

**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 OBJECTION TO CONFIRMATION OF
SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION
OF SYMS CORP. AND ITS SUBSIDIARIES**

Ultra Stores, Inc. ("Ultra"), by and through its undersigned counsel, hereby files this objection (the "Objection") to the confirmation of 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. Filene's² Plan should not be confirmed because the Plan improperly classifies contract rejection claims separate from other similarly situated general unsecured claims, and also provides a smaller and more uncertain recovery to holders of contract rejection claims than every other class of unsecured creditors. The Debtors have failed to set forth a reasonable justification for failing to classify contract rejection claims with the other unsecured claims in Filene's Class 4,³ although both classes are comprised of general unsecured claims that share the same priority. Moreover, no business reason exists to justify the Debtors' classification scheme.

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 in the Preliminary Statement shall have the meaning ascribed to them herein.

³ Interestingly, Syms' Plan classifies contract rejection claims with other unsecured claims other than convenience claims and certain union claims.



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Filene's has discontinued operations and closed its stores permanently, is liquidating and will distribute all proceeds resulting from such liquidation to its creditors. As such, there are no continuing relationships that could justify the separate classification and the disparate treatment of Filene's Class 5 Claims.

2. Accordingly, the Plan is not fair and equitable to the creditors in Filene's Class 5 and confirmation of the Plan should be denied.

BACKGROUND

3. On November 2, 2011 (the "Petition Date"), the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a petition for relief under Chapter 11 of Title 11 of the United States Code (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 their stores.

4. On July 13, 2012, the Debtors filed their Plan. Although the Plan is proposed jointly among the Debtors, the Plan constitutes two separate Plans – one for Syms Corp. ("Syms") and one for Filene's Basement, LLC ("Filene's"). Filene's Plan establishes eight classes of claims, four of which are comprised of unsecured claims: (i) Class 3: Convenience Claims; (ii) Class 4A and B: Filene's General Unsecured (Short-Term) Claims ("Filene's Class 4 Claims"); (iii) Class 5A and B: Filene's General Unsecured (Long-Term) Claims ("Filene's Class 5 Claims"); and (iv) Class 6: Filene's Union Pension Plan Claims. This Objection focuses primarily on Filene's Class 4 Claims and Filene's Class 5 Claims.

5. 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 that are not Convenience

Claims⁴ or Union Pension Plan Claims. Specifically, the term “Filene’s General Unsecured (Long-Term) Claim” is defined as

A general unsecured Claim against Filene’s on account of rejection of an executory contract or unexpired lease pursuant to sections 365 and 502 of the Bankruptcy Code to the extent not guaranteed by Syms, and that, in all cases, is not an Administrative Claim, Convenience Claim, Intercompany Claim, Non-Tax Priority Claim, Priority Tax Claim, Secured Claim, Syms General Unsecured Claim, Syms Union Pension Plan Claim, Filene’s General Unsecured (Short-Term) Claim, Filene’s Union Pension Fund Claim, or Superpriority Intercompany Claim.

(Plan, Art. I § 1.77.) The term “Filene’s General Unsecured (Short-Term) Claim is defined as

A general unsecured Claim against Filene’s, including but not limited to any Claims of a vendor on account of goods or services provided prior to the Petition Date or of an employee for severance pay that is not guaranteed by Syms, and that is not an Administrative Claim, Convenience Claim, Intercompany Claim, Non-Tax Priority Claim, Priority Tax Claim, Secured Claim, Syms General Unsecured Claim, Syms Union Pension Plan Claim, Filene’s General Unsecured (Long-Term) Claim, Filene’s Union Pension Plan Claim, or Superpriority Intercompany Claim.

(Plan, Art. I, § 1.78.)

6. The Plan distributes cash to claimants pursuant to a waterfall mechanism. Filene’s Class 4 Claims are to receive Excess Cash over time until Filene’s Class 4 Claims are paid in full, after all Allowed Senior Claims, Allowed Convenience Claims, Allowed Syms Class 4 General Unsecured Claims and the Initial Majority Shareholder Payment have been paid in full. (Plan, Art. V.D.4.) Holders of Filene’s Class 5 Claims are entitled only to receive Excess Cash over time up to 75% of each Filene’s Class 5 Claim, and only after Filene’s Class 4 Claims have been paid in full. (Plan, Art. IV.D.5.) The Debtors’ disclosure statement [Docket No. 1641] (the “Disclosure Statement”) estimates that holders of claims in Filene’s Classes 3, 4 and 6 – all general unsecured claimants other than contract rejection claimants – are to receive a full recovery, whereas holders of claims in Filene’s Class 5 only are expected to recover 75% of their

⁴ Capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

claims only after other claims have been satisfied. (See Disclosure Statement pp. 9-11.)

