IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
FILENE'S BASEMENT, LLC, et al.,[1]	:	Case No. 11-13511 (KJC)
Debtors.	:	Jointly Administered

PLAN PROPONENTS' MEMORANDUM OF LAW (I) IN SUPPORT OF CONFIRMATION OF THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES AND (II) IN RESPONSE TO OBJECTIONS THERETO

[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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Syms Corp. ("Syms"), Filene's Basement, LLC ("Filene's"), Syms Clothing, Inc. ("Clothing"), Syms Advertising, Inc. ("Advertising" and together with Syms, Filene's and Clothing, the "Debtors") and the Official Committee of Syms Corp. Equity Security Holders (the "Equity Committee" and, together with the Debtors, the "Plan Proponents") submit this Memorandum of Law (the "Memorandum") in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (as it may be amended or modified, the "Plan"), pursuant to section 1129 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as amended (the "Bankruptcy Code"). In support of confirmation, the Debtors and the Equity Committee respectfully represent as follows: [2]

I. PRELIMINARY STATEMENT

1. The Plan Proponents come before this Court to seek confirmation of a consensual Plan that is broadly supported, satisfies all of the conditions to confirmation, and will allow the Debtors to emerge from chapter 11. The Plan represents the culmination of overwhelming efforts by, among others, the Debtors, the Equity Committee, the Official Committee of Unsecured Creditors (the "Creditors' Committee"), and the Debtors' majority shareholder, to reach a fair and equitable resolution of the complex business and legal issues presented by these chapter 11 cases. These efforts have resulted in a Plan that maximizes value

[2] This Memorandum, and confirmation of the Plan, are further supported by the (a) Declaration of Gary Binkoski, In Support of Confirmation Of Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (the "Binkoski Declaration");(b) Declaration of Jill R. Goodman In Support of Confirmation Of Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (the "Goodman Declaration"); (c) Declaration of Saul Burian In Support of Confirmation Of Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (the "Burian Declaration"); and (d) Declaration of Andrew Sole In Support of Confirmation Of Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries (the "Sole Declaration" and together with the Goodman, Binkoski, and Burian Declarations, the "Plan Declarations"), which are being filed in these chapter 11 cases in advance of the Confirmation Hearing.

for the Debtors' stakeholders and provides a vehicle for the Debtors' successful emergence from chapter 11.

2. The Plan has received overwhelming support from all of the Debtors' major constituencies, including acceptance of the Plan from all impaired classes of creditors. As evidenced by the Plan development process, the global Plan Settlement (defined below) embodied in the Plan, the highly favorable results of the Plan voting, and the support of both Committees, the Plan is in the best interests of the Debtors' estates, creditors and other stakeholders. Indeed, the Debtors distributed over 17,000 notices to parties-in-interest regarding the Confirmation Hearing and the Plan, yet received only eight objections to Plan confirmation.

3. Of these eight objections, two are limited to matters concerning disposition of certain executory contracts. One such objection, asserted by 655 Merrick, LLC, has been resolved as described below.[3] The other such objection, asserted by Macy's, Inc., is responded to in a separate joint reply of the Debtors, the Creditors' Committee and the Equity Committee. Another objection, filed by Liberty Mutual Insurance Company, has been resolved. The other five objections that raise confirmation issues, are unresolved and are discussed herein and/or on the Chart of Objections attached hereto as Exhibit B.

4. Two of the five unresolved objections are overlapping objections of the Internal Revenue Service and the State of Michigan. The other three remaining objections include an objection by a self-styled Ad Hoc Committee of creditors to the Plan's failure to provide post-petition interest, a matter which the Plan Proponents propose to remedy by affording such interest at the federal judgment rate. Ultra Stores, Inc. raises an objection to one

[3] See Objection By Merrick, LLC As Successor To The Estate Of Murray Pergament To The Second Amended Joint Chapter 11 Plan Of Reorganization Of Syms Corp. and Its Subsidiaries (Docket No. 1893).

aspect of the Filene's classification scheme, but that classification is amply justified because the claims are not similar and there is a rationale basis for separate treatment. And the U.S. Trustee filed a very limited objection to the proposed exculpation for Syms' majority shareholder, but that exculpation is justified under applicable law and the Plan Settlement. For the reasons set forth in this Memorandum, the Plan Declarations, and the record in these cases, the Plan Proponents submit that the objections should be overruled, and the Plan should be confirmed.

5. The Plan Proponents recognize that they have the affirmative obligation under the Bankruptcy Code to demonstrate by a preponderance of the evidence that the Plan satisfies all requirements of Bankruptcy Code section 1129. Accordingly, the Debtors submit this Memorandum together with the Plan Declarations to demonstrate that the Plan satisfies all applicable requirements of the Bankruptcy Code. To assist the Court in evaluating objections to the Plan, attached as Exhibit A hereto is a chart summarizing the Plan's satisfaction of the applicable requirements of the Bankruptcy Code. Also attached as Exhibit B is a summary of the objections and the proposed resolutions and responses thereto. The objections and the responses are also addressed in greater detail throughout this Memorandum.

II. BACKGROUND AND OVERVIEW OF THE PLAN

A. Debtors' Businesses

6. As of the November 2, 2011 petition date (the "Petition Date"), the Debtors collectively owned and operated 46 "off-price" retail stores under the "Syms" and "Filene's Basement" names. The Syms and Filene's stores offered a broad range of first quality, in-season merchandise bearing nationally recognized designer or brand-name labels at discounted prices for men, women and children. As of the Petition Date, Syms employed approximately 910 employees and its stores were located throughout the Northeast, Middle Atlantic, Midwest, Southwest and Southeast regions of the United States. Filene's employed

approximately 1,500 employees as of the Petition Date and operated stores throughout the Northeast, Middle Atlantic, Midwest and Southeast regions of the United States.

B. Debtors' Corporate And Capital Structure

7. Syms, the corporate parent of the three debtor subsidiaries, is a publicly-held New Jersey corporation. Prior to the Petition Date, Syms' common stock was listed on the NASDAQ Stock Market under the symbol "SYMS." As of the Petition Date, approximately 14.5 million shares of Syms' common stock were outstanding. Ms. Marcy Syms, the Chairperson of Syms and its CEO and majority shareholder (the "Majority Shareholder"), exercises voting control over approximately 54.4 % of the Syms common stock.

8. Prior to the Petition Date, Syms and Filene's were joint borrowers under a secured $75 million revolving credit facility pursuant to a credit agreement, dated as of August 27, 2009 (as amended, the "Credit Agreement"), with Bank of America, N.A. ("BoA"). Syms' and Filene's obligations under the Credit Agreement were secured by liens on their respective inventory and other personal property and two parcels of real property owned by Syms. As of the Petition Date, the Debtors owed approximately $31.3 million to BoA under the Credit Agreement. All amounts owed to BoA have been paid in full from the proceeds of the Debtors' store liquidation sales. Virtually all the Debtors' other debt obligations are comprised of unsecured employee severance obligations, unsecured trade claims, lease rejection claims, and various union and pension-related claims.

C. Overview of the Plan

9. The Plan consists of two separate plans, one for each of Syms (with the merger of its two dormant subsidiaries) and Filene's.[4] The Plan contemplates the reorganization of Syms into a real estate holding company that will operate and lease, as appropriate, its 17 parcels of owned commercial real estate pending their disposition in a non-distressed, commercially reasonable manner. Under the Plan, 13 parcels of Syms' real estate will be sold in the near term; another three parcels will be sold after they are developed and leased to commercial tenants in the medium term; and a final property, the so-called "Trinity Property," will be developed, operated and ultimately sold over a much longer time frame. Filene's will be reorganized as a wholly owned subsidiary of Syms for the principal purpose of exploring the sale or joint venture opportunities with respect to certain owned or licensed intellectual property.

10. The Plan also embodies a global compromise and settlement (the "Plan Settlement") of asserted intercompany claims and claims asserted by the Creditors' Committee, including that the Debtors' estates should be substantively consolidated. These claims and the rationale for the Plan Settlement are described further below and in the Binkoski Declaration. In a nutshell, however, under the Plan Settlement, all Syms creditors and Filene's trade creditors and employees will be paid in full over time from the proceeds of the disposition of all assets, including Syms owned real estate. Holders of non-guaranteed lease rejection claims against Filene's will be paid 75% of their claims over time, also from proceeds from the disposition of all assets, including Syms owned real estate.[5]

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[4] The Debtors do not believe that Advertising or Clothing have any assets or liabilities and, thus, the Debtors have not proposed a plan for either of those Debtors other than their merger into Reorganized Syms under the terms of the Plan.

[5] As an alternative to the foregoing, Filene's creditors had the option of accepting distributions from Filene's assets only, which will result in an estimated recovery of between 0% and 5%, while preserving whatever

(cont'd)

11. Each of the Syms and Filene's plans also contains a separate class of convenience claims (generally, claims under $10,000). Additionally, each plan contains a separate class that embodies a separate settlement and compromise of certain union pension fund claims related to Local 1102. Pursuant to this settlement and compromise, such clams will be paid in periodic installments in accordance with a budget and an operating reserve agreement contained in the Plan. Separately, Syms is assuming all its obligations under a qualified pension plan, thereby avoiding any need to terminate the plan and preventing the creation of a significant claims by the PBGC against all the Debtors.

12. In addition to the Plan provisions regarding disposition of the real estate and the treatment of claims, the Plan contemplates a change of control transaction pursuant to which the Majority Shareholder shall cease to be the majority shareholder of Reorganized Syms. In particular, the Majority Shareholder has agreed to sell all of the Majority Shareholder's shares[6] on the Effective Date – 7,857,794 shares in total – to Syms for $2.49 per share, or $19,565,590 in the aggregate. Syms simultaneously has offered to sell to existing shareholders who qualify as "accredited investors" under the securities laws, other than the Majority Shareholder, the right to purchase a total of 10,040,160 new shares at a price equal to $2.49 per share, or approximately $25 million in the aggregate. Certain members of the Equity Committee and their affiliates have agreed to purchase new shares made available in the rights offering that

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individual claims they may have against Syms. No Filene's creditors exercised the option of accepting distributions from Filene's assets only.

[6] It is important to note that the shares of the Majority Shareholder include shares belonging to the Laura Merns Living Trust and the Marcy Syms Revocable Living Trust, as the term Majority Shareholder is defined in the Plan, to mean, "collectively, Ms. Marcy Syms, the Laura Merns Living Trust, dated February 14, 2003 and the Marcy Syms Revocable Living Trust, dated January 12, 1990, as amended, that collectively own and have the power to vote approximately 54.4% of the Interests in Syms." See, Plan Article I.B.1.105.

are not subscribed for by other shareholders (the "Backstop Parties"), ensuring that Reorganized Syms receives the full $25 million in the rights offering.

13. As part of the Plan Settlement, including the releases granted to the Majority Shareholder, the funds from the rights offering will be used, first, to pay certain administrative costs and other amounts necessary for Syms and Filene's to exit Chapter 11, with the balance utilized to pay creditors and to reduce Syms' obligation to pay the Majority Shareholder for the Majority Shareholder's shares. After payment of exit and other costs, any proceeds remaining from the rights offering, plus proceeds of real estate and other asset dispositions, will be split between creditors and the Majority Shareholder, with creditors receiving 60% and the Majority Shareholder receiving 40%, until the Majority Shareholder is paid $10,725,761. Payments thereafter will be made to creditors until all obligations to all creditors under the Plan are paid in full. The balance of Syms' payment obligation to the Majority Shareholder, in the amount of $7,065,907, will be paid after Reorganized Syms has satisfied all its obligations to creditors under the Plan.[7]

III. ARGUMENT – THE PLAN SHOULD BE CONFIRMED

14. To confirm the Plan, the Court must find that both the Plan and the Debtors are in compliance with each of the requirements of section 1129(a) of the Bankruptcy Code. See In re Tribune Co., 464 B.R. 126 (Bankr. D. Del. 2011); In re Exide Techs., 303 B.R. 48, 58 (Bankr. D. Del. 2003); see also Grogan v. Garner, 498 U.S. 279, 291 (1991); In re 203 N. LaSalle St. P'ship, 126 F.3d 955, 960-61 (7th Cir. 1997), rev'd on other grounds, 526 U.S. 434 (1999); Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters, Ltd.,

[7] The total amount to be paid to the Majority Shareholder is net of certain reimbursement payments due now or in the future to Syms with respect to the reimbursement of premiums paid on the split-dollar life insurance policy for Marcy Syms.

II), 994 F.2d 1160, 1165 (5th Cir. 1993); Kane v. Johns-Manville Corp., 843 F.2d 636, 648 (2d Cir. 1988); In re Kent Terminal Corp., 166 B.R. 555, 561 (Bankr. S.D.N.Y. 1994). As set forth below, the Debtors and the Plan satisfy all of the requirements of section 1129(a) of the Bankruptcy Code. Accordingly, the Plan should be confirmed.

A. The Plan Complies With The Applicable Provisions Of Title 11 (Section 1129(a)(l)).

15. Section 1129(a)(1) of the Bankruptcy Code provides that a plan of reorganization may be confirmed only if "[t]he plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) explains that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code, which govern classification of claims and interests and the contents of the plan, respectively. See S. Rep. No. 95-989, at 126 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, at 412 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6368; see also In re Machne Menachem, Inc., 233 F. App'x 119, 120 (3d Cir. 2007); In re Fed.-Mogul Global, 402 B.R. 625, 629 n.7 (D. Del. 2009), aff'd, 684 F.3d 355 (3d Cir. 2012); In re Armstrong World Indus., Inc., 348 B.R. 136, 158 (D. Del. 2006).

1. Classification of Claims and Interests.

16. Courts in this Circuit and elsewhere have recognized that, under Bankruptcy Code section 1122, plan proponents have significant flexibility in placing claims into different classes, provided there is a rational legal or factual basis to do so and all claims or interests within a particular class are substantially similar. See, e.g., John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 159 (3d Cir. 1993); (noting that a classification scheme is permissible if a legal difference exists between the classes); In re Tribune Co., No. 08-13141 (KJC), 2012 WL 2885921, at *6-7 (Bankr. D. Del. July 13, 2012); In re Kaiser Aluminum

Corp., No. 02-10429 (JKF), 2006 WL 616243, at *5 (Bankr. D. Del. Feb. 6, 2006), aff'd, 343 B.R. 88 (D. Del. 2006); In re Magnatrax Corp., No. 03-11402 (PJW), 2003 WL 22807541, at *4 (Bankr. D. Del. Nov. 17, 2003). The Debtors' classification structure should be afforded deference, as plan proponents are routinely afforded significant discretion in classifying claims. In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 224 (Bankr. D.N.J. 2000).

