2) be for the benefit of the estate. *Id.*; *Trucking Employees of N. Jersey Welfare Fund, Inc. v. Marcal Paper Mills, Inc.*, No. 09-1863, 2009 U.S. Dist. LEXIS 101695, at *13 (D. N.J. Nov. 2, 2009). An expense incurred for the benefit of the estate is an expense necessary to preserve the value of the estate and includes costs “ordinarily incident to operation of a business.” *Trucking Employees*, 2009 U.S. Dist. LEXIS 101695, at *13.

8. Syms’s continuation of participation in the Pension Fund occurred after Debtors’ 2011 petition for bankruptcy protection, and Syms’s later withdrawal from the Pension Fund shows that Syms’s continued participation was an integral part of its reorganization. As such, the withdrawal is a post-petition transaction, and payment of the withdrawal liability as a result of Syms’s participation into 2012 is an expense necessary to preserve the value of the estate. Consequently, the Pension Fund is entitled to treatment of its claim as an administrative expense of the Debtors’ reorganization.

9. At a minimum, the Courts of Appeals for the Second and Third Circuits have recognized that a portion of withdrawal liability should be classified as an administrative expense where it is attributable to post-petition covered work. See *In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 314-315 (3d Cir. 2011) (“covered employees were required to perform work post-petition in order to keep [the debtor] in operation, unquestionably conferring a benefit to the estate”), *McFarlin’s*, 789 F.2d at 101-04.

10. The closing of the covered Syms stores occurred several months after Debtors filed for bankruptcy protection. During the period between the petition date and the store closings, while Debtors’ stores liquidated their inventory, Syms benefitted from the continued

labor of employees for whom Syms was required to contribute to the Pension Fund. Consequently, the withdrawal liability owed by Syms to the Pension Fund is attributable to post-petition covered work, and thus the Pension Fund is entitled to administrative treatment of the withdrawal liability.

11. To the extent that the Disclosure Statement seeks to categorize the Pension Fund's entire claim as non-administrative, contrary to the assertions in the Pension Fund's proofs of claim, the Pension Fund respectfully objects to the confirmation of the Plan in its current form.

Dated: June 29, 2012
Washington D.C.

/s/ Timothy K. Eicher
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