7. The Disclosure Statement states that the Plan is a result of negotiations among the Debtors, the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) and the Official Committee of Syms Corp. Equity Security Holders (the “Equity Committee”) resolving various issues raised by the parties. Among the issues raised was whether the estates of Syms and Filene’s should be substantively consolidated. The Creditors’ Committee believed the Debtors should be substantively consolidated, whereas the Debtors and the Equity Committee did not believe substantive consolidation was appropriate. The resolution of the substantive consolidation issue, as well as to the other issues raised, resulted in Syms sharing a portion of the proceeds from the sale of its assets with the creditors of Filene’s and establishing the waterfall structure described above. The resolution results in every unsecured creditor receiving payment in full of its claim except for holders of contract rejection claims against Filene’s.

8. The Debtors’ Disclosure Statement further states that the reason for the separate classification and disparate treatment between Filene’s Class 4 Claims and Filene’s Class 5 Claims is that holders of Filene’s Class 4 Claims, which are comprised primarily of trade claims and employee severance claims, “arguably may have stronger arguments” that Syms and Filene’s estates should be substantively consolidated. (Disclosure Statement, Art. VI.B.3.) Specifically, the Debtors assert that holders of Filene’s Class 5 Claims are more “sophisticated” than the holders in Filene’s Class 4 Claims whom “may not have appreciated the distinction” between Filene’s and Syms corporate structure when Syms acquired Filene’s. (Disclosure Statement, Art. VI.B.3.) In addition, the Debtors assert that holders of Filene’s Class 5 Claims were in a better position to negotiate away any risks associated with doing business with Filene’s and Syms because of their preexisting contractual relationship with Filene’s. (Id.) Thus, the Debtors have

attempted to justify the lower recovery for Filene's Class 5 claimants due to their purported sophistication and relationship with the Debtors.

ARGUMENT

9. The standards governing confirmation of a plan of reorganization are set forth in section 1129 of the Bankruptcy Code. The proponent of a plan bears the burden of proving that the plan satisfies each of the statutory requirements set forth in section 1129(a) by a preponderance of the evidence. See In re Armstrong World Indus., Inc., 348 B.R. 111, 120 (D. Del. 2006). Among the requirements for plan confirmation are that the claims are properly classified and claims placed in a class receive the same treatment. See In re Nutritional Sourcing Corp., 398 B.R. 816, 824 (Bankr. D. Del. 2008) (stating that the legislative history explains that section 1129(a)(1) encompasses the requirements of sections 1122 and 1123 governing classification of claims and contents of a plan, respectively).

10. Section 1122 of the Bankruptcy Code governs the classification of claims. Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). The Third Circuit has held that a debtor may classify similarly situated claims in separate classes only where a reasonable justification exists. John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Assocs., 987 F.2d 154, 158 (3d Cir. 1993) (adopting the reasonable standard and stating that "the Code was not meant to allow a debtor complete freedom to place substantially similar claims in separate classes."); see also In re Jersey City Medical Center, 817 F.2d 1055, 1061 (3d Cir. 1987) ("[T]he classification of the claims or interests must be reasonable.").

11. Contract rejection damage claims are “substantially similar” to general unsecured claims. See, e.g., FGH Realty Credit Corp. v. Newark Airport/Hotel Ltd. Partnership, 155 B.R. 93, 100 (D.N.J. 1993) (“Claims resulting from the rejection of executory contracts are legally similar to general unsecured claims.”); In re One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 705 (Bankr. S.D.N.Y. 1993) (“The lease rejection claimants and all other unsecured claimants have the same legal relationship with the Debtor, that of general unsecured creditors. The legal nature of the rejection claims are not unique and separate classification is not justified by any sound business reason.”). Therefore, the Debtors must articulate a reasonable justification for placing the holders of contract rejection claims into Filene’s Class 5 separately from the holders of other general unsecured claims of Filene’s Class 4. The Debtors have failed to set forth such justification and, furthermore, no such reasonable justification exists.

12. The Debtors incorrectly rely on the sophistication and relationship of the holders of Filene’s Class 5 Claims as the justification to separately classify contract rejection claims from other general unsecured claims. Courts have declined to find classification schemes reasonable where the basis for separate classification is on “the status or circumstances of the claimant” and not the legal attributes of the claims. In re Coram Healthcare Corp., 315 B.R. 321, 349 (Bankr. D. Del. 2004); see also Fairfield Executive Assocs. v. Hyperion Credit Capital Partners, L.P. (In re Fairfield Executive Assocs.), 161 B.R. 595, 602 (D.N.J. 1993) (classification improper where it is based upon the “motives and agenda of the claim holder rather than on the nature of the underlying claim.”). The Coram case is instructive because there the court rejected the Debtors’ reasoning for separately classifying the contract rejection claims from other general unsecured claims.