17. "If the plan proponent can articulate differences among the claims – that is, if the plan proponent can demonstrate the lack of 'substantial similarity' – then separate classification is proper." In re Bloomingdale Partners, 170 B.R. 984, 997 (Bankr. N.D. Ill. 1994). A lack of similarity can be demonstrated by differences in legal rights or bankruptcy priorities, as well as "business reasons relevant to the success of the reorganized debtor." Id. ("As an example, it might be vital to a debtor to be able to treat customers' warranty claims differently than trade creditor claims, even though they are all general unsecured claims.").

18. The Plan meets these requirements. In addition to Administrative Claims and Priority Tax Claims (as defined in the Plan), which are not required to be classified, the Plan provides for six (6) classes of Syms Claims and seven (7) classes of Filene's Claims as well as one class of Interests for each of Syms and Filene's. Article III of the Plan provides for the separate classification of Claims and Interests with respect to the Debtors based upon differences in the legal nature or priority of such Claims and Interests. Further, all Claims within each class are substantially similar to other Claims included in the same class.

19. In particular, the classes of Claims against and Interests in Syms under the Plan are as follows, each as defined in the Plan: Class 1 Secured Claims, Class 2 Non-Priority Claims, Class 3 Convenience Claims, Class 4 General Unsecured Claims, Class 5 Union Pension Plan Claims, Class 6 Intercompany Claims and Class 7 Interests in Syms. The classes of Claims

against and Interests in Filene's under the Plan are as follows, each as defined in the Plan: Class 1 Secured Claims, Class 2 Non-Priority Claims, Class 3 Convenience Claims, Class 4A and B General Unsecured (Short-Term) Claims (trade and employee claims), Class 5A and B General Unsecured (Long-Term) Claims (lease rejection claims), Class 6 Union Pension Plan Claims, Class 7 Intercompany Claims and Class 8 Interests in Filene's.

20. There should be no serious question that the Claims and Interests in each of the foregoing classes have different legal and factual bases and hence, that the classification scheme therefore is proper. However, one creditor, Ultra Stores, Inc., has filed an objection to one aspect of this classification scheme:[8] the bifurcation of Filene's claims, other than Convenience and Union Pension Claims, into the Short-Term Claims, which will receive a 100% recovery, and Long-Term Claims, which will receive a 75% recovery. The former class, as noted above, is comprised of trade and employee claims in the aggregate estimated amount of approximately $8.75 million, whereas the latter is comprised of lease rejection claims in the aggregate estimated amount of approximately $36.877 million.

21. The Short-Term and Long-Term Claims are not substantially similar. This Court has held that claims are substantially similar if they share a similar legal status vis a vis the debtor's assets or "'exhibit a similar effect on the debtor's bankruptcy estate.'" Tribune, 2012 WL 2885921, at *7 (quoting W.R. Grace & Co., Nos. 11-199, 11-200, et al., 2012 WL 2130981, at *37 (D. Del. June 11, 2012)). Thus, substantial similarity is not measured by the attributes of the claim holders, but rather by the legal attributes of the claims. Tribune, 2012 WL 2885921, at *7.

[8] See Ultra Stores, Inc.'s Objection To Confirmation Of Second Amended Joint Chapter 11 Plan Of Reorganization Of Syms Corp. And Its Subsidiaries (Docket No. 1897).

22. Both sets of Claims are indeed unsecured with respect to *Filene's* assets. But Filene's assets – not including estate claims – are not nearly sufficient to afford holders of Long-Term Claims and Short-Term Claims the recoveries they are slated to receive under the Plan: 75% and 100%, respectively. Rather, those recoveries are a product of a settlement among the Debtors, the Creditors' Committee and the Equity Committee under which all creditors of Filene's will share in the value of *Syms'* separate assets. And this settlement, in turn, reflects the different legal status between Filene's Long-Term Claims and Short-Term Claims with respect to their asserted claims on *Syms'* assets.

23. In particular, the settlement resolves two sets of claims asserted by the Creditors' Committee that the Creditors' Committee believes could have resulted, if successfully litigated, in full payment for all Filene's creditors: (i) Filene's has certain claims against Syms on account of, among other things, unpaid royalties and use of Filene's assets to repay obligations of Syms and (ii) the Filene's and Syms estates should be substantively consolidated. A detailed discussion of these matters is contained on pages 25 through 30 of the Disclosure Statement, including countervailing views of the Debtors and the Equity Committee as well as in the Binkoski Declaration. Those matters will not be repeated here, except to note that the settlement ultimately reached among the parties was the result of very protracted and contentious negotiations that required the repeated intervention of Judge James Peck, as mediator, to resolve.

24. However, for purposes of the separate classification issue, the Short-Term and Long-Term Claims were separately classified to reflect the differing strengths of the two classes' substantive consolidation claims. Put simply, the Short-Term Claimants, comprised primarily of trade vendors and employees, arguably had a more compelling case for alleging that they dealt with Syms and Filene's as a single economic unit and hence, that their estates should

have been substantively consolidated. The Long-Term Claimants, on the other hand, are comprised exclusively of landlords who had separate, pre-existing contractual relationships with Filene's *only* and/or entered into such relationships with either or both of Syms and Filene's *after* Syms' acquisition of Filene's. Given these explicit, negotiated, contractual relationships, the Debtors and the Equity Committee believe Filene's landlords as a group had a less compelling case under Third Circuit law on substantive consolidation that they reasonably viewed Syms and Filene's as a single economic unit. In re Owens Corning, 419 F.3d 195, 208-09 (3d Cir. 2005) (describing substantive consolidation as an extraordinary remedy that should be used rarely). The separate classification of Short-Term and Long-Term Filene's creditors takes into account the fact that under applicable substantive consolidation law, the court has the power to fashion equitable relief whereby the claims of a certain subset of creditors (Filene's Short-Term) would be entitled to the benefits of substantive consolidation, while other creditors (Filene's Long-Term) would not.

25. Despite the relative weakness of the landlords' substantive consolidation case, the Debtors and the Equity Committee nonetheless agreed to afford landlords a very significant, 75% recovery. While this recovery arguably is more than the Long-Term claimants are entitled to receive on account of their claims – including not only the substantive consolidation claims but also the other intercompany claims raised by the Creditors' Committee on behalf of Filene's against Syms – the Debtors and the Equity Committee agreed to this settlement primarily to avoid further expense to both Estates. As described in more detail below, this settlement is reasonable and appropriate under the circumstances, and reflects a legitimate difference in the legal and factual bases of Short-Term and Long-Term Claims.

26. Moreover, even if the Court finds that the Filene's Short-Term and Long-Term Claims are substantially similar, their separate classification is not improper, as the Third Circuit expressly permits separate classification of similar claims if the classification structure is not designed to gerrymander claims to secure the affirmative vote of an impaired class. John Hancock Mut. Life Ins., 987 F.2d at 159; In re Coram Healthcare Corp., 315 B.R. 321, 348 (Bankr. D. Del. 2004). See Phoenix Mut. Life Ins. v. Greystone III Joint Venture (In re of Greystone III Joint Venture), 955 F.2d 1274, 1279 (5th Cir. 1992) (holding that similar claims may be separately classified only if done "for reasons independent of the debtor's motivation to secure the vote of an impaired assenting class of claims").

27. Here, the Debtors did not separately classify the Short-Term and Long-Term Claims in order to gerrymander the vote of such Classes. The separate classification was created for the legitimate business purpose of resolving very contentious issues upon terms that reflected different litigation risks and that afforded a recovery to creditors commensurate with the merits of their claims and potential substantive consolidation rights. In short, the Debtors have demonstrated a valid and reasonable business justification for the separate classification - - recognition of the differing strengths of the Classes' substantive consolidation arguments - - that are substantiated by the nature and history of the respective Claimants' business relationships with the Debtors. In re Jersey City Med. Ctr., 817 F.2d 1055, 1061 (3d Cir. 1987) (holding that the separate classification of similar claims is proper if founded upon a necessary business objective or reasonable purpose).

28. Notwithstanding the foregoing, Ultra argues that this Court's holding in Coram compels the conclusion that the Debtors' classification scheme here is improper. Ultra is

wrong.[9] In Coram, the plan proponent separately classified unsecured trade creditors from an unsecured insider claim. It justified this separate classification by arguing that the reorganized company needed the trade creditors going forward, and that the insider was in a better position than trade creditors to assess the risks of doing business with the debtor. Oddly, however, the plan treated the insider better than the vendors. Accordingly, the Coram Court found both grounds unconvincing, stating that if the ongoing business relations with trade creditors was so essential to the reorganization to justify separate classification, the plan should have provided the trade creditors better treatment than the insider, not worse treatment. Similarly, the Court held that the status of the affiliate as an insider did not provide a reasonable business justification for separate classification "especially since [the insider] is given more favorable treatment." Coram 315 B.R. at 350.

29. The Coram facts clearly are completely unlike the facts here. Moreover, Ultra misses the point by focusing solely on the fact that each of the Short Term Claims and the Long-Term Claims are unsecured, and in arguing instead that the Plan's separate classification and treatment somehow improperly focuses on the attributes of the holders of the Claims rather than the nature of the Claims themselves. By doing so, Ultra leaves entirely out of the calculus the fact that the recoveries to these Claimants are almost exclusively a function of the Plan Settlement of claims between Filene's and Syms, a settlement that in turn appropriately recognized a fairly fundamental difference between the relative strengths of each group's legal arguments in support of substantive consolidation. Notably, Ultra fails to point to any facts

[9] The Court should note that the Ultra Claim is subject to a pending objection filed by the Debtors, who believe that Ultra does not have a valid claim against either Filene's or Syms based on the express terms of its agreement.

which would support an argument that it has a strong case to look to the assets of Syms to satisfy its claim, if it has one.

30. Indeed, Ultra also improperly conflates the test for determining substantial similarity with the test for whether separate classification is reasonably justified. The test for determining substantial similarity focuses on the nature of the claims, not the status of the claimants, a matter that Ultra confuses as described above. However, the test for whether separate classification of substantially similar claims is proper turns on whether such classification is reasonable – a test that Ultra fails to address at all in its objection. Here, for the reasons set forth above, the Claims must be separately classified because they are not substantially similar. However, even if the Claims are substantially similar, the Debtors have articulated reasonable business grounds to justify the classification structure. For all these reasons, Ultra's objection should be overruled.

2. Mandatory Contents of the Plan.

31. Bankruptcy Code section 1123(a) identifies seven requirements for the contents of a plan of reorganization. The Plan fully complies with each requirement of Bankruptcy Code section 1123(a). Article III of the Plan provides for Classes of Claims and Interests, as required by section 1123(a)(1), and specifies the Classes of Claims and Interests that are not impaired under the Plan, as required by section 1123(a)(2). Article V of the Plan specifies the treatment of each Class of Claims and Interests that is impaired in accordance with section 1123(a)(3).

32. Moreover, section 1123(a)(4) is complied with, which requires that all creditors or interest holders within a given class be treated the same. There is one difference, however, in the treatment of Syms shareholders that warrants discussion. Whereas all Syms shareholders, other than the Majority Shareholder, will retain their existing stock in Syms, only

those Syms shareholders who qualify as "accredited investors" under the securities laws have the right to acquire new Syms shares at $2.49 per share under the rights offering. Non-accredited, or "retail," shareholders, do not have that right.[10]

33. While section 1123(a)(4) requires the same treatment, the same treatment does *not* mean the same exact payment or distribution. Finova Grp., Inc. v. BNP Paribas (In re Finova Grp., Inc.), 304 B.R. 630, 637 (D. Del. 2004) ("The requirements of Section 1123 do not require the parties to receive equal payment . . . .") Moreover, Code section 1123(a)(4) does not require that the form of treatment be identical. Magten Assets Mgmt. Corp. v. NorthWestern Corp. (In re NorthWestern Corp.), 372 B.R. 684, 688 (D. Del. 2007). In fact, while section 1123(a)(4) requires that all class members receive the same treatment, that requirement does not mandate that each class member receive precisely equal treatment, but merely "'some approximate measure [of equality.]'" In re Dow Corning Corp., 255 B.R. 445, 497 (E.D. Mich. 2000), aff'd, 280 F.3d 648 (6th Cir. 2002) (citing In re Resorts Int'l, Inc., 145 B.R. 412, 447 (Bankr. D.N.J. 1990) (alteration in original)).

34. Here, the estimated value of the right to acquire Syms stock at $2.49 per share is so negligible that the treatment of Syms shareholders who are accredited investors and those who are not is approximately equal. In fact, as explained in the Disclosure Statement, the estimated value of Syms shares after accounting for the effects of the dilution on account of the rights offering is between $1.50 and $2.00 per share. This is *less* than the offering price of $2.49 per share. As explained in the Disclosure Statement, however, there is a possibility that, if Reorganized Syms' development plans for its real estate are realized, additional value could be

[10] Non-accredited shareholders comprise a small minority of all Syms shareholders: no more than approximately 11.7% of all shares are held by such shareholders.

realized of over $7.00 per share. While this estimate suggests that the participation rights could have value, as the Disclosure Statement further explains, there are many risks and uncertainties concerning the possibility of achieving such results. Indeed, no such value would be realized for many years.

35. Based on the foregoing, and according to the expert valuation affidavit testimony of Mr. Saul Burian of Houlihan Lokey, the investment banker to the Equity Committee, the estimated value of the participation right is *de minimus*. The value is so negligible that there should be no dispute that the treatment of Syms shareholders who are accredited investors and those who are not is "approximately equal." Indeed, no non-accredited investor shareholders have raised this as an issue, despite extensive discussion of these matters in the Disclosure Statement.

