

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

In re:

FILENE'S BASEMENT, LLC, et al.,Debtors.¹

Chapter 11

Case No. 11-13511 (KJC)

Jointly Administered

Re: Docket No. 1640, 1641

**OBJECTION OF ASM CAPITAL, LP
TO THE DEBTORS' DISCLOSURE STATEMENT WITH
RESPECT TO THE SECOND AMENDED JOINT CHAPTER 11 PLAN
OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES**

ASM Capital, LP ("ASM"), by and through its undersigned counsel, hereby files this objection and reservation of rights (the "Objection") to the Debtors' Disclosure Statement (the "Disclosure Statement") with Respect to the Second Amended Joint Chapter 11 Plan of Reorganization (the "Proposed Plan") of Syms Corp. ("Syms") and Its Subsidiaries (collectively, the "Debtors") [Docket No. 1641], and in support thereof, ASM states as follows:

PRELIMINARY STATEMENT

1. ASM understands that the Disclosure Statement and Proposed Plan are the product of negotiations between the Debtors, the Official Committee of Syms Corp. Equity Security Holders (the "Equity Committee"), and the Official Committee of Unsecured Creditors (the "Creditors Committee"). The fact that these three constituencies were able to agree upon terms of a plan does not make it fair, particularly where none of those constituencies have a significant interest in the general unsecured claims in the Syms bankruptcy case.²

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, NJ 07094.

² Upon information and belief, at least three and possibly four of the creditors on the Creditors Committee have claims which are significantly larger in the Filene's case than in the Syms case. For example, based upon the claims



2. Here the Proposed Plan is unconfirmable because it brazenly violates the absolute priority rule set forth in 11 U.S.C. § 1129(b)(2)(B) by allowing Syms' equity holders to receive payments prior to Syms' creditors having been paid in full.

3. Were it not enough that Syms' general unsecured creditors may have to wait until a yet-undetermined time to receive the distributions to which they are entitled, thereby violating the absolute priority rule, the Proposed Plan provides that Syms' general unsecured creditors will only receive interest upon the remaining outstanding portion of their claims as of October 1, 2015. Accordingly, Syms' creditors will not receive or retain under the Proposed Plan the value as of the Effective Date of the Proposed Plan that they would receive if the Debtors were liquidated under Chapter 7. Such proposed treatment violates the best interests of creditors test set forth in 11 U.S.C. § 1129(a)(7).

BACKGROUND

4. On July 13, 2012,³ the Debtors filed the Proposed Plan [Docket No. 1640], which provides in relevant part, the following treatment of Syms' general unsecured claims:

Syms Class 4: Syms General Unsecured Claims (Impaired) - Syms Class 4 consists of Syms General Unsecured Claims. After all Allowed Senior Claims have been paid in full or, to the extent not paid in full, funds

register on the website of the Court appointed claims agent, PVH, Corp. has claims against Syms aggregating \$818,773.40 whereas it has claims in the aggregating amount of approximately \$4.7 million against Filene's. Vornado Realty Trust filed a claim in the amount of \$2,033,448.47 against Filene's and an unliquidated claim against Syms. A third Committee member, Saul Zabar, Stanley Zabar, and 2220 Broadway, LLC filed a claim against Filene's and none against Syms. ASM has not been able to determine the claims of a fourth member of the Committee, Rabina Properties, LLC. The fact that the majority of the members of the Creditors Committee predominant have claims against Filene's should give rise to greater judicial scrutiny with respect to the proposed settlement, particularly where it appears that the cost of such settlement is disproportionately borne by the Syms' creditors.

³ To be specific, the Proposed Plan was filed at 4:57 a.m. and the current iteration of the Disclosure Statement was filed at 5:18 a.m. on July 13, 2012. A prior version of the Proposed Plan was filed at 12:58 a.m. on July 12, 2012 and the prior version of the Disclosure Statement was filed at 4:11 a.m. on July 12, 2012. ASM does not object to the fact that Debtors gave creditors less than 34 hours to review and analyze a 121 page disclosure statement, which is one of the most significant pleadings filed in any Chapter 11 case. ASM does believe that it is appropriate to note, however, that the federal rules generally permit parties in interest more than a day and a half to respond to pleadings which are far less legally significant.

sufficient to satisfy such Claims have been placed in a segregated reserve, and as and to the extent practicable as Excess Cash becomes available, each Holder of an Allowed Syms General Unsecured Claim shall receive, on the later of (a) the Initial Distribution Date or (b) the Distribution Date(s) immediately following the date on which such Holder's Syms General Unsecured Claim becomes an Allowed Syms General Unsecured Claim (1) one or more cash payments from 60% of the first available distributable Excess Cash until the Initial Majority Shareholder Payment is made in full from the other 40% of the first available distributable Excess Cash, and then cash payments aggregating not more than 100% of the Allowed amount of its Allowed Syms General Unsecured Claim, or (2) such other less favorable treatment as to which such Holder and Syms shall have agreed upon in writing, in full satisfaction, settlement, release, and discharge of and in exchange for its Allowed Syms General Unsecured Claim. Interest shall accrue at a rate of 7.0% per annum on any unpaid Plan Distribution to Holders of Allowed Syms General Unsecured Claims from and after October 1, 2015. Interest shall be paid in kind and compounded annually.

