

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

In re

FILENE'S BASEMENT, LLC, *et al.*,

Debtors.

Chapter 11

Case No. 11-13511 (KJC)

**Hearing Date: August 29, 2012, at 1:00 p.m.
Objections Due: August 21, 2012, at
4:00 p.m., (extended to August 24, 2012,
at 12:00 p.m. for the U.S. Trustee)**

Re: Docket Item 1640

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS'
SECOND AMENDED PLAN OF REORGANIZATION, AS MODIFIED,
PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Roberta A. DeAngelis, the United States Trustee for Region 3 (the "U.S. Trustee"), by and through her undersigned counsel, hereby files the present objection (the "Objection") to confirmation of the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries (the "Plan"), and in support thereof states as follows:

Introduction

1. This Court has jurisdiction to hear and determine this Objection.
2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary



1113511120824000000000003

interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”).

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised by this Objection.

Background

4. On November 2, 2011 (the “Petition Date”), the Debtors¹ filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage their respective properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On November 8, 2011, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) (D.I. 111).

6. On November 15, 2011, the U.S. Trustee appointed the Official Committee of Syms Corp. Equity Security Holders (the “Equity Committee”) (D.I. 159).

7. On July 13, 2012, the Debtors filed the Plan (D.I. 1640).

8. On July 13, 2012, the Debtors filed the Disclosure Statement with Respect to the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries (the “Disclosure Statement”) (D.I. 1641).

9. On July 13, 2012, the Court entered an order approving the Disclosure Statement and authorizing the Debtors to solicit votes to accept or reject the Plan (D.I. 1655). The Court scheduled a hearing to consider confirmation of the Plan for August 29, 2012.

Objection

10. A chapter 11 plan may not be confirmed unless the Court can find that the plan complies with the provisions of 11 U.S.C. § 1129(a). A plan proponent bears the burden of

¹ The Debtors are Syms Corp.; Syms Clothing, Inc.; Syms Advertising, Inc.; and Filene’s Basement, LLC.

proof with respect to each and every element of 11 U.S.C. § 1129(a). *See In re Tribune Co.*, 464 B.R. 126, 151-52 (Bankr. D. Del. 2011). As discussed below, the Plan is not confirmable because it contains an exculpation provision that is contrary to applicable law in this District.

Basis for Objection

A. Relevant Plan Provision

11. Article XII.D of the Plan provides:

Except as otherwise specifically provided in the Plan, . . . (iv) the Majority Shareholder; (v) any Professionals of the Majority Shareholder . . . shall not have or incur any liability, claim . . . or Claim . . . whether known, unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent . . . to any Claimholder or Interestholder, or any other party in interest . . . for any act or omission originating or occurring on or after the Petition Date through and including the Effective Date in connection with, relating to, or arising out of the Debtors, the Chapter 11 Cases, the negotiation and filing of the Plan or any prior plans, the filing of the Chapter 11 Cases, the pursuit of confirmation of the Plan or any prior plans, the consummation of the Plan including the Rights Offering and Share Purchase Transaction, the administration of the Plan, or the property to be liquidated and/or distributed under the Plan, except for their willful misconduct or gross negligence as determined by a Final Order of a court of competent jurisdiction

B. Exculpation Must Be Limited to Estate Fiduciaries

12. The Plan attempts to exculpate parties other than estate fiduciaries, namely the Majority Shareholder and her professionals (Plan Article XII.D). The Majority Shareholder and her professionals may not be exculpated under applicable law.

13. An exculpation provision “must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors’ directors and officers.” *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011). *Accord In re Tribune Co.*, 464 B.R. 126, 189 (Bankr. D. Del.

2011) (“Because an exculpation provision merely states that standard to which estate fiduciaries should be held, the *Washington Mutual* Court determined that exculpation clauses should be limited to fiduciaries who have served during the chapter 11 proceedings: estate professionals, committees and their members, and the debtors’ directors and officers. I agree”) (citation omitted); *see also In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (the creditors’ committee, its members and estate professionals may be exculpated under a plan for their actions in the bankruptcy case, except for willful misconduct or gross negligence).² Exculpation must be limited to the post-petition activities of such fiduciaries in the bankruptcy case. *See In re Washington Mutual*, 464 B.R. at 350 (citing *In re PWS*, 228 F.3d at 246).

14. The Majority Shareholder owes no fiduciary duty to the Debtors’ bankruptcy estates or in connection with the Debtors’ bankruptcy proceedings. The Majority Shareholder may have agreed to incur obligations in connection with the Plan, but any such obligations would be contractual—not fiduciary—and presumably would have been bargained for. The Majority Shareholder has already bargained for a debtor release (*see* Plan § XII.E) and a third-party release (*see* Plan § XII.H). Given the layers of protection that these releases give the Majority Shareholder, the exculpation clause may also be partly duplicative and unnecessary.

15. In sum, the Majority Shareholder and her professionals are not eligible to be exculpated.

² Judge Shannon recently wrote that *PWS* “implies that a party’s exculpation is based upon its role or status as a fiduciary. That is why, as the *Washington Mutual* court pointed out, courts have permitted exculpation clauses insofar as they ‘merely state[] the standard to which ... estate fiduciaries [a]re held in a chapter 11 case.’ *Wash. Mut.*, 442 B.R. a[t] 350. ‘That fiduciary standard, however, applies only to estate fiduciaries,’ no one else.” *In re PTL Holdings LLC*, 2011 WL 5509031 at *12, No. 11-12676 (BLS Nov. 10, 2011 D.I. 215).

WHEREFORE, the U.S. Trustee respectfully requests this Court to issue a ruling in accordance with the Objection, and to award such other relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

ROBERTA A. DEANGELIS
United States Trustee

BY: /s/ David M. Klauder
David M. Klauder
Benjamin A. Hackman
Trial Attorneys
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 fax

Dated: August 24, 2012

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

IT IS CERTIFIED that on the 24th day of August, 2012, the United States Trustee's Objection to the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries, was caused to be served electronically and/or by placing copies thereof in the United States Mail, postage prepaid, addressed as follows:

Mark S. Chehi, Esquire
Jason M. Liberi, Esquire
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899
Email: mark.chehi@skadden.com
Email: jason.liberi@skadden.com

Jay M. Goffman, Esquire
Mark A. McDermott, Esquire
David M. Turetsky, Esquire
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
Four Times Square
New York, NY 10036
Email: mark.mcdermott@skadden.com

Michael J. Merchant, Esquire
Paul N. Heath, Esquire
Zachary I. Shapiro, Esquire
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19899
Email: merchant@rlf.com
Email: heath@rlf.com
Email: shapiro@rlf.com

Mark T. Power, Esquire
Janine M. Carbone, Esquire
HAHN & HESSEN LLP
488 Madison Avenue
New York, NY 10022
Email: mpower@hahnhausen.com

Robert J. Dehney, Esquire
Gregory W. Werkheiser, Esquire
Matthew B. Harvey, Esquire
MORRIS, NICHOLLS, ARSHT &
TUNNELL, LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
Email: rdehney@mnat.com
Email: gwerkheiser@mnat.com
Email: mharvey@mnat.com

Thomas B. Walper, Esquire
Seth Goldman, Esquire
Bradley R. Schneider, Esquire
MUNGER, TOLLES & OLSEN LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
Email: thomas.walper@mto.com
Email: seth.goldman@mto.com
Email: bradley.schneider@mto.com

BY: /s/ David M. Klauder
David M. Klauder