36. In In re Washington Mutual, Inc., 442 B.R. 314 (Bankr. D. Del. 2011), Judge Walrath denied confirmation of a plan because, among other things, it afforded no consideration to certain claimants who could not participate in a rights offering because their claims were less than a specified dollar amount. Significantly, however, the plan proponents in Washington Mutual failed to proffer *any* evidence whatsoever regarding the value of the right. While not providing non-accredited investors some additional form of consideration may be argued to violate section 1123(a)(4)'s requirement of equal treatment in some instances, that is not the case here where: (i) the current value of the stock is *less* than the offer price; (ii) the potential upside is subject to numerous contingencies and a very long investment horizon; and (iii) the estimated value of the right is so small that the Estates would incur more expense in making the distribution than the value being distributed. For all the foregoing reasons, the treatment of Class 7 Syms Interests complies with section 1123(a)(4) of the Bankruptcy Code.

(a) The Plan Provides Adequate Means For Its Implementation.

37. Section 1123(a)(5) of the Bankruptcy Code requires that the Plan provide "adequate means" for its implementation. Adequate means for implementation of a plan may include retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; amendment of the debtor's charter; or the issuance of securities in exchange for cash, property, or existing securities, all in exchange for claims or interests or for any other appropriate purpose. See generally, In re Spiegel, Inc., No. 03-11540 (BRL), 2005 WL 1278094 (Bankr. S.D.N.Y. May 25, 2005).

38. Article VII of the Plan and various other provisions of the Plan provide adequate means for the Plan's implementation. Those provisions relate to, among other things: (a) the continued corporate existence of Reorganized Syms and Reorganized Filene's; (b) the authorization and deemed occurrence of each of the matters provided for under the Plan involving the corporate structure of the Debtors or corporate action to be taken by or required of the Debtors; (c) the formulation of revised organizational documents, including the certificate of incorporation and by-laws for Reorganized Syms and the limited liability company agreement for Reorganized Filene's, that will govern the Reorganized Debtors after the Plan Effective Date; (d) the authorization and issuance of new shares pursuant to the rights offering; (e) the purchase and redemption of the Majority Shareholder shares; and (f) various other matters under the Plan. Moreover, based on the Financial Projections and Sources And Uses Statement (attached to the Disclosure Statement as Exhibit E and Exhibit F respectively), the Debtors should have sufficient liquidity to make all payments required to be made on the Plan Effective Date and to continue operating as contemplated by the terms of the Plan.

(b) The Plan Prohibits the Issuance of Non-Voting Securities.

39. Section 1123(a)(6) of the Bankruptcy Code requires that a debtor's corporate constituent documents prohibit the issuance of non-voting equity securities. In accordance with this requirement, the certificate of incorporation and bylaws for Reorganized Syms, attached to the Plan as Exhibit C, provides that Syms shall not issue any non-voting equity securities to the extent required by Bankruptcy Code section 1123(a)(6).

(c) The Selection of Officers and Members of the Board of Directors is Consistent with the Interests of Creditors and Equity Security Holders and with Public Policy.

40. Finally, section 1123(a)(7) of the Bankruptcy Code requires that a plan of reorganization "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan." 11 U.S.C. § 1123(a)(7). This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which prescribes the methods by which the directors and management of the reorganized corporation is to be chosen to ensure adequate representation of those whose investments are involved in the reorganization – i.e., creditors and equity holders. See 7 Collier on Bankruptcy ¶ 1123.01[7], at 1123-15 (Lawrence P. King ed., 15th ed. rev. 1999).

41. Article VII.A.2 of the Plan complies with section 1123(a)(7) by properly and adequately disclosing or otherwise identifying the procedures for determining the identity and affiliations of all individuals or entities proposed to serve on or after the Plan Effective Date as officers and members of the initial board of directors of Reorganized Syms. Specifically, Article VII.A.2 of the Plan provides that the Reorganized Syms Board of Directors will consist of five (5) directors, three (3) of which will be appointed by the Equity Committee, of which two (2) of the three (3) shall be designated by the Backstop Parties if there are unsubscribed shares in

the rights offering. One (1) director will be an independent director and one (1) director will be chosen by the Creditors' Committee.

42. The Board of Directors will be "staggered" with the independent director and the Creditors' Committee director constituting "Class I" and the Equity Committee Directors constituting "Class II." Significantly, the Plan also provides that control over disposition of various groups of Syms owned real estate will shift to a special committee comprised of the Creditors' Committee's board designee if creditors of Syms and Filene's are not paid within certain time periods specified in the Plan. There are similar provisions respecting control by the Majority Shareholder if she is not paid all amounts owed to her within the time periods and upon the condition specified in the Plan. These provisions adequately balance the competing interests of shareholders and creditors of both Estates.

43. In accordance with Article VII.A.2 of the Plan, the Debtors have filed, in the Plan Supplement, the identities of the initial Reorganized Syms Board of Directors and the officers of the Reorganized Company, which will be further supplemented on or before Confirmation. The compensation to be disbursed to the directors, executives and officers serving as of the Effective Date also has been disclosed in the Budget. The foregoing satisfies the disclosure requirements of Bankruptcy Code section 1123(a)(7).

3. Discretionary Contents of the Plan.

44. Section 1123(b) of the Bankruptcy Code identifies various discretionary provisions that may be included in a plan of reorganization, but are not required. For example, a plan may impair or leave unimpaired any class of claims or interests and provide for the assumption or rejection of executory contracts and unexpired leases. 11 U.S.C. § 1123(b)(1)(2). A plan also may provide for: (a) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; (b) the retention and enforcement by the debtor, by the trustee, or

by a representative of the estate appointed for such purpose, of any such claim or interest; or (c) the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests. 11 U.S.C. §§ 1123(b)(3)(A)-(B); 1123(b)(4). Finally, a plan may "modify the rights of holders of secured claims . . . or . . . unsecured claims, or leave unaffected the rights of holders of any class of claims" and may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]." 11 U.S.C. § 1123(b)(5)-(6).

45. As described above, the Plan provides for the impairment of certain Classes of Claims and Interests, while leaving others unimpaired. The Plan thus modifies the rights of the holders of certain Claims and Interests and leaves the rights of others unaffected. See Plan, Art. III and V. The Plan provides for the assumption or rejection of executory contracts or unexpired leases to which the Debtors are parties. See Plan, Art. IX. The Plan also provides for the retention and enforcement of certain claims by the Reorganized Debtors. See Plan, Article VII.I. Further, the Plan embodies the Plan Settlement that is referred to above and described in pages 25 through 30 of the Disclosure Statement. The Plan also includes a settlement of the Claims filed by the Local 1102 Retirement Trust and Syms and Filene's Local 1102 Unions (the "Trust Settlement"). See Plan, Article II.A. The Plan's satisfaction of Code sections 1129(a)(1) and 1123(b)(3)(A) and Rule 9019 of the Federal Rules of Bankruptcy Procedure with regard to the Plan Settlement and Trust Settlement is discussed in Section IV below.

4. Executory Contracts and Unexpired Leases.

46. The Debtors have exercised appropriate business judgment in determining whether to reject each of their executory contracts and unexpired leases. Pursuant to the Plan and except as otherwise set forth therein, the Debtors are rejecting all agreements unless such

contract or lease (a) previously was assumed, assumed and assigned, or rejected by the Debtors, (b) previously expired or terminated pursuant to its own terms before the Effective Date, (c) is the subject of a pending motion to assume or reject on the Confirmation Date, including but not limited to the Debtors' ground leases of property located in Fairfield, Connecticut and Secaucus, New Jersey, or (d) is identified in Exhibit B to the Plan. In identifying those agreements for assumption listed on Exhibit B, the Debtors commenced an extensive review of all executory contracts and unexpired leases and determined, as an exercise of their business judgment, which contracts were necessary for the operations of the Reorganized Company.

47. The Debtors also have agreed with certain of their unions on termination of their collective bargaining agreements. In particular, as part of the Trust Settlement, the Debtors, Filene's Local 1102 Union, Syms Local 1102 Union and Local 1102 Retirement Trust agreed that Filene's Local 1102 CBA and the Syms Local 1102 CBA will be deemed voluntarily terminated. Moreover, the Debtors determined, in conjunction with the Equity Committee and the Creditors' Committee, to assume their obligations under their qualified pension plan. The Debtors determined that assumption and maintenance of their go-forward obligations under the plan are more cost effective than immediate rejection of the plan and payment of any related claims asserted by the PBGC. As noted above, 655 Merrick LLC raised an objection respecting disposition of certain real-estate related agreements. This objection has been resolved by the Debtors' agreement to assume such agreements. Macy's separately objects to Filene's assumption of an exclusive trademark licensing agreement for the Filene's name. Macy's objection, however, is without merit. This matter is addressed in a separate submission.

B. The Plan Complies With The Applicable Provisions Of Title 11 (Section 1129(a)(2)).

48. Section 1129(a)(2) requires the proponent of a plan to "compl[y] with the applicable provisions of [title 11 of the Bankruptcy Code]." 11 U.S.C. § 1129(a)(2). The principal purpose of Bankruptcy Code section 1129(a)(2) is to ensure that a plan proponent has complied with the requirements of the Bankruptcy Code regarding solicitation of acceptances of the plan. See, e.g., In re PWS Holding Corp., 228 F.3d 224, 248 n.23 (3d Cir. 2000) (quoting In re Trans World Airlines, Inc., 185 B.R. 302, 313 (Bankr. E.D. Mo. 1995) in noting that: "'The principal purpose of section 1129(a)(2) of the Bankruptcy Code is to assure that the plan proponents have complied with the disclosure requirements of section 1125 of the Bankruptcy Code in connection with the solicitation of acceptances of the plan.'").

49. In these cases, the Court approved the Disclosure Statement relating to the Plan by an order dated July 13, 2012 (the "Solicitation Procedures Order") which, among other things, specifically found that the Disclosure Statement contained adequate information within the meaning of Bankruptcy Code section 1125. In addition, the Court considered and, in the Solicitation Procedures Order, approved, (a) the forms of all materials to be transmitted to those holders of Claims and Interests and other parties-in-interest (collectively, the "Solicitation Packages"), (b) the timing and method of delivery of the Solicitation Packages, and (c) the rules for tabulating votes to accept or reject the Plan.

50. Thereafter, the Debtors and their agents transmitted Solicitation Packages in accordance with the Solicitation Procedures Order.[11] Specifically, on or before July 20, 2012,

[11] See Affidavit of Service and Supplemental Affidavit of Service of Kurtzman Carson Consultants, LLC on mailing of Solicitation Packages executed by Christopher R. Schepper that were filed with the Court on August 2, 2012 [Docket Nos. 1757 and 1758] and the Affidavits of Service of Kurtzman Carson Consultants, LLC on mailing of Solicitation Packages executed by Robert D. Tomasch that were filed with the Court on August 8, *(cont'd)*

the Debtors caused to be mailed (a) a confirmation hearing notice and a CD-ROM containing the Plan, the Disclosure Statement and the Solicitation Procedures Order to all parties entitled to receive such materials, and (b) a confirmation hearing notice to over 17,000 parties-in-interest. In addition, the Debtors caused the confirmation hearing notice to be published in the national edition of USA Today, the Boston Globe and Women's Wear Daily. The Debtors thus have complied with the applicable provisions of Title 11, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018, and, as a result, the Plan meets the requirements of section 1129(a)(2) of the Bankruptcy Code.

C. The Plan Was Proposed In Good Faith (Section 1129(a)(3)).

51. Bankruptcy Code section 1129(a)(3) requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). "Though the term 'good faith,' as used in section 1129(a)(3), is not defined in the Bankruptcy Code, . . . the term is generally interpreted to mean that there exists 'a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.'" 203 N. LaSalle St. P'ship, 126 F.3d at 969 (internal quotation marks omitted; alteration in original) (quoting In re Madison Hotel Assocs., 749 F.2d 410, 424-25 (7th Cir. 1984); see also In re SGL Carbon Corp., 200 F.3d 154, 165 (3d Cir. 1999) (the good faith standard in section 1129(a)(3) requires that there must be "some relation" between the chapter 11 plan and the "reorganization-related purposes" that chapter 11 was designed to serve).

52. In determining whether a plan will succeed and accomplish goals consistent with the Bankruptcy Code, courts look to the terms of the reorganization plan and

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2012 [Docket Nos. 1785 and 1796]. The affidavit demonstrates that the Solicitation Packages were transmitted to Holders of Claims and Interests in accordance with the requirements of the Solicitation Procedures Order.

determine, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code. See, e.g., In re Future Energy Corp., 83 B.R. 470, 486 (Bankr. S.D. Ohio 1988). The plan proponent must show, therefore, that the plan has not been proposed by any means forbidden by law and that the plan has a reasonable likelihood of success. See In re Century Glove, Inc., Nos. 90-400-SLR, 90-401-SLR, 1993 WL 239489, at *4 (D. Del. Feb. 10, 1993) ("'Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied.'") (citation omitted); see also Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship), 116 F.3d 790, 802 (5th Cir. 1997) (same).

53. The Plan has been proposed by the Debtors in good faith, with legitimate and honest purposes of reorganizing the Debtors' ongoing businesses and maximizing the value of each of the Debtors and the recovery to Claimholders and Interestholders under the circumstances of these chapter 11 cases. As described in the Binkoski and the Goodman Declarations, the Debtors filed the chapter 11 cases to maximize value to all stakeholders while conducting an orderly wind-down of their retail operations and reorganizing as a real estate holding company. The Plan accomplishes these goals by providing the means by which the Reorganized Debtors may operate and lease, as appropriate, their real estate assets pending their disposition in a non-distressed, commercially reasonable manner.

54. It has been held that good faith in proposing a plan "also requires a fundamental fairness in dealing with one's creditors." Stolrow v. Stolrow's Inc. (In re Stolrow's Inc.), 84 B.R. 167, 172 (B.A.P. 9th Cir. 1988). As the Court is aware, the Debtors have worked closely with all of their major constituencies with an interest in the Debtors' reorganization to reach a consensual deal. The Plan reflects the end product of these efforts and constitutes the

agreement among such key constituencies regarding the terms of the Debtors' restructuring, as memorialized in the Plan Settlement.

