

**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)

**ULTRA STORES, INC.'S MOTION FOR TEMPORARY ALLOWANCE OF CLAIM
FOR VOTING PURPOSES ONLY PURSUANT TO BANKRUPTCY RULE 3018**

Ultra Stores, Inc. ("Ultra"), by and through its undersigned counsel, submits this motion (the "Motion") for an order allowing its claim for the purpose of voting to accept or reject the *Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries*, dated July 13, 2012 [Docket No. 1640] (the "Plan"). In support thereof, Ultra respectfully states as follows:

PRELIMINARY STATEMENT

1. The above-captioned debtors and debtors in possession (collectively, the "Debtors") have filed an objection to Ultra's proof of claim on May 11, 2012, seeking to disallow the claim or, in the alternative, to reduce the claim amount. Because the Debtors have determined not to prosecute the claim objection until after the confirmation hearing, Ultra seeks to have its claim temporarily allowed pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") in the amount of \$6,346,276.00 for purposes of voting to accept or reject the Plan.

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.



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JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought herein are sections 105(a) and 502(b) of Title 11 of the United States Code (the “Bankruptcy Code”) and Bankruptcy Rule 3018.

BACKGROUND

4. Prior to the petition date, Ultra and the predecessor-in-interest to Debtor Filene’s Basement, LLC (“Filene’s”) entered into a certain Licensed Department Agreement, dated November 13, 2007, as amended (the “Agreement”),² whereby Ultra was granted an exclusive license to operate retail fine jewelry departments (collectively, the “Jewelry Departments”) in certain Filene’s stores. Specifically, Ultra’s exclusive license provides that Ultra will (i) take over the operation of certain existing Jewelry Departments; (ii) open up new Jewelry Departments in certain already existing Filene’s stores; and (iii) open Jewelry Departments in all new Filene’s stores opened during the term of the Agreement in which Filene’s decides to include a Jewelry Department for such new stores. See Agreement § 2(a). (Keefe Decl., Ex. 1.) In exchange for the exclusive license, Ultra is obligated to pay Filene’s a commission calculated based upon a formula set forth in the first amendment to the Agreement, dated March 15, 2011 (the “Amendment”). See id. at § 6. (Keefe Decl., Ex. 1.); Amendment § 3. (Keefe Decl., Ex. 2.) Pursuant to the Amendment, the term of the Agreement was extended to February 29, 2016. Amendment § 2. (Keefe Decl., Ex. 2.)

² True and correct copies of the Agreement and the first amendment thereto were filed as Exhibit 1 and Exhibit 2, respectively, to the *Supplemental Declaration of Ann Keefe in Support of Debtors’ Objection to Proof of Claim No. 2032 (Ultra Stores, Inc.)* (the “Keefe Decl.”), filed on June 6, 2012 [Docket No. 1442].

5. On November 2, 2011 (the “Petition Date”), the Debtors each filed a petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware. Since the Petition Date, the Debtors have proceeded to liquidate their assets by, among other things, conducting numerous going out of business sales resulting in the permanent closing of all of the Filene’s stores containing Jewelry Departments operated by Ultra.

6. On February 24, 2012, Ultra filed a proof of claim against Filene’s which was assigned claim number 2302 (the “Claim”). The Claim is for \$6,346,276.00 on account of lost profits arising from Filene’s breach of the Agreement by closing all of the stores in which Ultra operated a Jewelry Department. Ultra calculated its Claim’s value by determining its trailing twelve month profits for the period ending October 2011 and then using that amount to project its expected profits for the remainder of the Agreement.

7. On May 11, 2012, the Debtors filed an objection (the “Claim Objection”) [Docket No. 1263] to Ultra’s Claim, seeking to disallow, or alternatively to reduce, the Claim. Specifically, the Claim Objection argues that (i) Ultra waived its right to assert claims for lost profits; (ii) Ultra failed to set forth its calculations of the Claim and, in any event, that such calculations are presumed to be too speculative to constitute a valid claim; and (iii) the Debtors can opt out of the Agreement as of February 28, 2013 by providing “notice of non-renewal.”³ On June 1, 2012, the Official Committee of Unsecured Creditors filed a joinder [Docket No. 1424] to the Claim Objection, which reiterates the Debtors’ waiver argument.

8. On June 4, 2012, Ultra filed a response [Docket No. 1431] to the Claim Objection, setting forth the validity of the Claim and contesting the Debtors’ assertions in the Claim Objection. Specifically, the response argued that the Claim Objection should be denied

³ Also on May 11, 2012, the Debtors moved [Docket No. 1262] to reject the Agreement (the “Rejection Motion”). Ultra filed a limited objection [Docket No. 1428] contesting, among other things, the *nunc pro tunc* relief sought in the Rejection Motion. The Rejection Motion is still pending.

because (i) the Debtors misconstrued the terms of the Agreement which does not waive Ultra's right to seek lost profits in the event the Debtors close all of their stores; (ii) Ultra calculated its claim for lost profits to a reasonable degree of certainty as required by the law and subsequently provided support for its calculations; and (iii) the Agreement only authorizes opting out of the automatic one-year renewals of the Agreement after the end of the current term (February 29, 2016) and not to the ability to terminate the Agreement prior to its set expiration period. The Debtors filed a reply [Docket No. 1441] to the Ultra's response, reasserting their prior arguments.