13. In Coram, the plan proponent classified an insider's general unsecured claim in a class separate from the general unsecured claims of trade creditors. 315 B.R. at 349. The plan proponent justified such classification because the insider "was in a superior position to evaluate the risks of dealing with the Debtors." Id. at 350. The Coram court rejected this argument because the plan proponent based classification on the attributes of the holder of the claim (*i.e.*, the insider's knowledge and relationship with the debtors) and not the attributes of the underlying claims. Id. at 349 ("Emphasis is not upon the holder so much as it is upon [the claim] which is held."). Because the insider's claim was "substantially similar to those of the general unsecured creditors in legal attributes and priority status," the Coram court held that separate classification of the insider's claim from the other unsecured claims was improper. Id. at 349-50.

14. Likewise, the Debtors' justification for separately classifying Filene's Class 4 Claims and Filene's Class 5 Claims fails. The Debtors' basis for separate classification is that holders of Filene's Class 5 Claims have a weaker argument for substantively consolidating the Debtors' estates because such holders are more "sophisticated" than those holders of Filene's Class 4 Claims. (Disclosure Statement, Art. VI.B.3.) However, as demonstrated by Coram, reliance on a creditor's knowledge or familiarity with the debtor does not justify separate classification and treatment. By placing the holders of contract rejection claims into Filene's Class 5, the Debtors improperly used the attributes of the claimant to segregate similar claims. This rationale is wrong. Only the legal attributes of the underlying claim may be used to separately classify claims. In this case, Filene's Class 4 Claims and Filene's Class 5 Claims are unsecured claims that share the same priority status. There is no distinguishing factor among the underlying claims to support the separate classification in connection with a liquidating plan. The Debtors have failed to articulate a reasonable justification for such separate classification.

15. Moreover, the Debtors misconstrue the function of substantive consolidation in an attempt to justify the separate classification and treatment of Filene's Class 5 Claims. Substantive consolidation "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.), 402 F.3d 416, 423 (3d Cir. 2005). "The combination of the assets and liabilities of two or more debtors or other legal entities will result in the unsecured creditors of both receiving the same percentage recovery on their claims." 2 Collier on Bankruptcy ¶ 105.09[1][a] (16th ed. rev. 2011). Substantive consolidation is not tailored among classes of claimants due to each class's relative dealings with the entities. All creditors of the same priority level share equally under substantive consolidation. See id. Because substantive consolidation does not differentiate among classes of creditors of the same priority level, the Debtors should not be allowed to treat one class of unsecured claimants – Filene's Class 5 Claims – differently from others on account of the purported strength or weakness of its argument for substantive consolidation.

16. Thus, because the holders of Filene's Class 5 Claims and Filene's Class 4 Claims are substantially similar and no reasonable justification for such separate classification has been provided by the Debtors, the Plan cannot be confirmed until the classification scheme is modified.⁵

⁵ Ultra reserves its rights to supplement this Objection, either through additional filings or at the confirmation hearing, after voting has been completed to assert any additional arguments if section 1129(b) of the Bankruptcy Code is applicable.

CONCLUSION

17. No business justification exists for the disparate treatment of Filene's contract rejection claims. Filene's has already closed all of its stores, is liquidating its remaining assets, and has no ongoing business to conduct. Thus, the Debtors cannot argue that they need the continuing services or goodwill of trade creditors or employees going forward. As such, there is no business reason that can justify every other unsecured claimant receiving payment in full while Filene's contract rejection claimants receive a substantially lesser recover. As a result, the Debtors' Plan should not be confirmed.

WHEREFORE, Ultra respectfully requests that this Court enter an order (i) denying confirmation of the Plan; and (ii) granting any additional relief as is just and proper.

Dated: August 21, 2012


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	:	
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 Objection to Confirmation of Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries* to be served upon the parties listed below in the manner indicated:

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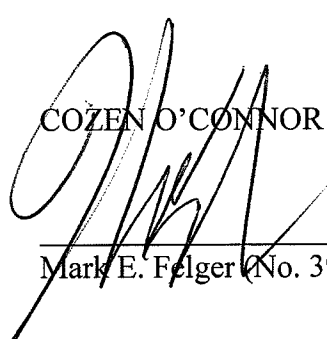
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Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: August 21, 2012

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