55. Indeed, the support of the Debtors' primary constituencies and the overwhelming acceptance of the Plan by holders of Claims that voted on the Plan reflect the overall fairness of the Plan and the acknowledgment by the Debtors' Claimholders that the Plan has been proposed in good faith and for proper purposes. See In re Eagle-Picher Indus., Inc., 203 B.R. 256, 274 (S.D. Ohio 1996) (finding that a plan of reorganization was proposed in good faith when, among other things, it was based on extensive arm's-length negotiations among the plan proponents and other parties in interest). Accordingly, the requirements of Bankruptcy Code section 1129(a)(3) have been fully satisfied.

D. All Payments To Be Made By The Debtors In Connection With These Cases Are Subject To The Approval Of The Court (Section 1129(a)(4)).

56. Section 1129(a)(4) of the Bankruptcy Code requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4). In essence, this subsection requires that any and all fees promised or received from the estate in connection with or in contemplation of a chapter 11 case must be disclosed and subject to the court's review. Eagle-Picher Indus., 203 B.R. at 274; Future Energy, 83 B.R. at 487-88 (noting that certain payments, as detailed in section 1129(a)(4), are subject to approval by the bankruptcy court).

57. All payments made or to be made by the Debtors for services or for costs or expenses in connection with the chapter 11 cases, including all Claims of Professionals, are

subject to approval of the Court as reasonable. In particular, Articles V.A.1 and V.B.1 of the Plan provide for the payment of Allowed Administrative Claims, and Article XI.A of the Plan makes all payments on account of Professionals' requests for compensation or reimbursement for services rendered prior to the Plan Effective Date subject to the requirements of the Bankruptcy Code and orders of this Court as applicable. Finally, Article XIII of the Plan provides that the Court will retain jurisdiction after the Plan Effective Date to hear and determine all applications of Professionals for allowance of compensation or reimbursement of expenses earned or incurred prior to the Effective Date and authorized pursuant to the Bankruptcy Code or the Plan. Accordingly, the Plan fully complies with the requirements of Bankruptcy Code section 1129(a)(4).

E. The Plan Discloses All Required Information Regarding Postconfirmation Directors, Management And Insiders (Section 1129(a)(5)).

58. Bankruptcy Code section 1129(a)(5) provides that a plan of reorganization may be confirmed if the proponent discloses the identity of those individuals who will serve as management of the reorganized debtor, the identity of any insider to be employed or retained by the reorganized debtor, and the compensation proposed to be paid to such insider. 11 U.S.C. § 1129(a)(5)(B). In addition, under Bankruptcy Code section 1129(a)(5)(A)(ii), the appointment of, or continuation in office of, existing management must be consistent with the interests of creditors, equity security holders, and public policy. 11 U.S.C. § 1129 (a)(5)(A)(ii).

59. In determining whether the postconfirmation management of a debtor is consistent with the interests of creditors, equity security holders, and public policy, a court must consider proposed management's competence, discretion, experience, and affiliation with entities having interests adverse to the debtor. See In re Sherwood Square Assocs., 107 B.R. 872, 878 (Bankr. D. Md. 1989); see also In re W.E. Parks Lumber Co., 19 B.R. 285, 292 (Bankr. W.D. La.

1982) (a court should consider whether "the initial management and board of directors of the reorganized corporation will be sufficiently independent and free from conflicts and the potential of post-reorganization litigation so as to serve all creditors and interested parties on an even and loyal basis").

60. The Debtors have fully satisfied the requirements of Bankruptcy Code section 1129(a)(5). As more fully described above, Article VII.A.2 of the Plan provides for the manner of selection of the initial directors of Reorganized Syms Board of Directors, and also provides that the identities of the initial directors and officers of the Reorganized Company will be identified in the Plan Supplement. The Plan Supplement, containing the requisite information under Code section 1129(a)(5), was filed on August 13, 2012, as further supplemented on August 21, 2012. The Debtors may file additional supplemental information regarding the identities and compensation of the directors and officers in a further supplement on or before Confirmation. Accordingly, the Plan fully satisfies the requirements of Bankruptcy Code section 1129(a)(5).

F. The Plan Does Not Provide For Any Rate Change Subject To Regulatory Approval (Section 1129(a)(6)).

61. Bankruptcy Code section 1129(a)(6) requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, that appropriate governmental approval has been obtained for any rate change provided for in the plan, or that such rate change be expressly conditioned on such approval. 11 U.S.C. § 1129(a)(6). This section of the Bankruptcy Code does not apply because there is no governmental regulatory commission that has jurisdiction over the Debtors' or the Reorganized Debtors' rates.

G. The Plan Satisfies The "Best Interests" Test (Section 1129(a)(7)).

62. The "best interests of creditors" test as set forth in Bankruptcy Code section 1129(a)(7) requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest has accepted the plan or will receive property of a value not less than what such holder would receive if the debtor were liquidated under chapter 7. See Kane v. Johns-Manville, 843 F.2d at 649; In re Leslie Fay Cos., 207 B.R. 764, 787 (Bankr. S.D.N.Y. 1997). The best interest test focuses on individual dissenting creditors or interest holders, rather than classes of claims or interests. Leslie Fay Cos., 207 B.R. at 787; In re Drexel Burnham Lambert Grp., Inc., 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992).

63. In considering whether a plan is in the "best interests" of creditors, a court is not required to consider any alternative to the plan other than the dividend projected in a liquidation of all of the debtor's assets under chapter 7 of the Bankruptcy Code. See e.g., In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 297 (Bankr. S.D.N.Y. 1990); Future Energy, 83 B.R. at 489-90 (suggesting that the "best interests" test requires looking at the plan as compared with a chapter 7 liquidation); In re Jartran, Inc., 44 B.R. 331, 389-93 (Bankr. N.D. Ill. 1984) (best interests test satisfied by showing that, upon liquidation, cash received would be insufficient to pay priority claims and secured creditors so that unsecured creditors and stockholders would receive no recovery).

64. The Debtors performed a liquidation analysis, attached to the Disclosure Statement as Exhibit G (the "Liquidation Analysis"), to determine whether the Plan satisfies the "best interests" test and to assist creditors in determining whether to accept the Plan. The Liquidation Analysis focuses on Filene's only, as Syms is solvent and, under the Plan, all Syms creditors are being paid in full. As set forth in Exhibit G of the Disclosure Statement, as well as in the Binkoski and Goodman Declarations, under any reasonable set of assumptions, the overall

values that may be realized by the holders of Claims and Interests in a hypothetical chapter 7 case of Filene's are significantly less than the value of the recoveries to these holders under the Plan.

65. Specifically, the Debtors and their advisors estimate that, in a liquidation scenario, holders of Filene's Convenience Claims, Filene's General Unsecured (Short-Term) Claims, Filene's General Unsecured (Long-Term) Claims and Filene's Union Pension Plan Claims will receive approximately 2% on account of such Claims. Because the treatment under the Plan, which implements the Plan Settlement, provides for (i) a 100% recovery to holders of Filene's Convenience Claims and Filene's General Unsecured (Short-Term) Claims; (ii) a 75% recovery to holders of Filene's General Unsecured (Long-Term) Claims; and (iii) continued maintenance of the Syms Pension Plan, following Confirmation, and the making of all contributions required under applicable minimum funding rules, the Debtors submit that the recovery to all such Holders is significantly greater than under a liquidation scenario.

66. ASM Capital, LP ("ASM") and certain other Syms Class 4 Claimants (together, the "Ad Hoc Committee") objected to the Plan, claiming that the best interest test is not satisfied because the Plan only provides for interest on Class 4 Syms General Unsecured Claims from and after October 1, 2015. The Debtors acknowledge that where a debtor is solvent, postpetition interest must be paid on unsecured claims before any distribution may be made to equity. See Tribune, 464 B.R. at 206 n.92; Wash. Mut., 442 B.R. at 356; Coram Healthcare, 315 B.R. at 345 (D. Del. 2004). Thus, the Debtors will modify the Plan to provide for payment of postpetition interest on account of the Class 4 Syms General Unsecured Claims from and after the Petition Date until paid in full at the federal judgment rate.

67. The Bankruptcy Code requires, where the debtor is solvent, that interest be paid "at the legal rate from the date of the filing of the petition." 11 U.S.C. § 726(a)(5). The Code does not, however, define "the legal rate." While a few courts have interpreted section 726(a)(5) to require the contractual rate of interest, see, e.g., In re Carter, 220 B.R. 411, 415 (Bankr. D.N.M. 1998); In re Schoeneberg, 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993), or the state statutory rate, see, e.g., Beguelin v. Vocano Vision, Inc. (In re Beguelin), 220 B.R. 94, 99 (B.A.P. 9th Cir. 1998), Courts in this District have followed the majority rule that the federal judgment rate is the appropriate interest rate to be paid to unsecured creditors for section 1129(a)(7) to be satisfied.[12] See W.R. Grace, 2012 WL 2130981; In re Wash. Mut., Inc., No. 08–12229 (MFW), 2011 WL 57111 (Bankr. D. Del. Jan. 7, 2011) (citing Coram Healthcare, 315 B.R. at 346);.see also Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002); In re Adelphia Commc'ns Corp., 368 B.R. 140, 257 (Bankr. S.D.N.Y. 2007); Branch Banking & Trust Co. v. McDow (In re Garriock), 373 B.R. 814, 816 (E.D. Va. 2007); In re Best, 365 B.R. 725, 727 (Bankr. W.D. Ky. 2007); In re Dow Corning Corp., 237 B.R. 380, 412 (Bankr. E.D. Mich. 1999).

68. Notwithstanding the foregoing, the Ad Hoc Committee Objection contends that the rate of interest to be paid on Syms Class 4 Claims must be calculated using the formula approach developed by the Supreme Court in Till v. SCS Credit Corp., 541 U.S. 465 (2004), wherein the Court determined the appropriate interest rate for modifying and paying off a secured clam in a Chapter 13 cram-down plan. This reliance on Till is misplaced. The Ad Hoc Committee acknowledges that this Chapter 11 case neither involves interpretation of Code

[12] Applicable precedent in this District makes no distinction between the postpetition pre-Effective Date period and the post-Effective Date period in requiring a minimum of the federal judgment rate.

section 1325 nor does it concern the payment of interest on a crammed-down secured claim. Indeed, the Ad Hoc Committee does not even cite or analyze Washington Mutual, W.R. Grace, or Coram Healthcare or any of the other majority cases that cite the federal judgment rate as the appropriate rate for unsecured creditors in an insolvent case. [13]

H. The Plan Has Been Accepted By The Requisite Classes Of Creditors and Interest Holders (Section 1129(a)(8)).

69. Bankruptcy Code section 1129(a)(8) requires that each class of claims or interests under a plan has either accepted the plan or is not impaired under the plan. With respect to an unimpaired class of claims, under Bankruptcy Code section 1126, such unimpaired class of claims is "conclusively presumed" to have accepted the plan and need not be further examined under Bankruptcy Code section 1129(a)(8). 11 U.S.C. § 1126(f). See In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 150 (Bankr. S.D.N.Y. 1984) (unimpaired classes of claims deemed to have accepted the plan pursuant to section 1126(f) of the Bankruptcy Code). In these chapter 11 cases, all Classes of Impaired Claims voted to accept the Plan in accordance with Bankruptcy Code section 1126.

[13] See In re Wash. Mut., Inc., 461 B.R. 200, 242-43 (Bankr. D. Del. 2011) (holding that "the federal judgment rate is the appropriate rate to be applied under section 726(a)(5)"), *vacated, in part, on other grounds*, No. 08-12229, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012); W.R. Grace, 2012 WL 2130981 at *243 (finding that the equities of the case did not warrant departure from the federal judgment rate); Coram, 315 B.R. at 356 (same). Even if the federal judgment rate is not *required* and the Court may impose a higher rate on equitable grounds, which the Debtors do not concede is the case, the Ad Hoc Committee failed to argue that there are any such equities here. Nor are there any such equities here. The value of Syms owned real estate is vastly in excess of estimated Syms claims; there should be no serious doubt, therefore, that such claims will be paid. Indeed, they must be paid before any Filene's claims are paid, whose distributions would be inequitably delayed if a rate greater than the federal judgment rate were imposed. And if Syms claims are not paid within a year of the Effective Date, the Creditor's Committee's Board designee can assume control of the process for selling the near-term properties to ensure that Syms creditors are paid. Finally, the good faith efforts of the Debtors, the Equity Committee and the Creditors' Committee in reaching a global Plan Settlement and the overwhelming creditor support of the Plan illustrate the absence of any compelling justification to impose a more onerous interest rate obligation on the Estates.

I. The Plan Provides For The Payment Of Priority Claims (Section 1129(a)(9)).

70. Bankruptcy Code section 1129(a)(9) requires that certain priority claims be paid in full on the effective date of a plan and that the holders of certain other priority claims receive deferred cash payments.[14] The Plan satisfies these requirements. In general, the Plan provides that all holders of Allowed Administrative Claims, Allowed Priority Tax Claims, and Allowed Non-Tax Priority Claim will be paid Cash equal to the allowed amount of such Claim. Thus, the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code.

J. The Plan Has Been Accepted By At Least One Impaired, Non-Insider Class (Section 1129(a)(10)).

71. Section 1129(a)(10) of the Bankruptcy Code provides that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). As described above, the Plan has been accepted by all Classes of Impaired Claims.

K. The Plan Is Feasible (Section 1129(a)(11)).

72. Pursuant to section 1129(a)(11) of the Bankruptcy Code, a plan of reorganization may be confirmed only if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor

[14] In particular, pursuant to Bankruptcy Code section 1129(a)(9)(A), holders of claims of a kind specified in Bankruptcy Code section 507(a)(2) – administrative claims allowed under section 503(b) of the Bankruptcy Code – must receive cash equal to the allowed amount of such claims on the effective date of the plan. Bankruptcy Code section 1129(a)(9)(B) requires that each holder of a claim of a kind specified in section 507(a)(4) through (7) of the Bankruptcy Code – generally, wage, employee benefit and deposit claims entitled to priority – must receive deferred cash payments of a value equal to the allowed amount of such claim or cash equal to the allowed amount of such claim on the effective date of the plan, depending upon whether the class has accepted the plan. Finally, section 1129(a)(9)(C) provides that the holder of a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code – i.e., priority tax claims – must receive deferred cash payments over a period not to exceed five years after the petition date, the present value of which equals the allowed amount of the claim.

to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). One commentator has stated that this section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." 7 Collier on Bankruptcy ¶ 1129.03[11], at 1129-64 (Lawrence P. King ed., 15th ed. rev. 1999). However, "there is a relatively low threshold of proof necessary to satisfy the feasibility requirement." Tribune, 464 B.R. at 185 (quoting In re Briscoe Enters., Ltd. II., 994 F.2d 1160, 1166 (5th Cir. 1993)).

