

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

<p>In re:</p> <p>FILENE'S BASEMENT, LLC, <u>et al.</u>,</p> <p style="text-align: center;">Debtors.<sup>1</sup></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 11-13511 (KJC)</p> <p>Jointly Administered</p>
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**LIMITED OBJECTION OF LIBERTY MUTUAL INSURANCE COMPANY  
TO SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION  
OF SYMS CORP. AND ITS SUBSIDIARIES**

Liberty Mutual Insurance Company, on behalf of itself and its affiliates (collectively, “Liberty”) hereby objects on a limited basis to the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (the “Plan”).<sup>2</sup> As described in greater detail below, Liberty objects to the Plan because certain provisions thereof impermissibly seek to modify, amend, alter or otherwise affect Liberty’s rights and the Debtors’ obligations under insurance policies issued by Liberty for the benefit of certain Debtors.

In support of its limited objection, Liberty respectfully states as follows:

**Jurisdiction**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the purview of, without limitation, 28 U.S.C. § 157(b)(2).

<sup>1</sup> The Debtors and the last four digits of their respective tax payer 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.

<sup>2</sup> Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Plan.



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### **Background**

2. On November 2, 2011 (the "Petition Date"), the Debtors commenced these cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

3. Liberty and its affiliates are party to numerous insurance contracts with the Debtors. In particular, beginning in November 2008 and continuing after the Petition Date, Liberty provided the Debtors with workers' compensation, automobile, and general liability insurance coverage under certain insurance policies and related agreements (collectively, the "Policies").

4. Certain of the Policies include provisions whereby premiums are adjusted retrospectively and are subject to future audit based on, among other things, the insured's claim history. In addition, certain of the Policies require the Debtors to pay amounts within the deductible or self-insured layer of the applicable policy. Moreover, pursuant to the terms of the Policies and applicable non-bankruptcy law, Liberty has the right, inter alia, to review, control, direct, approve and/or authorize the settlement of any claim made against the Policies and participate in the settlement or litigation thereof, and the Debtors have the obligation, inter alia, to notify and cooperate with Liberty in connection therewith.

5. Speaking broadly, the Plan provides that the Policies shall continue in effect after the Effective Date. Plan at IX. B. Liberty does not oppose this treatment of the Policies, and is willing to allow the Policies to remain in effect, so long as the respective rights and obligations of Liberty and the Debtors remain unaltered by the Plan and Confirmation Order. However, notwithstanding the language in Section IX. B. of the Plan, there are various provisions in the Plan that could be construed to limit Liberty's rights and/or the Debtors' obligations under the Policies.

## **LIBERTY'S LIMITED OBJECTION**

### **A. The Plan Impermissibly Ascribes to Certain of the Policies a Cure Amount of Zero.**

6. Section IX. B. of the Plan provides that, to the extent that the Policies are executory contracts, they shall be deemed to be assumed by the Debtors pursuant to the Plan. However, Section IX. B. of the Plan further provides that “no payments shall be required to cure any defaults of the Debtors existing as of the Confirmation Date” with respect to the Policies.

7. As of the date hereof, the Debtors owe Liberty an amount not less than \$397,849.55 in connection with the Policies. Amounts due under the Policies are adjusted periodically in the ordinary course of business and the balance owed to Liberty undoubtedly will increase in the future. Liberty seeks assurance that the Debtors will assume *all* of the obligations under the Policies and, notwithstanding anything to the contrary in the Plan or the Confirmation Order, pay all amounts due to Liberty under the Policies as and when such amounts are due.

### **B. The Plan Injunction Is Overly Broad And Impermissibly Alters The Rights Of Liberty Under The Policies And Applicable Law.**

8. The Debtors propose a broad Plan Injunction in Section XII. C. of the Plan (the “Plan Injunction”) that infringes upon Liberty’s rights of, among other things, setoff and recoupment. In particular, the Plan Injunction enjoins “asserting a right of setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Debtors . . . .”

