

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

	X	
	:	Chapter 11
In re:	:	
	:	Case No. 11-13511 (KJC)
FILENE'S BASEMENT, LLC, <u>et al.</u> , ¹	:	
	:	Jointly Administered
Debtors.	:	
	:	Re: Docket Nos. 1364, 1572
	X	

DEBTORS' RESPONSE TO LIMITED OBJECTION OF U.S. BANK NATIONAL ASSOCIATION, IN ITS CAPACITY AS TRUSTEE, TO THE DISCLOSURE STATEMENT WITH RESPECT TO THE JOINT CHAPTER 11 PLAN OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES [DOCKET NO. 1572]

The above-captioned debtors and debtors in possession (each a "Debtor" and, collectively, the "Debtors"), by and through their undersigned counsel, hereby file this response (the "Response") to the *Limited Objection of U.S. Bank National Association, in its Capacity as Trustee, to the Disclosure Statement With Respect to the Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries [Docket No. 1572]* (the "Limited Objection").

In support of this Response, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT²

In its Limited Objection, U.S. Bank confuses the confirmation requirement that the Debtors pay allowed administrative claims in full in cash on the effective date, with the disclosure statement requirement that the Debtors provide "adequate information" to creditors and interest holders to enable them to decide whether to vote in favor of the Plan. The detailed

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Filene's Basement, LLC (8277), Syms Corp. (5228), Syms Clothing, Inc. (3869), and Syms Advertising Inc. (5234). The Debtors' address is One Syms Way, Secaucus, New Jersey 07094.

² Capitalized terms utilized herein but not otherwise defined shall have the meanings ascribed to such terms in the *Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries* [Docket No. 1363] (the "Plan") or the *Disclosure Statement With Respect to the Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries* [Docket No. 1364] (the "Disclosure Statement"), as applicable.



information in the Disclosure Statement regarding the proposed treatment of allowed Administrative Claims provides more than sufficient information to enable voting creditors in these cases to decide whether to cast their votes in favor of the Plan. The appropriate funding of the Administrative Claims Reserve will be considered at confirmation in connection with the Court's evaluation of the other confirmation requirements specified in section 1129(a) of the Bankruptcy Code.

Moreover, by the time U.S. Bank's Limited Objection is considered in connection with Plan confirmation, it will be moot. The Debtors believe that, aside from a \$5,026.55 cure amount, U.S. Bank's claims³ are entirely without merit and ultimately will be disallowed by the Court in litigation that already is underway.⁴ Because the Debtors' Plan likely will be confirmed before the hearing on the U.S. Bank Claims,⁵ the Debtors intend to file a motion to estimate these claims for reserve purposes, to be heard at or before the hearing on confirmation of the Plan. In the unlikely event that the Court determines that some limited reserve amount is necessary to protect U.S. Bank, the Debtors will reserve that amount on account of the U.S. Bank Claims.

³ U.S. Bank National Association ("U.S. Bank") filed two proofs of claim against Syms Corp. ("Syms") relating to that certain Ground Lease between U.S. Bank as landlord and Syms, as assignee thereunder, for property located in Secaucus, New Jersey (the "Ground Lease"): (i) an unliquidated, disputed administrative claim in the amount of not less than \$3.51 million; and (ii) a general unsecured claim in the amount of not less than \$17,000 (together, the "U.S. Bank Claims"). Because the Debtors are assuming the Ground Lease (see Docket No. 1247), both U.S. Bank Claims will be Administrative Claims in these cases.

⁴ On July 5, 2012, the Court entered a scheduling order [Docket No. 1583] (the "Scheduling Order"), which sets forth an expedited timeline for resolving the U.S. Bank Claims, culminating in a trial to be held on September 25, 2012.

⁵ Although at the time the Scheduling Order was negotiated, it was anticipated that the hearing to determine the validity of the U.S. Bank Claims would be conducted prior to confirmation of the Plan, the recent settlement among the parties that currently is being documented has accelerated the timetable for confirmation of the Plan, thereby necessitating an estimation proceeding.