73. Bankruptcy Code section 1129(a)(11) does not require a guarantee of the plan's success; rather, the proper standard is whether the plan offers reasonable assurance of success. In re Am. Capital Equip., LLC, No. 10-2239, 2012 WL 3024202 (3d Cir. July 25, 2012); Tribune, 464 B.R. at 185; Drexel Burnham Lambert, 138 B.R. at 762. Courts have identified a number of factors relevant to evaluating the feasibility of a proposed plan of reorganization, including: (a) the prospective earnings or earning power of the debtor's business, (b) the soundness and adequacy of the capital structure and working capital for the debtor's postconfirmation business, (c) the debtor's ability to meet its capital expenditure requirements, (d) economic conditions, (e) the ability of management and the likelihood that current management will continue, and (f) any other material factors that would affect the successful implementation of the plan. See, e.g., W.R. Grace, 2012 WL 2130981, at *42; In re Prudential Energy Co., 58 B.R. 857, 862-63 (Bankr. S.D.N.Y. 1986); see also In re Adamson Co., 42 B.R. 169, 176 (Bankr. E.D. Va. 1984); Clarkson v. Cooke Sales & Serv. Co. (In re Clarkson), 767 F.2d 417, 420 (8th. Cir. 1985); In re Sound Radio, Inc., 93 B.R. 849, 856 (Bankr. D.N.J. 1988), aff'd in part, 103 B.R. 521 (D.N.J. 1989), aff'd, 908 F.2d 964 (1990).

74. The Sources and Uses Statement and Projections contained in Exhibit E and Exhibit F to the Disclosure Statement indicate that, after giving effect to confirmation of the Plan, including consummation of the rights offering, the Reorganized Debtors will have sufficient operating cash to fund ongoing business operations and any anticipated capital expenditures as contemplated by the business plan. Specifically, the Projections show that the Debtors will be able to meet their obligations under the Plan based on existing cash, the receipt of the proceeds of the rights offering and the cash inflows from the sale of the near term and medium term properties over time. Further, management of the Reorganized Companies is well qualified to achieve success post-confirmation, as evidenced by their credentials discussed in detail in Annex 1 to the Plan Supplement. Accordingly, the Plan satisfies the feasibility standard of section 1129(a)(11) of the Bankruptcy Code.

L. The Plan Provides For The Payment Of Certain Fees (Section 1129(a)(12)).

75. Bankruptcy Code section 1129(a)(12) requires that certain fees listed in 28 U.S.C. § 1930, determined by the court at the hearing on confirmation of a plan, be paid or that provision be made for their payment. All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on the Plan Effective Date, thereby satisfying Bankruptcy Code section 1129(a)(12).

M. Continuation of Retiree Benefits (Section 1129(a)(13)).

76. Section 1129(a)(13) of the Bankruptcy Code requires that a plan of reorganization provide for the continuation, after the effective date, of all retiree benefits at the level established by agreement or by court order pursuant to section 1114 of the Bankruptcy Code, for the duration of the period that the debtor has obligated itself to provide such benefits. See 11 U.S.C. § 1129(a)(13). The Debtors do not have any "retiree benefits" within the meaning given to such term in the Bankruptcy Code. Accordingly, section 1129(a)(13) of the Bankruptcy Code is not applicable.

N. The Plan Satisfies The "Cramdown" Requirements.

77. As noted above, all impaired Classes of Claims accepted the Plan. Thus, there is no need for the Debtors to address the cramdown provisions of the Bankruptcy Code. At the Disclosure Statement hearing, however, ASM Capital asserted that the Plan violates the absolute priority rule because the Majority Shareholder will receive cash payments on account of her shares that Syms is purchasing under the Plan before creditors of Syms and Filene's will be paid their distributions.[15] Given the importance of the share purchase transaction to the Plan, the Debtors briefly address this assertion.

78. ASM's argument misconstrues the plain language of the Bankruptcy Code. In particular, with respect to a class of unsecured claims, a plan will be found to be fair and equitable if it complies with one of the following conditions:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . . .

11 U.S.C. § 1129(b)(2)(B).

79. There is *no* temporal aspect to this statute, i.e., there is *no* requirement that stakeholders of a lower priority must await any and all distributions until every other stakeholder of a higher priority is paid in full. Rather, the plain language of section 1129(b) only requires

[15] The Plan provides that, after payment of exit and other costs, any proceeds remaining from the rights offering, plus proceeds of real estate and other asset dispositions, will be split between creditors and the Majority Shareholder, with creditors receiving 60% and the Majority Shareholder receiving 40%, until the Majority Shareholder is paid $10,725,761. The balance of Syms' payment obligation to the Majority Shareholder, in the amount of $7,065,907, will be paid after Reorganized Syms has satisfied all its obligations to creditors under the Plan.

that junior stakeholders receive no recovery unless the plan "provides" for full value to more senior stakeholders: it does not actually require "payment" to more senior stakeholders as a condition to payment to more junior stakeholders.

80. This construction of the absolute priority rule is supported by numerous courts that have specifically considered this issue. As one court said, section 1129(b)(2)(B) does not "require *payment* before a junior class could receive anything; it merely means that senior classes must be fully *provided for* in order for junior classes to receive anything." In re Arden Props., Inc., 248 B.R. 164, 173-74 (Bankr. D. Ariz. 2000) (second emphasis added). Similarly, in overruling a senior creditor's plan objection that the absolute priority rule was violated because a senior creditor was being paid over a longer period than a junior creditor, another court said:

> It must be remembered that *the absolute priority rule does not require sequential distributions* (i.e., cash payment in full to senior creditors before any distribution is made to junior creditors), but merely that the values represented by the higher-ranking claims are fully satisfied by the values distributed under the Plan.

Mercury Capital Corp. v. Milford Conn. Assocs., L.P., 354 B.R. 1, 13 (D. Conn. 2006) (quoting In re Penn Cent. Transp. Co., 458 F. Supp. 1234, 1283 (E.D. Pa. 1978) (emphasis added); see In re TCI 2 Holdings, LLC, 428 B.R. 117 (Bankr. D.N.J. 2010) (holding that the absolute priority rule does not require sequential distributions); see also In re Snyder, 967 F.2d 1126, 1128 (7th Cir. 1992).

81. Indeed, the actual timing of payment is relevant only if the *feasibility* of the plan is in question and, therefore, the debtor's ability to make later-in-time payments to a senior class is suspect:

> Must the money be in hand at the date of confirmation to satisfy the absolute priority rule? We think not, so long as its provision is

> established by uncontested findings of the bankruptcy court which are not clearly erroneous, and which 'provide for' such payments in accordance with the feasible confirmed plan.

Steelcase Inc. v. Johnston (In re Johnston), 21 F.3d 323, 330-31 (9th Cir. 1994) (proposed plan under which debtor was to retain its equity interest "before" payment to the objecting creditor properly "provided for" the required treatment of unsecured creditors under section 1129(b)(2)(B) because unsecured creditors were being paid in full with interest).

82. It is undisputed that the Plan "provides for" payment in full of Syms creditors. The Disclosure Statement and the related Plan Declarations establish that the estimated, "as is" value of the Syms owned real estate is approximately $147 million, whereas the estimated, aggregate amount of all Syms unsecured claims significantly is less than half this amount. The Sources and Uses Statement and the Projections attached to the Disclosure Statement further demonstrate that there will be sufficient resources available to pay all administrative and priority claims as and when allowed, along with all go-forward expenses of operating Reorganized Syms' real estate assets pending their disposition.

83. As a further check on Reorganized Syms' ability to honor its obligation to pay all its creditors in full, the Plan provides for control over disposition of the near-term and medium-term properties to vest in a special subcommittee of the Syms Board of Directors comprised exclusively of the board member designated by the Creditors' Committee if the Syms creditors are not paid in full by October 1, 2013 and the Filene's creditors are not paid what they are owed under the Plan by October 1, 2014 (subject to a potential of up to a six month extension under certain conditions). These terms further ensure that the Plan "provides for" the payment in full of Syms creditors in accordance with the absolute priority rule.

84. Finally, it is important to note that the Majority Shareholder's agreement to sell her shares and defer payment in favor of creditors upon the terms outlined in the Plan benefits all stakeholders, including Syms creditors. The Majority Shareholder did not initiate discussions about the sale of her shares. Rather, certain minority shareholders on the Equity Committee conditioned their support of a consensual plan on the Majority Shareholder's disposition of her shares to minority shareholders. The Majority Shareholder had no obligation to agree to this condition, but after protracted negotiations, and in an effort to pave the way for a consensual plan, she agreed to do so.

85. Significantly for all stakeholders, while Reorganized Syms will acquire all of the Majority Shareholder's shares on the Plan Effective Date, thereby allowing minority shareholders to immediately assume control so they can pursue their real estate disposition plans, the Majority Shareholder agreed to receive the overwhelming majority of the proceeds from the share purchase transaction over time, thereby financing this very critical aspect of this consensual restructuring with rights offering proceeds that would not otherwise have been available to satisfy estate expenses and claims. In fact, despite surrendering her shares on the Effective Date, she agreed to accept over 40% of the purchase price consideration only after all obligations to creditors are honored under the Plan, including obligations to both Syms and Filene's creditors. No interest will accrue during the deferral period. In order to achieve a consensual plan, the Majority Shareholder agreed to receive no consideration for this deferral. Based on the foregoing, there is no violation of the absolute priority rule.

IV. THE SETTLEMENTS EMBODIED IN THE PLAN ARE CONSISTENT WITH APPLICABLE PRECEDENT AND SHOULD BE APPROVED

A. The Plan Settlement

86. In determining whether the Plan may be confirmed, the Bankruptcy Court must evaluate whether the Plan Settlement is fair and equitable. Tribune, 464 B.R. at 158 (citing Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968)). The Bankruptcy Court must also conduct a careful assessment of the Plan Settlement to ensure it meets the requirements of Fed. R. Bankr. P. 9019. Whether Rule 9019 is satisfied is committed to the sound discretion of the Bankruptcy Court, which requires a finding that the Plan Settlement is fair, reasonable and in the estate's best interest. Tribune, 464 B.R. at 158 (citing In re Louise's, Inc., 211 B.R. 798, 801 (D. Del. 1997)).

87. In scrutinizing a settlement's compliance with the Code and the Rules, courts in this District weigh the value of the claims being compromised against the value that the compromise confers upon the estate. Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996). This requires a balancing of four factors: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the litigation's complexity and the expense, inconvenience and delay associated therewith; and (4) the paramount interest of creditors. Martin, 91 F.3d at 393 (citing TMT Trailer, 390 U.S at 424-25); Tribune, 464 B.R. at 158; In re Spansion, No. 09-10690 (KJC), 2009 WL 1531788, at *4 (Bankr. D. Del. June 2, 2009). The Court is neither required to examine every aspect of the law and every relevant fact, nor is the Court required to find that the compromise embodies the best conceivable settlement of claims. See Wash. Mut., 442 B.R. at 328. Thus, the Plan Settlement must only surpass the "lowest point in the range of reasonableness." Tribune, 464 B.R. at 158 (citing Wash. Mut., 442 B.R. at 328).

88. Until the Plan Settlement was reached, there was a dispute between Syms and the Equity Committee, on the one hand, and the Creditors' Committee, on the other hand, regarding whether Filene's creditors should be paid in full. In particular, while the Filene's estate currently has limited liquid assets available for distribution to unsecured creditors, the Creditors' Committee asserted that (i) Filene's has significant claims against Syms that, once liquidated and paid from the proceeds of the disposition of Syms Owned Real Estate, will allow Filene's creditors, as well as Syms' creditors, to be paid in full, and (ii) aside from such intercompany claims, Filene's bankruptcy estate should be substantively consolidated with Syms' bankruptcy estate, which would result in all creditors of both estates being paid in full.

89. The Creditors' Committee raised three main intercompany claims. First, as discussed in greater detail in pages 25 through 30 of the Disclosure Statement as well as the Binkoski Declaration, the Creditors' Committee contended that Syms owed Filene's approximately $15 million for Filene's share of the store disposition proceeds used to pay off the BoA debt, which the Creditors' Committee asserted was solely the obligation of Syms. Syms and the Equity Committee disputed these contentions, as both Syms and Filene's were joint obligors on the BoA debt. Syms and the Equity Committee also asserted that Syms and Filene's entered into the BoA facility for Filene's benefit when Syms acquired Filene's operating assets in 2009 prior to which Syms had no need for the revolving facility.

90. Second, the Creditors' Committee asserted that Syms owed Filene's significant royalty payments on account of Filene's ownership of Syms' trademarks and tradenames of at least $15.5 million. In support of this assertion, the Creditors' Committee relied on a license agreement entered into by Syms and Filene's in 1986 that contemplated Syms' payment of a royalty fee to Filene's equal to a percentage of net merchandise sales. However,

Syms and the Equity Committee disputed this contention, pointing out that the arrangement between Syms and Filene's was discontinued in practice almost six years before Filene's was acquired.

91. Third, the Creditors' Committee asserted that certain claims that Syms has against Filene's should be equitably subordinated or recharacterized as equity, including a $33 million prepetition, general unsecured, intercompany claim that Syms asserted against Filene's, plus subrogation claims of approximately $18.4 million that Syms would be entitled to assert under guarantees of certain Filene's trade claims and leases. Syms and the Equity Committee disputed these contentions, asserting that Syms afforded significant financial support to Filene's that was recorded contemporaneously as intercompany accounts in the Debtors' books and records and which allowed Filene's to operate and pay its creditors for much of the time that it was owned by Syms, thereby benefiting Filene's and its creditors.

92. Alternatively, the Creditors' Committee claimed that the Syms and Filene's estates should be substantively consolidated because Syms and Filene's historically operated as a single entity and commingled their operations and assets such that all creditors effectively dealt with Syms and Filene's as a single entity. Consequently, the Creditors' Committee asserted that intercompany claims and accounts between the Debtors should be ignored and that all creditors should be allowed to be paid from all assets of both Syms and Filene's, including the Syms owned real estate.