Proposed Plan, Section C, V.4.

OBJECTION

5. Courts have routinely held that, in deciding whether to approve a disclosure statement under Bankruptcy Code section 1125, the Court must first determine whether the underlying plan of reorganization can itself be confirmed. See, e.g., In re Cardinal Congregate I, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990); In re Filex, Inc., 116 B.R. 37, 40-41 (Bankr. S.D.N.Y. 1990); In re Atlanta West VI Ltd. P'ship, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988); In re Unichem Corp., 72 B.R. 95, 97-98 (Bankr. N.D. Ill. 1987), aff'd, 80 B.R. 448 (N.D. Ill. 1987); In re Pecht, 53 B.R. 768, 772 (Bankr. E.D. Va. 1985); In re McCall, 44 B.R. 242, 243 (Bankr. E.D. Pa. 1984). If the plan cannot possibly be confirmed as a matter of law, then the disclosure statement should not be approved because such approval would simply waste judicial time and estate assets in a fruitless solicitation and confirmation attempt. See, e.g., Atlanta West VI Ltd. P'ship, 91 B.R. at 622; In re McCall, 44 B.R. at 243; In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988).

6. ASM objects to the Disclosure Statement because the proposed treatment of Class 4 - Syms' general unsecured claims – under the Proposed Plan violates the absolute priority rule under 11 U.S.C. § 1129(b)(2)(B), rendering the Proposed Plan unconfirmable. A plan may only be confirmed over the objection of a dissenting group if: (1) the dissenting creditors will be paid in full; or (2) if no one with a claim or interest junior to the claims of the creditor will receive a recovery under the plan. See, e.g., 11 U.S.C. §§ 1129(b)(2)(B)(i) and (b)(2)(B)(ii). Because the Proposed Plan does not provide full recovery to general unsecured creditors of Syms prior to Syms' equity holders receiving the Initial Majority Shareholder Payment, the Proposed Plan violates the absolute priority rule.

7. ASM anticipates that the Debtors and both official committees will argue that the Disclosure Statement should be approved because the absolute priority rule only becomes an issue if Class 4 creditors vote to reject the Proposed Plan. Therefore, they will likely argue that the Court should wait until after solicitation and voting to adjudicate whether the Debtors' efforts to contravene the waterfall contemplated under the Bankruptcy Code was appropriate. ASM acknowledges that the Court could delay ruling on this issue until confirmation, however such determination would come only after a lengthy delay and a costly solicitation process. ASM respectfully submits that the Court should address the issue of the absolute priority rule before the estates serve out thousands of copies of the Disclosure Statement and Proposed Plan.

8. While the issue of the absolute priority rule could be kicked down the road until confirmation, the best interests of creditors test cannot. Section 1129(a)(7) of the Bankruptcy Code requires that each holder of a claim or interest in an impaired class receive or retain under the Plan the value as of the Effective Date of the plan that they would receive if the Debtors were liquidated under Chapter 7. Here, the Debtors seek to disallow creditors from receiving any

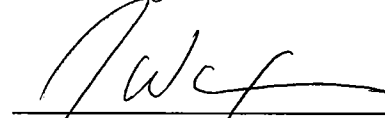
interest until October 1, 2015.⁴ Accordingly, if the Debtors were to remit final payment on account of Class 4 claims on September 30, 2015, the holders of such claims would receive no interest at all.

9. Unlike the absolute priority rule, the best interests of creditors test is not conditioned upon creditor voting, and ASM by and through this objection unequivocally states that it will object to any treatment of its claims which does not provide ASM with appropriate interest for any claim not paid on the Effective Date.

WHEREFORE, ASM respectfully requests entry of an Order (i) sustaining ASM's Objection to the First Amended Disclosure Statement, and (ii) granting to ASM such other and further relief as may be just and equitable.

Dated: July 13, 2012

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⁴ As a point of clarification, it is unclear from the language of Section C, V.4 of the Proposed Plan that Class 4 creditors could ever receive any interest at all. Specifically, Section C, V.4 of the Proposed Plan states that claims which are unpaid prior to October 1, 2015 are entitled to interest but, in the prior sentence, it states that Class 4 claims shall receive "... cash payments aggregating not more than 100% of the Allowed amount of its Allowed Sym's General Unsecured Claim." ASM presumes that the Debtors intended to permit such claims to receive 100%, plus whatever interest is permitted under this Section.