9. A status conference on the Claim Objection was held on July 9, 2012. At that time the Debtors advised the Court they would seek to move for summary judgment and Ultra requested that the Court refer the matter to mediation. The Court indicated it would decide whether to refer the matter to mediation after reviewing the parties' submissions in connection with any summary judgment motions.

10. On July 13, 2012, the Debtors filed their Plan. The Plan separately classifies general unsecured claims of Filene's into two separate classes – Filene's Class 4A and B: Filene's General Unsecured (Short-Term) Claims ("Filene's Class 4 Claims") and Filene's Class 5A and B: Filene's General Unsecured (Long-term) Claims ("Filene's Class 5 Claims"). Claims that are Filene's Class 5 Claims are comprised of contract damage claims and Filene's Class 4 Claims are all other general unsecured claims other than convenience class claims and certain union claims. (See Plan Art. I, §§ 1.77, 1.78.) Pursuant to the distribution mechanism established by the Plan, Filene's Class 4 Claims are to receive excess cash over time until Filene's Class 4 Claims are paid in full, whereas holders of Filene's Class 5 Claims are to receive excess cash over time up to 75% of each Filene's Class 5 Claim. (See id. at Art. IV.) Ultra

believes its Claim constitutes a Filene's Class 5 Claim.

11. On July 13, 2012, the Court entered an *Order (I) Approving Disclosure Statement; (II) Approving Ballot Solicitation And Tabulation Procedures, Key Dates And Deadlines Related Thereto, Forms Of Ballots, And Manner Of Notice; And (III) Fixing Date, Time And Place For Confirmation Hearing And Deadline for Filing Objections Thereto* [Docket No. 1655] (the "Solicitation Order"). The Solicitation Order directs parties seeking to have claims temporarily allowed for voting purposes to file a motion seeking such relief on or before August 17, 2012. The Debtors extended such deadline for Ultra through and including August 21, 2012.

RELIEF REQUESTED

12. In accordance with the Solicitation Order and Bankruptcy Rule 3018(a), Ultra seeks an order temporarily allowing its Claim in the amount of \$6,346,276.00, the amount asserted in the Claim, for the sole purpose of voting to accept or reject the Plan.

BASIS FOR RELIEF

13. Pursuant to section 1126(a) of the Bankruptcy Code, a "holder of a claim or interest allowed under section 502 of this title may accept or reject a plan." 11 U.S.C. § 1126(a). Further, section 502(a) provides that, a "claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a).

14. In cases where a creditor is excluded from participating in the confirmation process through a claims objection, Bankruptcy Rule 3018 allows a creditor to seek Court authorization to participate in the confirmation process. See In re Century Glove, Inc., 88 B.R. 45, 46 (Bankr. D. Del. 1988) (stating that Rule 3018 "was designed to give all creditors, even those holding disputed claims, the opportunity to vote and provided the means of accomplishing

this.”). Bankruptcy Rule 3018(a) provides, in relevant part, that “[N]otwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.” Fed. R. Bank. P. 3018(a).

15. The decision to grant the relief requested pursuant to Bankruptcy Rule 3018 is subject to the reasonable discretion of the court. In re Ralph Lauren Womenswear, Inc., 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996); In re Zolner, 173 B.R. 629, 633 (Bankr. N.D. Ill. 1994) (Rule 3018(a) contemplates a summary hearing and exercise of court’s discretion based on reasoned analysis). Temporary allowance of a claim for voting purposes is appropriate when full adjudication of the matter could not be completed before confirmation or would delay administration of the bankruptcy case. See 9 Collier on Bankruptcy ¶ 3018.01[5] (16th ed. rev. 2011); see also In re Stone Hedge Properties, 191 B.R. 59, 65–66 (Bankr. M.D. Pa. 1995) (observing that a bankruptcy court should consider equitable principles in considering the temporary allowance of claims for voting purposes). Indeed, to allow disputed claims “to vote on the plans, even though some may be eventually disallowed for purposes of distribution, is more in keeping with the spirit of Chapter 11 which encourages creditor vote and participation in the reorganization process.” In re Amarex Inc., 61 B.R. 301, 302 (Bankr. W.D. Okla. 1985).

16. By temporarily allowing ultra’s Claim for voting purposes, the Debtors will be able to continue to devote their resources to confirmation and Ultra will be able to participate in the confirmation process. Such a result is fair and equitable to all parties involved.