9. Under the Policies and applicable law, Liberty has certain rights, including but not limited to, rights of setoff and recoupment. Liberty timely filed proofs of claim (the “Proofs of Claim”) with regard to each of the Debtors against which Liberty had claims. By the Proofs of

Claim, Liberty preserved its rights of setoff and recoupment under the terms of the Policies and applicable law. If the Plan is confirmed as it is drafted, the language included in the Plan Injunction possibly could be construed to enjoin Liberty from exercising its contractual rights under the Policies and applicable law.

10. Timely asserted claims to setoff cannot be extinguished by the confirmation of a Debtors' Plan. See U.S. v. Continental Airlines (In re Continental Airlines), 134 F. 3d 536, 542 (3d Cir. 1998). Accordingly, the Plan cannot modify the terms, conditions, exclusions and limitations of the Policies, or Liberty's rights under applicable law, including but not limited to, its rights of setoff and recoupment.

11. To resolve this objection, the Plan should be revised to provide that the Plan Injunction and the Plan generally do not expand, modify, abridge or otherwise affect Liberty's or the Debtors' contractual rights and obligations under the Policies or applicable law, including, without limitation, Liberty's rights of setoff and recoupment.

**C. The Plan Impermissibly Modifies Liberty's Right To Settle Claims Under The Policies.**

12. Liberty objects to the Plan as proposed because it could be construed to impermissibly modify Liberty's rights under the Policies and applicable law to, inter alia, review, control, direct and approve the settlement of certain claims. In particular, Section XIII. I. indicates that "Reorganized Syms is authorized to compromise or settle all Claims, Disputed Claims, and Liens pursuant to Bankruptcy Rule 9019(b), and to execute necessary documents, including Lien releases (subject to the written consent of the party having such Lien) and stipulations of settlement or release, without further order of the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan or the Confirmation Order."

13. Liberty objects to Section XIII. I. because this section, broadly construed, impermissibly purports to permit Reorganized Syms to retain rights to handle and resolve claims that could implicate the Policies.

14. As a result, the Plan should be amended to indicate that XIII. I. of the Plan and the Plan generally, do not expand, modify, abridge or otherwise affect Liberty's rights to, review, handle, control, direct and approve the resolution of any claims covered by the Policies.

### **RESERVATION OF RIGHTS**

15. Liberty reserves, and does not waive, any and all of its rights and defenses under the Policies and applicable law. Liberty further reserves all rights to assert any and all such rights and defenses in any appropriate manner and forum. Nothing contained in this objection shall be deemed to alter or expand any coverage that may otherwise be available under any insurance policies or related agreements issued by Liberty or any settlement agreement or other adjudication to which Liberty is a party.

16. Nothing in this objection shall be construed as an acknowledgement or admission that any policy issued or alleged to have been issued by Liberty covers or otherwise applies to any claims, losses, or damages, or that any such claims, losses, or damages are eligible for payment.

17. Liberty reserves the right to amend, supplement, alter, or modify the objections raised herein.

**WHEREFORE**, Liberty respectfully requests that this Court enter an Order:

1. Modifying the Plan in accordance with the foregoing Objection, or in the alternative;
2. Denying Confirmation of the Plan; and

3. Granting Liberty such other and further relief as this Court deems just and proper.

**LIBERTY MUTUAL INSURANCE  
COMPANY,**

By its attorneys,



Dated: August 22, 2012

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**CERTIFICATE OF SERVICE**

I, *R. Karl Hill, Esquire* certify that on August 22, 2012 I caused a true and correct copy of the *Limited Objection of Liberty Mutual Insurance Company to Second Amended Joint Chapter 11 Plan of Reorganization of Syms corp. and its Subsidiaries (D.I. 1640)* to be served upon those parties appearing on the CM/ECF notice and further upon the parties below via e-mail:

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