RESPONSE

A. The Limited Objection Raises Confirmation, Not Disclosure Statement Issues, and Regardless, the Disclosure Statement Contains Adequate Information With Respect to the Treatment of Administrative Claims Under the Plan

1. Section 1129(a)(9)(A) of the Bankruptcy Code requires that holders of administrative claims be paid the allowed amounts of such claims in cash on the effective date of the plan—or the plan can not be confirmed. See 11 U.S.C. § 1129(a)(9)(A). The Debtors will have the burden at confirmation to establish that this requirement has been satisfied. However, the Debtors are not required at the hearing on the Disclosure Statement to make this case.⁶

2. Rather, the Debtors at this stage of the cases simply are required to provide holders of impaired claims with “adequate information” regarding the proposed Plan. See 11 U.S.C. § 1125(a)(1). A disclosure statement must, as a whole, provide information that is “reasonably practicable” to permit an “informed judgment” by creditors and interest holders entitled to vote on the plan. See In re Phoenix Petroleum Co., 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001); In re Dakota Rail, Inc., 104 B.R. 138, 142 (Bankr. D. Minn. 1989); see also In re Copy Crafters Quickprint Inc., 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) (adequacy of disclosure statement “is to be determined on a case-specific basis under a flexible standard that can promote the policy of chapter 11 towards fair settlement through a negotiation process

⁶ Although it may be appropriate to raise confirmation objections at the disclosure statement stage of a case when the plan under consideration is so fatally flawed that that confirmation is impossible, the Plan here facially satisfies all confirmation requirements and, in particular, the requirement of section 1129(a)(9)(A) that holders of administrative claims be paid the allowed amounts of their claims in cash on the effective date of the plan. See, e.g., In re Phoenix Petroleum Co., 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) (noting that “Courts generally have agreed that it may, on occasion, be appropriate to consider issues at the disclosure hearing stage which could otherwise be raised at confirmation, if the described plan is fatally flawed so that confirmation would not be possible.”); accord In re Eastern Maine Elec. Cooperative, Inc., 125 B.R. 329, 333 (Bankr. D. Me. 1991) (finding that a “disclosure statement should be disapproved at the threshold only where the plan it describes displays fatal facial deficiencies or the stark absence of good faith”); In re Cardinal Congregate I, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) (noting that disapproval of the adequacy of a disclosure statement only is appropriate where it describes a plan of reorganization that is so fatally flawed that confirmation is impossible).

between informed interested parties”). Fundamentally, a disclosure statement “must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution.” In re Ferretti, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

3. To the extent that voting creditors are concerned about the treatment of Administrative Claims, the Debtors submit that the Disclosure Statement provides “adequate information” regarding the Plan’s treatment of such claims:

- Allowed Administrative Claims will be paid in full in cash on the effective date as required by section 1129(a)(9)(A) of the Bankruptcy Code. See Disclosure Statement at p. 24.
- The Debtors will establish an Administrative Claims Reserve, which the Debtors will fund in an amount equal to the estimate of all allowed Administrative Claims. See id. at p. 32.
- The estimated aggregate amount of allowed Administrative Claims against Syms is \$19.5 million. See id. at 24.
- To the extent that a claim is disputed, the Disclosure Statement explains the process for resolving such disputed claims. See id. at p. 36.

This detailed information with respect to the treatment of allowed Administrative Claims constitutes information that is more than sufficient for a creditor to determine whether to vote to accept or reject the Plan.

4. While holders of Administrative Claims like U.S. Bank have a legitimate interest in having their allowed claims paid in full, such holders are not entitled to vote and their concerns regarding the mechanical process of setting reserves is squarely an issue for the hearing on confirmation of the Plan—at which time it will be considered by the Court in its evaluation of the various confirmation requirements specified in section 1129 of the Bankruptcy Code.

B. U.S. Bank's Limited Objection Will Be Rendered Moot Before it is Properly Considered in Connection with Confirmation of the Plan

5. Additionally, to the extent that the Limited Objection raises a legitimate confirmation objection, it will be rendered moot before it is ever heard by the Court. Because the U.S. Bank Claims likely will not be adjudicated until after the Plan has been confirmed, the Debtors intend to file a motion to estimate such claims for the sole purpose of determining the amount necessary to fund the Administrative Claims Reserve with respect to U.S. Bank's claims. The Debtors will seek to have the estimation motion heard on or before the date of the Debtors' hearing on confirmation of the Plan. While the Debtors, in their business judgment, believe that the U.S. Bank Claims are wholly without merit (aside from a \$5,026.55 cure amount)—and consequently that no reserve should be required—if the Court determines that some limited reserve is necessary to protect U.S. Bank, the Debtors will fund the Administrative Claims Reserve in the Court-determined amount on account of the U.S. Bank Claims.

CONCLUSION

For the reasons set forth above, the Court should overrule the Limited Objection filed by U.S. Bank and approve the Disclosure Statement.

Dated: July 6, 2012
Wilmington, Delaware

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