17. Indeed, given the disparate treatment of Filene’s Class 4 Claims and Filene’s Class 5 Claims, it is important that Ultra be allowed to participate fully in the confirmation process. Pursuant to the Plan, Ultra’s Claim is classified separately from other unsecured claims

and is expected to recover approximately 25% less than such other unsecured claimants. Moreover, Ultra's recovery is subject to the additional risk that its claim receives payment only after all Filene's Class 4 Claims have been paid. Ultra does not believe any justification for the separate classification and disparate treatment of Filene's Class 4 Claims and Filene's Class 5 Claims exists and Ultra intends to file an objection to confirmation of the Plan on account of such disparate classification and treatment.

18. Further, Ultra's Claim could impact whether Filene's Class 5 votes to accept or reject the Plan. The Debtors' disclosure statement estimates that the total amount of Filene's Class 5 Claims is approximately \$36.877 million. (*See Disclosure Statement with Respect to the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries*, dated July 13, 2012 [Docket No. 1641] at pp. 10-11.) Ultra's Claim constitutes a significant portion of the total amount of estimated Filene's Class 5 Claims. Thus, the Claim should be temporarily allowed to permit Ultra to participate fully in the confirmation process.

19. Moreover, the temporary allowance of Ultra's Claim in its asserted amount of \$6,346,276.00 is also warranted. Ultra calculated the value of its claim based upon accepted principles of Massachusetts law, the law governing the Agreement. Specifically, Massachusetts law recognizes a claim for lost profits where "the loss of [prospective profits] appears to have been the direct result of the wrong complained of and when they are capable of proof to *a reasonable degree of certainty*." *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 413 (Mass. 2003) (emphasis added). Indeed, "[t]he plaintiff [is] not required to prove its lost profits with mathematical precision. Under our cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence." *Id.*

20. Here, Ultra lost prospective profits on account of the Debtors closing all of their stores containing Jewelry Departments. Ultra calculated its Claim's value by determining its trailing twelve month profits for the period ending October 2011 and then using that amount to project its expected profits for the remainder of the Agreement. Such methodology is reasonable under the circumstances. See Herbert A. Sullivan, Inc., 439 Mass. at 414 (court affirmed award of loss profits calculated on historical record projected over five years, taking into account potential revenue growth, inflation and interest rates).

21. Thus, since Ultra's Claim is asserted for a value in accordance with Massachusetts law, its Claim should be temporarily allowed for voting purposes in such amount.

CONCLUSION

WHEREFORE, Ultra respectfully requests that this Court enter an order (i) temporarily allowing its Claim solely for the purpose of voting to accept or reject the Plan; and (ii) granting any additional relief as is just and proper.

Dated: August 21, 2012


COZEN O'CONNOR

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- and -

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Exhibit A

Proposed Order

**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(
Related Docket No. _____

**ORDER GRANTING ULTRA STORES, INC.'S MOTION
FOR TEMPORARY ALLOWANCE OF CLAIM FOR
VOTING PURPOSES ONLY PURSUANT TO BANKRUPTCY RULE 3018**

This matter coming before the Court on Ultra Stores, Inc.'s ("Ultra"), motion (the "Motion") for an order temporarily allowing its claim for the sole purpose of voting to accept or reject the *Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries*, dated July 13, 2012 [Docket No. 1640] (the "Plan") pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that no other or further notice of the Motion need be provided; and upon consideration of the Motion and the responses; and the Court having determined that the Motion and the relief sought therein is warranted; and after due deliberation and sufficient cause appearing therefore, it is

ORDERED that the Motion is GRANTED; and it is further

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.

IT IS FURTHER ORDERED that Ultra shall have a temporarily allowed "Class 5: Filene's General Unsecured (Long-Term) Claims (Impaired)" claim in the amount of \$6,346,276.00 for purposes of voting on the Plan.

Date: _____, 2012

Hon. Kevin J. Carey
United States Bankruptcy Judge

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

In re:	:	Chapter 11
	:	
FILENE'S BASEMENT, LLC, <i>et al.</i> ,	:	Case No. 11-13511 (KJC)
	:	
Debtors.	:	(Jointly Administered)

CERTIFICATE OF SERVICE

I, Mark E. Felger, hereby certify that on the 21st day of August 2012, I caused a copy of the foregoing *Ultra Stores, Inc.'s Motion for Temporary Allowance of Claim for Voting Purposes Only Pursuant to Bankruptcy Rule 3018* to be served upon the parties listed below in the manner indicated:

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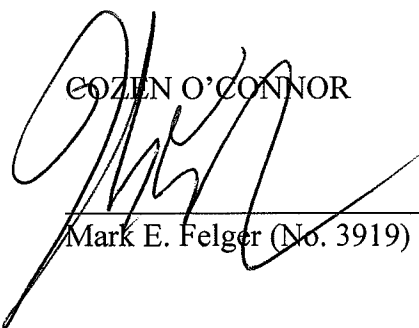
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Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: August 21, 2012

COZEN O'CONNOR



Mark E. Felger (No. 3919)