93. In contrast, Syms and the Equity Committee contended that substantive consolidation was not warranted because Syms and Filene's had separate stores, separate websites, and separate advertisements and promotions. Syms and the Equity Committee also asserted, among other things, that (i) the Debtors' pre-petition revolving lender treated them as

two separate entities by requiring both of them to become borrowers under the lending facility; (ii) vendors invoiced Syms and Filene's separately based on their historic business dealings prior to the acquisition of Filene's assets, with such vendors being paid from accounts owned by Syms and Filene's, respectively; and (iii) many other Filene's vendors and landlords dealt with Syms and Filene's as separate entities, as evidenced by some Filene's vendors and landlords negotiating for Syms guarantees, whereas others negotiated that term away in favor of enhanced economics.

94. While Syms and the Equity Committee disputed each of the Creditors' Committee's contentions with respect to the intercompany claims as well as the appropriateness of substantive consolidation, the parties acknowledge that the results of litigation over these matters was not free from doubt. As such, success on the merits, while possible, was not sufficiently probable for any party involved in the negotiation to undertake the risk of foregoing settlement on the terms embodied in the Plan Settlement.

95. After months of highly contentious negotiations between and among the Debtors, the Equity Committee, the Creditors' Committee and the Majority Shareholder, the parties engaged in two rounds of mediation, with the assistance of Judge James Peck as mediator, to reach a reasonable settlement. The Debtors believe that the Plan Settlement, which provides neither of the Syms shareholders nor the Filene's creditors as great a recovery as they would prefer, falls within a range of reasonableness and is in the collective best interest of all stakeholders taking into consideration the costs, delay, and risks of litigation. As such, the Plan Settlement meets the standards articulated under the Martin test and satisfies Fed. R. Bankr. P. 9019.

B. The Settlement With Local 1102 Retirement Trust, Filene's Local 1102 Union and Syms Local 1102 Union

96. The Local 1102 Retirement Trust filed a Claim against Syms asserting priority status in the amount of $6,408,848 (the "Trust Claim") on account of alleged multi-employer pension plan withdrawal liability. The Debtors do not dispute the amount of the Claim, though they do dispute the priority status of the Claim. The Debtors ultimately reached a settlement of the Trust Claim (the "Trust Settlement") pursuant to which the Debtors will pay (i) one minimum funding payment plus interest on the Effective Date, (ii) two minimum funding payments plus interest on November 15, 2012; and (iii) quarterly payments thereafter, beginning on February 1, 2013, until the trust Claim is paid in full. The parties also agreed that the Filene's Local 1102 collective bargaining agreement and the Syms Local 1102 collective bargaining agreement will be deemed voluntarily terminated.

97. After evaluating the merits of the Trust Claim, the Debtors determined that it was in the best interests of the Estates to reach a compromise that resulted in avoiding payment in full on the Effective Date, as well as avoiding the burden and expense of a non-consensual termination of the collective bargaining agreements. In light of the respective strengths of the parties' arguments and the compelling fact that the Debtors' plan feasibility would be substantially enhanced by eliminating a $6.4 million payment on the Effective Date, the Debtors believe that the Trust Settlement is fair, reasonable, in the estate's best interest and should be approved.

V. PLAN PROVISIONS ESTABLISHING LIABILITY STANDARDS AND RELEASING CLAIMS ARE CONSISTENT WITH APPLICABLE PRECEDENT AND SHOULD BE APPROVED

98. Article XII of the Plan contains certain liability standards, limited releases, and exculpatory provisions. As set forth below, these provisions are consistent with applicable precedent and should be approved.

A. The Debtors' Release Of Claims

99. Article XII.E of the Plan provides for the Debtors', the Reorganized Debtors' and the Estates' release of claims that they might have against (i) the Debtors' directors, officers, and employees, and each of the Debtors' respective agents and professionals in their capacities as such; (ii) the Equity Committee and Creditors' Committee and their respective members and their retained professionals in their capacities as such; and (iii) the Majority Shareholder and the Majority Shareholder's professionals in their capacities as such, in each case in connection with actions in any way relating to the Debtors, the Chapter 11 cases, the purchase, sale or rescission of the purchase or sale of any security of the Debtors or Reorganized Syms, or based upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date. Article XII.F.1 provides a similar release of claims that the Debtors might have against the non-defaulting Backstop Parties related to the Plan, the rights offering, the equity commitment agreement, and the transactions contemplated thereby.

100. These releases are (i) fair, equitable, and reasonable, (ii) integral elements of the restructuring and resolution of the Chapter 11 cases in accordance with the Plan, (iii) necessary for the reorganization of the Debtors, and (iv) supported by reasonable consideration. In determining whether a particular release is appropriate, the presence of the following factors is important:

(1) an identity of interest between the debtor and the third party such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate.

(2) the non-debtor has contributed substantial assets to the reorganization.

(3) the injunction is essential to the reorganization.

(4) a substantial majority of the creditors agree to such injunction; the impacted class has overwhelmingly voted to accept the proposed plan treatment.

(5) the plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

See Tribune, 464 B.R. at 186; Wash. Mut., 442 B.R. at 346; Exide, 303 B.R. at 72.

101. Here, the parties being released by the Debtors all have an identity of interest in seeing that the Plan succeeds and the Debtors reorganize. With respect to the Debtors' officers and directors in particular, no party in these cases, including the Creditors' Committee or the Equity Committee, has suggested that there are any claims worth preserving outside the context of the Plan Settlement. Thus, while the Debtors filed a motion for appointment of an examiner to investigate whether there are any such claims in light of certain pre-petition allegations, no such claims of any consequence have been identified in the several months since the motion was filed that either of the major stakeholders were not willing to see released as part of the Plan Settlement.

102. Moreover, there is a further identity of interest between the Debtors and their current and former officers and directors because, as an integral aspect of the Plan Settlement, the Creditors' Committee and the Equity Committee agreed in the Plan that Reorganized Syms would assume all its indemnification obligations to directors and officers under its charter. Given this agreed-upon provision, a suit against the officers and directors effectively would constitute a suit against Reorganized Syms. These points apply with equal force to the Majority Shareholder in her capacity as such: no one has suggested that there are

any claims against her that should not be resolved as part of the share purchase transaction and Plan Settlement, and because of the negotiated indemnification by Reorganized Syms of the Majority Shareholder in her capacity as such, a suit against her would in effect be a suit against Reorganized Syms.

103. In addition, the current officers and directors, Committee members and Backstop Parties have made substantial contributions to the reorganization. All of them facilitated the Debtors' successful, consensual restructuring by participating in the formulation of the Plan Settlement. The Backstop Parties made additional, substantial contributions by agreeing to back-stop the rights offering without payment of any fees or other consideration other then reimbursement of their attorneys' fees. Moreover, the price at which the Majority Shareholder chose to sell her shares and her agreement to defer payment was a result of a negotiation between her and the Equity Committee that reflected concessions and hence, value contributed by her. In short, the releases are all essential aspects of the global, consensual restructuring.

104. Finally, the Plan has been overwhelmingly accepted by creditors, and the Plan provides a mechanism for the payment of all, or substantially all, of the claims of persons affected by the releases. Indeed, all Syms creditors will be paid in full, and all Syms shareholders will retain their interests in the Reorganized Company. Moreover, Filene's Short-Term creditors and Long-Term creditors are receiving 100% and 75% of their claims, respectively. For this reason and the other reasons outlined above, the Debtors' releases are appropriate and should be approved.

B. Releases By Holders Of Claims And Interests Should Be Approved

105. Article XII.H of the Plan provides that persons (a) who vote to accept the Plan as set forth on the relevant ballot and do not mark their ballot to indicate their refusal to grant releases to released parties, (b) who are holders in Filene's Classes 4A or 5A, or (c) whose

Claim or Interest is deemed unimpaired under the Plan will, by virtue of their receipt of distributions and/or other treatment under the Plan, release the released parties of claims arising under or in connection with or related to the Debtors, the Estates, the conduct of the Debtors' businesses or the chapter 11 cases. This provisions is consistent with precedent in this District and therefore should be approved. See In re Spansion, Inc., 426 B.R. 114 (Bankr. D. Del. 2010) (approving releases binding parties-in-interest who were deemed to have accepted the plan since unimpaired classes were being paid in full and received adequate consideration for release, and those affected by release had not objected to plan).

C. The Exculpation And Limitation Of Liability Provisions Are Appropriate

106. The Plan contains customary exculpation provisions establishing liability standards for claims against certain parties. In particular, the Plan establishes a willful misconduct/gross negligence standard of liability for the released parties consistent with PWS Holding., 228 F.3d 224. In that case, the Third Circuit approved a plan provision that released claims "brought in connection with work on the bankruptcy reorganization plan." Id. at 235. The plan provision at issue in PWS Holding did not "eliminate liability but rather limit[ed] it to willful misconduct or gross negligence." Id. The Third Circuit characterized such a provision as a "commonplace provision in Chapter 11 plans." Id. at 245.

107. The Plan provides for exculpation for the released parties described above.[16] Such exculpation of officers, directors, Committee members, and estate advisors is consistent with precedent in this Circuit, as the provisions extend to estate fiduciaries and exclude acts of gross negligence or willful misconduct. See In re PTL Holdings LLC, No. 11-

[16] There is one exception to exculpation of the released parties, based on agreement with the U.S. Trustee, to be explained at the Confirmation Hearing.

12676 (BLS), 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011) (requiring exculpation provisions to be limited to estate fiduciaries); Tribune, 464 B.R. at 185-86 (same); Wash. Mut., 442 B.R. at 350-51 (same); see also PWS Holding, 228 F.3d at 235.

108. The U.S. Trustee has objected to the exculpation for the Majority Shareholder. The U.S. Trustee's objection is premised on the assertion that the Majority Shareholder is not an estate fiduciary. With due respect, the Majority Shareholder is, in fact, an estate fiduciary who is entitled to exculpation under the plan. Controlling shareholders, like directors, owe fiduciary duties to corporations and minority shareholders. "A shareholder owes fiduciary duties in two instances: (1) when it is a 'majority shareholder,' owning more than 50 percent of the shares, or (2) when it 'exercises control over the business affairs of the corporation.'" See Superior Vision Servs. v. ReliaStar Life Ins. Co., No. 1668-N, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006) (citing Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987). See also Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113-14 (Del. 1994) (shareholder owes fiduciary duty if it owns majority interest in or exercises control over the business affairs of the corporation); In re MAXXAM, Inc./Federated Dev. S'holders Litig., 659 A.2d 760, 771 (Del. Ch. 1995) ("A shareholder that owns a majority interest in a corporation, or exercises actual control over its business affairs, occupies the status of a fiduciary to the corporation and its minority shareholders.").

109. Indeed, a majority shareholder's fiduciary duty extends to creditors when a corporation is insolvent. See Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co.), 280 B.R. 90, 92 (D. Del. 2002) ("Delaware case law 'suggests that . . . controlling shareholders may indeed be liable [to creditors] for breach of fiduciary duty in the zone of insolvency.'") (citation omitted; alteration in original); Official Comm. of Unsecured

Creditors v. Lozinski (In re High Strength Steel, Inc.), 269 B.R. 560, 569 (Bankr. D. Del. 2001) (once a corporation becomes insolvent, fiduciary duty imposed under Delaware law requires that the controlling shareholders and directors of the debtor maximize the value of the assets for payment of unsecured creditors). Syms is a New Jersey corporation. However, New Jersey courts, like Delaware courts, have recognized that a majority shareholder owes a fiduciary duty to minority shareholders and to the corporation. Liss v. Fed. Ins. Co., No. A-0006-07T2, 2009 WL 231992 (N.J. Super. Ct. App. Div. Feb. 3, 2009); Berkowitz v. Power/Mate Corp., 342 A.2d 566 (N.J. Super. Ct. Ch. Div. 1975)(those who control a corporation owe a fiduciary duty to the corporation); see also Casey v. Brennan, 780 A.2d 553 (N.J. Super. Ct. App. Div. 2001) (stating that the majority shareholders and directors of a corporation have a fiduciary duty to treat the minority shareholders fairly), aff'd, 801 A.2d 245 (N.J. 2002).

110. Because the Majority Shareholder is an estate fiduciary, she qualifies for exculpation consistent with this Court's precedent. Moreover, as noted above, exculpation of the Majority Shareholder is proper because exculpation constituted a portion of the consideration for the Majority Shareholder's transfer of control pursuant to the Plan Settlement.[17] It is important to note, however, that the Majority Shareholder's agreement to defer her compensation under the plan waterfall was *not* exchanged for any economics. To the contrary, her agreement to the deferred payment arrangement was an *additional* and *unilateral* concession made only after

[17] Section 7.3 of the Equity Commitment Agreement provides in pertinent part:

> "Section 7.3 Conditions to the Obligations of Ms. Syms and the Trust. The obligation of each of Ms. Syms and the Trusts to sell the shares of Syms common stock subject to the Share Purchase on the Effective date is subject to the following conditions:
>
> (a) Confirmation Order and Plan. The Confirmation Order shall have been entered by the Bankruptcy Court and such order shall be a Final Order. The Plan as approved and the Confirmation Order as entered in each case by the Bankruptcy court shall (i) be consistent with the requirements for the Plan and Confirmation Order set forth in this Agreement; (ii) contain releases and exculpation provisions reasonably acceptable to Ms. Syms and the Trusts..."

subsequent plan negotiations and mediations made it apparent that the plan waterfall was a necessary component of a global resolution that would include the Creditors' Committee.

111. Importantly, all of the Master Mortgage factors, recognized in Tribune, are satisfied with respect to the Majority Shareholder. See Tribune, 464 B.R. at 186 (citing In re Master Mortgage Inv. Fund, Inc., 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994)[18]). Indeed, in light of the negotiated Plan indemnity being provided to the Majority Shareholder, an action against the Majority Shareholder will be, in essence, an action against Reorganized Syms. Second, as also noted above, the Majority Shareholder is making a substantial contribution to the Plan through her transfer of control and deferment of payment. This contribution is augmented by the fact that the Majority Shareholder is deferring a significant portion of the payment for her shares until unsecured creditors receive their distributions under the Plan.[19] Third, the Debtors have received overwhelming acceptance of the Plan. Fourth, nearly all of the creditors are being paid in full under the Plan.

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[18] It should be noted that the Master Mortgage court upheld a plan which included non-consensual third party releases (in the form of a permanent injunction) based upon these factors. Master Mortgage, 168 B.R. 930.

[19] The funds raised through the Rights Offering (*i.e.*, $25 million) are being used to fund exit costs. Thereafter, funds available for distribution *(i.e.*, Excess Cash) will be disbursed pursuant to the plan waterfall described in Section IV of the Plan. As described above, the Majority Shareholder's shares are being purchased for approximately $19.5 million in two installments. The first installment will be paid only after Senior Allowed Claims are paid in full and thereafter only from 40% of excess cash (with 60% being distributed to unsecured creditors). The second installment will be a paid only after holders of Allowed Syms General Unsecured Claims, Allowed Filene's General Unsecured (Short-Term) Claims and Allowed Filene's General Unsecured (Long-Term) Claims are paid all of their distributions under the Plan. This process could take as long as three years. In the meantime, the Majority Shareholder will receive no interest and no interest will accrue. This unsecured, interest-free loan to the Reorganized Company represents a substantial contribution to the Plan. This unsecured, interest-free loan further establishes the "extraordinary circumstances" which would support a non-consensual third party release. See Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203 (3d Cir. 2000); Exide Techs., 303 B.R. 48. The Majority Shareholder is seeking a lesser form of protection (*i.e.*, exculpation).

VI. PROPOSED ORDER AND MODIFICATIONS TO THE PLAN

112. The proposed findings of fact, conclusions of law and order confirming the Plan (the "Confirmation Order") to be filed with the Court prior to the Confirmation Hearing will include proposed changed pages to the Plan. The Debtors will also file with the Court in advance of the Confirmation Hearing a proposed modified form of the Plan setting forth certain modifications. The proposed modifications of the Plan are not expected to be materially adverse to the Debtors or their creditors. The proposed order remains subject to additional review and comment by parties in interest.

VII. CONCLUSION

The Plan complies with and satisfies all of the requirements of Bankruptcy Code section 1129. Accordingly, the Debtors request that the Court (i) confirm the Plan, (ii) overrule any remaining Objections, and (iii) grant the Debtors such other and further relief as is just and proper.

Dated: Wilmington, Delaware
August 27, 2012

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EXHIBIT A

CONFIRMATION REQUIREMENTS SUMMARY CHART

CONFIRMATION OF THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES

THE PLAN COMPLIES WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE

This chart summarizes the requirements for confirmation of the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries (as it may be amended or modified, the "Plan") under section 1129 of the Bankruptcy Code, 11 U.S.C. § 101-1532 (the "Bankruptcy Code"), and is provided in support of the Plan and the Debtors' Memorandum of Law (I) in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries and (II) in Response to Objections Thereto (the "Memorandum") filed with the Court on August 27, 2012. Capitalized terms not otherwise defined herein have the meanings given to them in the Plan and the Memorandum.

Statutory Section	Statutory Requirement	Plan Compliance
11 U.S.C. § 1129(a)(1)	***Section 1129(a)(1) - The Plan Must Comply With the Provisions of Title 11.*** The substantive provisions that are most relevant in the context of section 1129(a)(1) are sections 1122 (classification requirements) and 1123 (mandatory plan contents) of the Bankruptcy Code.	
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1122)***[1]	A. Section 1122 establishes the requirements for the classification of claims and interests in a plan of reorganization.	A. The Plan meets the requirements of section 1122.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1122)***	1. Section 1122 provides that, except in the case of unsecured claims separately classified for administrative convenience, "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class."	1. In addition to Administrative Claims, Superpriority Intercompany Claims, and Priority Tax Claims (which are not required to be classified), Article III of the Plan designates six Classes of Syms Claims, one Class of Syms Interests, seven Classes of Filene's Classes, and one Class of Filene's Interests. The Plan designates Classes of Claims and Interests for each of the Debtors

[1] Italicized references are to the relevant portions of sections 1122 and 1123 of the Bankruptcy Code, as incorporated by reference in section 1129(a)(1) of the Bankruptcy Code.

Statutory Section	Statutory Requirement	Plan Compliance
		reflecting the differences in the legal nature or priority of those Claims and Interests. (See Plan, Article V) a. Moreover, each class of Claims or Interests includes only substantially similar Claims or Interests. (See Plan, Article V.) b. See also, Confirmation Brief at Section III.1 and the Chart of Objections attached as Exhibit B to the Confirmation Brief for a related discussion of the objection to classification of Ultra Stores, Inc.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a))***	B. Section 1123(a) specifies seven requisites for the contents of a plan of reorganization.	B. The Plan contains each of the mandatory plan provisions.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(1))***	1. Section 1123(a)(1) requires that a plan of reorganization designate: (a) classes of claims, other than priority claims under section 507(a)(1), 507(a)(2) or 507(a)(8) of the Bankruptcy Code; and (b) classes of interests.	1. Article III of the Plan designates Classes of Claims and Interests. (See Plan, Art. III)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(2))***	2. Section 1123(a)(2) requires that a plan specify classes of claims and interests that are unimpaired under the plan.	2. Article III of the Plan specifies that Syms Classes 1 and 2 are unimpaired and Filene's Classes 1, 2 and 8 are unimpaired (See Plan, Articles III.C and III.E)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(3))***	3. Section 1123(a)(3) requires that a plan specify the treatment of any class of claims or interests that is impaired under the plan.	3. Article V of the Plan specifies that Syms Classes 3, 4, 5, 6, and 7 and Filene's Classes 3, 4, 5, 6 and 7 are impaired and the treatment for each claim or interest of a particular class (See Plan, Articles V.C and V.D)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(4))***	4. Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest of a particular class unless the holder consents to less favorable treatment of such claim or interest.	4. Article V provides for the equality of treatment within each Class of Claims or Interests unless the holder of a particular Claim or Interest has agreed to less favorable treatment with respect to such Claim or Interest. (See Plan, Article V) a. There is one difference in the treatment of Syms shareholders. Although all Syms shareholders, other than the Majority Shareholder, are unimpaired and will therefore retain their existing Syms stock, only those Syms shareholders who qualify as "accredited investors" under the securities laws have the right to acquire new Syms shares at $2.49 per share under the rights offering. Section 1123(a)(4) neither requires the same exact payment nor identical treatment. Section 1123(a)(4) requires only that each class member receive an approximate measure of equality. Based on the expert testimony of Saul Burian of Houlihan Lokey, the estimated value of the right to acquire Syms stock at $2.49 per share is so negligible that the treatment of Syms shareholders who are accredited investors and those who are not is approximately equal.

Statutory Section	Statutory Requirement	Plan Compliance
		(See Confirmation Brief at Section III.A.2)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(5))***	5. Section 1123(a)(5) requires that a plan provide adequate means for its implementation and lists several examples of the means by which plan implementation may be accomplished.	5. With respect to the Plan's implementation, the Plan provides for, among other things (See Plan, Article VII): a. the continued corporate existence of Reorganized Syms and Reorganized Filene's; b. the authorization and deemed occurrence of each of the matters provided for under the Plan involving the corporate structure of the Debtors or corporate action to be taken by or required of the Debtors; c. the formulation of revised organizational documents, including the certificate of incorporation and bylaws for Reorganized Syms and the limited liability company agreement for Reorganized Filene's, that will govern the Reorganized Debtors after the Plan Effective Date; d. the authorization and issuance of new shares pursuant to the rights offering; e. the purchase of the Majority Shareholder shares; and f. the various other matters under the Plan.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(6))***	6. Section 1123(a)(6) requires that a plan provide for the inclusion in the charter of the debtor or any corporation referred to in section 1123(a)(5)(b) and (c) of a provision prohibiting the issuance of nonvoting equity securities and providing, as to the several classes of securities possessing voting power, an appropriate distribution of voting power among such classes.	6. In accordance with this requirement, the certificate of incorporation and bylaws for Reorganized Syms, attached to the Plan as Exhibit C, provides that Syms shall not issue any non-voting equity securities to the extent required by Bankruptcy Code section 1123(a)(6). (See Plan, Exhibit C and Article VII.A)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(a)(7)***	7. Section 1123(a)(7) requires that a plan contain only provisions that are consistent with the interests of creditors and equity security holders with respect to the manner of selection of any officer, director or trustee under the plan or any successor thereto. (This provision is supplemented by section 1129(a)(5) of the Bankruptcy Code, which directs the scrutiny of the Court to the methods by which the management of the reorganized corporation is to be chosen to provide adequate	7. Article VII.A.2 of the Plan complies with section 1123(a)(7) by properly and adequately disclosing or otherwise identifying the procedures for determining the identity and affiliations of all individuals or entities proposed to serve on or after the Plan Effective Date as officers and members of the initial Reorganized Syms Board of Directors. Specifically, Article VII.A.2 of the Plan provides that the Reorganized Syms Board of Directors will consist of five (5) directors, three (3) of which will be appointed by the Equity Committee, of which two (2) of the three (3) shall be designated by the Backstop Parties if there are unsubscribed shares in the rights offering. One (1) director will be an

Statutory Section	Statutory Requirement	Plan Compliance
	representation of those whose investments are involved in the reorganization.)	independent director and one (1) director will be chosen by the Creditors' Committee. The Debtors have filed, in the First Plan Supplement and the Second Plan Supplement, the identities of the initial Reorganized Syms Board of Directors and the officers of the Reorganized Company, which will be further supplemented on or before Confirmation. The compensation to be disbursed to the directors, executives and officers serving as of the Effective Date also has been disclosed in the Budget.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C § 1123(b))***	C. Section 1123(b) contains various discretionary provisions that may be, but are not required to be, included in a plan of reorganization.	C. The Plan contains many discretionary plan provisions.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(b)(1))***	1. Section 1123(b)(1) allows a plan to impair or leave unimpaired any class of claims (secured or unsecured) or interests.	1. Article III of the Plan provides for the impairment of certain Classes of Claims and Interests and provides that certain other Classes of Claims and Interests are unimpaired. (See Plan, Article III)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(b)(2))***	2. Section 1123(b)(2) allows a plan, subject to section 365, to provide for the assumption, rejection or assignment of any executory contract or unexpired lease not previously rejected.	2. Pursuant to the Plan and except as otherwise set forth therein, the Debtors are rejecting all agreements unless such contract or lease (a) previously was assumed, assumed and assigned, or rejected by the Debtors, (b) previously expired or terminated pursuant to its own terms before the Effective Date, (c) is the subject of a pending motion to assume or reject on the Confirmation Date, including but not limited to the Debtors' ground leases of property located in Fairfield, Connecticut and Secaucus, New Jersey, or (d) is identified in Exhibit B to the Plan. The Debtors have exercised appropriate business judgment in determining whether to reject each of their executory contracts and unexpired leases. The Debtors also have agreed with certain of their unions on termination of their collective bargaining agreements. Additionally, the Debtors determined, in conjunction with the Equity Committee and the Creditors' Committee, to assume their obligations under their qualified pension plan because maintenance of their obligations under the plan are more cost effective than immediate rejection of the plan and payment of any related claims of the PBGC. Macy's, Inc. has objected to the Debtors' attempted assumption of the license agreement with respect to the Filene's trademark. The Debtors believe the license agreement is not an executory contract and thus is property of the estate and, even if the license agreement is an executory contract, it is assumable under applicable law.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(b)(3)***	3. Section 1123(b)(3) allows a plan to provide for the settlement or adjustment of any claim or interest belonging to a debtor or provide for the retention and enforcement of any claim or interest.	3. a. The Plan provides for the retention and enforcement of certain claims by the Reorganized Debtors. (See Plan, Article VII.I) b. Further, the Plan provides for certain releases by the Debtors and by holders of Claims and Interests. (See, e.g., Plan, Article XII.E, XII.F and XII.H)

Statutory Section	Statutory Requirement	Plan Compliance
		c. More specifically, Article XII.E of the Plan provides for the Debtors', the Reorganized Debtors' and the Estates' release of claims that they might have against (i) the Debtors' directors, officers, and employees, and each of the Debtors' respective agents and professionals in their capacities as such; (ii) the Equity Committee and Creditors' Committee and their respective members and their retained professionals in their capacities as such; and (iii) the Majority Shareholder and the Majority Shareholder's professionals in their capacities as such, in each case in connection with actions in any way relating to the Debtors, the Chapter 11 cases, the purchase, sale or rescission of the purchase or sale of any security of the Debtors or Reorganized Syms, or based upon any other act or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date. Article XII.F.1 provides a similar release of claims that they might have against the non-defaulting Backstop Parties related to the Plan, the rights offering, the equity commitment agreement, or the transactions contemplated thereby. (See Plan, Article XII.E and XII.F and Confirmation Brief at Section V.A) Article XII.H of the Plan provides that persons (a) who vote to accept the Plan as set forth on the relevant ballot and do not mark their ballot to indicate their refusal to grant releases to released parties, (b) who are holders in Filene's Classes 4A or 5A, or (c) whose Claim or Interest is deemed unimpaired under the Plan will, by virtue of their receipt of distributions and/or other treatment under the Plan, release the released parties of claims arising under or in connection with or related to the Debtors, the Estates, the conduct of the Debtors' businesses or the chapter 11 cases. (See Plan, Article XII.H and Confirmation Brief at Section V.B) Article XII.D and XII.F of the Plan contains customary exculpation provisions establishing liability standards for claims against certain parties. This Plan section establishes a willful misconduct/gross negligence standard of liability for the released parties. The exculpation of officers, directors, committee members, and estate advisors is consistent with precedent in this Circuit, as the provisions extend to estate fiduciaries and exclude acts of gross negligence or willful misconduct. The Majority Shareholder also is an estate fiduciary who is entitled to exculpation under the plan. (See Plan, Article XII.D and XII.F and Confirmation Brief at Section V.C)

Statutory Section	Statutory Requirement	Plan Compliance
11 U.S.C. § 1129(a)(1) ***(11 U.S.C § 1123(b)(4))***	4. Section 1123(b)(4) allows a plan to provide for the sale of all or substantially all of the property of a debtor's estate.	4. This section is not applicable.
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(b)(5))***	5. Section 1123(b)(5) allows a plan to modify the rights of holders of claims, with the exception of claims secured only by a security interest in real property that is the debtor's principal residence, or leave unaffected the rights of holders of any class of claims.	5. The Plan modifies the rights of holders of Claims in impaired Classes and leaves unaffected the rights of holders of other Claims in unimpaired Classes. (See Plan, Article III)
11 U.S.C. § 1129(a)(1) ***(11 U.S.C. § 1123(b)(6))***	6. Section 1123(b)(6) allows a plan to include any other appropriate provisions not inconsistent with the provisions of title 11.	6. The Plan includes additional appropriate provisions that are not inconsistent with applicable sections of the Bankruptcy Code, including: (a) the provisions of Article VIII of the Plan governing distributions on account of Allowed Claims and procedures for resolving Disputed Claims; and (b) the provisions of Article XIII governing retention of jurisdiction by the Court over certain matters after the Plan Effective Date.
11 U.S.C. § 1129(a)(2)	***Section 1129(a)(2) — The Plan Proponents Comply With the Applicable Provisions of Title 11.***	
11 U.S.C. § 1129(a)(2) ***(11 U.S.C. § 1125)***	A. The primary purpose of section 1129(a)(2) is to ensure that the proponent has adhered to the disclosure requirements of section 1125 of the Bankruptcy Code. As a result, the plan proponent's compliance with section 1125 forms the basis of the inquiry under section 1129(a)(2).	A. The requirements of section 1129(a)(2) have been satisfied. The Debtors have adhered to the disclosure requirements of section 1125.
11 U.S.C. § 1129(a)(3)	***Section 1129(a)(3) – The Plan Must Be Proposed in Good Faith and Not by Any Means Forbidden by Law.***	
11 U.S.C. § 1129(a)(3)	A. Under the good faith standard, good faith is present if the plan has been proposed with the reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Accordingly, a plan proponent must simply demonstrate that the plan is reasonably likely to succeed and that a reorganization is possible.	A. The Plan has been proposed by the Debtors in good faith, with legitimate and honest purposes of reorganizing the Debtors' ongoing businesses and maximizing the value of each of the Debtors and the recovery to Claimholders and Interestholders under the circumstances of these chapter 11 cases. The Debtors filed the chapter 11 cases to maximize value to all stakeholders while conducting an orderly wind-down of their retail operations and reorganizing as a real estate holding company. The Plan accomplishes these goals by providing the means by which the Reorganized Debtors may operate and lease, as appropriate, their real estate assets pending their disposition in a non-distressed, commercially reasonable manner.
11 U.S.C. § 1129(a)(4)	***Section 1129(a)(4) — Payments to Be Made by the Debtor in Connection With Its Chapter 11 Case Must Be Subject to Court Approval As Reasonable.***	
11 U.S.C. § 1129(a)(4)	A. Section 1129(a)(4) requires that any payment made by a plan	A. All payments made or to be made by the Debtors for services or for costs or

Statutory Section	Statutory Requirement	Plan Compliance
	proponent, debtor or person issuing securities or acquiring property under a plan in connection with the plan or the bankruptcy case must have been disclosed and approved by the court, or be subject to the approval of the court, as reasonable.	expenses in connection with the chapter 11 cases, including all Claims of Professionals, are subject to approval of the Court as reasonable. (See Plan, Article V.A.1 and V.B.1, XI.A and XIII)
11 U.S.C. § 1129(a)(5)	***Section 1129(a)(5) The Plan Must Disclose Information Regarding Postconfirmation Management of the Debtor.***	
11 U.S.C. § 1129(a)(5)	A. Section 1129(a)(5) requires that a plan may be confirmed only if the proponent discloses the identity of those individuals who will serve as management of the reorganized debtor, the identity of any insider to be employed or retained by the reorganized debtor and the compensation to be paid to such insider.	A. The Debtors have fully satisfied the requirements imposed by section 1129(a)(5). 1. Article VII.A.2 of the Plan provides for the manner of selection of the initial directors of Reorganized Syms Board of Directors, and also provides that the identities of the initial directors and officers of the Reorganized Company will be identified in the Plan Supplement. The Plan Supplement, containing the requisite information under Code section 1129(a)(5), was filed on August 13, 2012, as further supplemented on August 21, 2012.
11 U.S.C. § 1129(a)(6)	***Section 1129(a)(6) — The Plan Does Not Provide for Any Rate Change Subject to Regulatory Approval.***	
11 U.S.C. § 1129(a)(6) **(NOT APPLICABLE)**	A. Section 1129(a)(6) requires that, after confirmation of a plan, any governmental regulatory commission with jurisdiction over the rates of the debtor has approved any rate change provided for in the plan, or that such rate change is expressly conditioned on such approval.	A. This section is not applicable because there is no governmental regulator commission that has jurisdiction over the Debtors' or the Reorganized Debtors' rates.
11 U.S.C. § 1129(a)(7)	***Section 1129(a)(7) - The Plan Must Be in the Best Interests of Creditors.***	
11 U.S.C. § 1129(a)(7)	A. Section 1129(a)(7) codifies the "best interests of creditors" test. The best interests of creditors test requires that, with respect to each impaired class of claims or interests, each holder of a claim or interest either has accepted the plan or will receive or retain property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.	A. The Plan satisfies the best interests of creditors test. 1. By its express terms, the best interests test is applicable only to non-accepting holders of Impaired Claims and Interests. 2. The Debtors performed a liquidation analysis, attached to the Disclosure Statement as Exhibit G (the "Liquidation Analysis"). The Liquidation Analysis focuses on Filene's only, as Syms is solvent and, under the Plan, all Syms creditors are being paid in full. As set forth in Exhibit G of the Disclosure Statement, under any reasonable set of assumptions, the overall

Statutory Section	Statutory Requirement	Plan Compliance
		values that may be realized by the holders of Claims and Interests in a hypothetical chapter 7 case of Filene's are significantly less than the value of the recoveries to these holders under the Plan. (See Disclosure Statement Exhibit G.) Because the Bankruptcy Code requires that interest be paid at the legal rate from the date of the filing of the petition if the debtor is solvent and because Courts in this District have followed the majority rule that the federal judgment rate is the appropriate rate, the Debtors have modified the Plan to provide for payment of postpetition interest on account of the Class 4 Syms General Unsecured Claims from and after the Petition Date at the federal judgment rate, thereby satisfying section 1129(a)(7) of the Code.
11 U.S.C. § 1129(a)(8)	***Section 1129(a)(8) The Plan Must Be Accepted by the Requisite Classes of Claims and Interests. (Satisfied as to All Debtors.)***	
11 U.S.C. § 1129(a)(8)	A. Section 1129(a)(8) requires that each class of claims or interests either vote to accept the plan or be unimpaired under the plan.	A. In these chapter 11 cases, all Classes of Impaired Claims voted to accept the Plan in accordance with Bankruptcy Code section 1126.
11 U.S.C. § 1129(a)(9)	***Section 1129(a)(9) — The Plan Must Provide for the Payment of Priority Claims.***	
11 U.S.C. § 1129(a)(9)	A. Section 1129(a)(9) provides for mandatory treatment of certain priority claims under a plan of reorganization.	A. The Plan meets these requirements. The Plan provides that all holders of Allowed Administrative Claims, Allowed Priority Tax Claims, and Allowed Non-Tax Priority Claim will be paid Cash equal to the allowed amount of such Claim. Thus, the Plan complies with the requirements of section 1129(a)(9) of the Bankruptcy Code. (See Plan, Article V.A through V.D)
11 U.S.C. § 11 29(a)(10)	***Section 1129(a)(10) — The Plan Must Be Accepted by at Least One Impaired Class Of Claims.***	
11 U.S.C. § 1129(a)(10)	A. Section 1129(a)(10) provides that if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan must accept the plan, determined without including any acceptance of the plan by any insider.	A. The Plan has been accepted by all Classes of Impaired Claims entitled to vote on the Plan.
11 U.S.C. § 1129(a)(11)	***Section 1129(a)(11) — The Plan Must Be Feasible.***	
11 U.S.C. § 1129(a)(11)	A. Section 1129(a)(11) provides that a plan of reorganization may be [c]onfirmed only if "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor	A. The Sources and Uses Statement and Projections contained in Exhibit E and Exhibit F to the Disclosure Statement indicate that, after giving effect to confirmation of the Plan, including consummation of the rights offering, the Reorganized Debtors will have sufficient operating cash to fund ongoing business operations and any

Statutory Section	Statutory Requirement	Plan Compliance
	under the plan, unless such liquidation or reorganization is proposed in the plan."	anticipated capital expenditures as contemplated by the business plan.
11 U.S.C. § 1129(a)(12)	***Section 1129(a)(12) - The Plan Must Provide for the Payment of Fees to the United States Trustee.***	
11 U.S.C. § 1129(a)(12)	A. Section 1129(a)(12) requires a plan to provide that all fees payable under 28 U.S.C. § 1930 to the United States trustee, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the Plan.	A. All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on the Plan Effective Date, thereby satisfying Bankruptcy Code section 1129(a)(12). (See Plan, Article XIV.D)
11 U.S.C. § 1129(a)(13)	***Section 1129(a)(13) — The Plan Must Provide for the Payment of Retiree Benefits.***	
11 U.S.C. § 1129(a)(13)	A. Section 1129(a)(13) requires a plan of reorganization to provide for the continuation after its effective date of payment of all retiree benefits, as that term is defined in Section 1114, at the level established by agreement or by court order pursuant to Section 1114 at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.	A. The Debtors do not have any "retiree benefits" within the meaning given to such term in the Bankruptcy Code. Accordingly, section 1129(a)(13) of the Bankruptcy Code is not applicable.
11 U.S.C. § 1129(b)	***Section 1129(b) — If a Class of Claims or Interests Rejects or is Deemed to Reject the Plan, the Plan Must Satisfy the Cramdown Requirements of Section 1129(b).***	
11 U.S.C. § 1129(b)	A. Section 1129(b) provides that a bankruptcy court is required to confirm a plan over the dissent of one or more classes of impaired claims or interests if the plan: 1. meets all requirements for confirmation set forth in section 1129(a) except the requirement of section 1129(a)(8) that all impaired classes accept the plan; 2. does not discriminate unfairly; and 3. is otherwise fair and equitable with respect to each impaired class of claims or interests that has not accepted the plan.	A. There is no need for the Debtors to address the cramdown provisions of the Bankruptcy Code because all impaired Classes of Claims accepted the Plan. (See Confirmation Brief at Section III.N and the Chart of Objections attached as Exhibit B to the Confirmation Brief for related discussion).
11 U.S.C. § 1129(c)	***Section 1129(c) — The Court can only confirm one Plan.***	

Statutory Section	Statutory Requirement	Plan Compliance
11 U.S.C. § 1129(c) (NOT APPLICABLE)	A. Section 1129(c) provides that the bankruptcy court may only confirm one plan.	A. The Plan is the only plan proposed.
11 U.S.C. § 1129(d)	***Section 1129(d) — The Court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes.***	
11 U.S.C. § 1129(d)	A. Section 1129(d) provides that the bankruptcy court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or application of section 5 of the Securities Act of 1933.	A. The Plan is fair and reasonable and has been proposed in good faith and for proper purposes.

EXHIBIT B

CHART OF CONFIRMATION OBJECTIONS

SUMMARY CHART OF OBJECTIONS TO SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES

Docket Number	Objecting Party	Summary of Objection	Resolution or Response
RESOLVED OBJECTIONS			
1893	655 Merrick, LLC as Successor to the Estate of Murray Pergament ("Merrick")	Merrick argued, among other things, that rejection of certain easement, interconnecting roadway and related agreements would not be in the best interests of the Syms Estate.	The Debtors have assumed the relevant agreements and have identified each such agreement on Exhibit B to the Plan. As a result, Merrick has withdrawn its objection.
1900	Liberty Mutual Insurance Company ("Liberty")	Liberty argued, among other things, that: (i) Article IX.B of the Plan, which provides that no payments are required to cure any defaults of the Debtors as of the Confirmation Date, may be construed to limit Liberty's rights and/or the Debtors' obligations under the insurance policies to which Liberty and its affiliates are parties with the Debtors (the "Policies"); (ii) Article XI.C of the Plan may be construed to enjoin Liberty from exercising its contractual rights; and (iii) Article XIII.I of the Plan may be broadly construed to permit Reorganized Syms to retain rights to handle and resolve claims that could implicate the Policies.	The Debtors resolved the objection of Liberty by inserting language at Paragraph 50 of the Confirmation Order providing that the Policies will be assumed and nothing in the Plan or Confirmation Order will affect Liberty's rights under the Policies or applicable law.
OUTSTANDING PLAN OBJECTIONS			
1865 and 1912	Internal Revenue Service ("IRS") and The State of Michigan, Department of the Treasury ("Michigan")	The IRS and Michigan argue that: (i) the Plan fails to comport with Bankruptcy Code section 1129(a)(9)(C) because the Plan does not provide for payment of statutory interest on priority tax claims; (ii) Article VIII.H of the Plan improperly extinguishes creditors' set-off rights in violation of Bankruptcy Code section 553; (iii) the Plan purports to set an	The Debtors will modify the Plan to provide for payment of statutory interest on priority tax claims in accordance with 11 U.S.C. § 511. The Confirmation Order will provide that setoff and recoupment rights of any governmental unit will not be impaired.

Docket Number	Objecting Party	Summary of Objection	Resolution or Response
		administrative claims bar date for taxes in violation of Bankruptcy Code section 503(b)(1)(D); and (iv) the third-party release provisions of the Plan are improper because they purport to release non-debtor third parties from claims by the United States for trust fund recovery penalties or other derivative obligations, including unpaid employment taxes.	The Confirmation Order will provide that the administrative bar date does not apply to claims of governmental units described in 11 U.S.C. § 503(b)(1)(D). The Confirmation Order will provide that any such claim of governmental units described in 11 U.S.C. § 503(b)(1)(D) that is not timely paid in the ordinary course of business shall accrue interest and/or penalties as provided by non-bankruptcy law until paid in full, subject to the Debtors' and their successors' rights to contest, dispute or otherwise object to any such claims, penalties or interest. The Confirmation Order will provide that notwithstanding any provision to the contrary in the Plan, nothing in the Confirmation order, the Plan or any implementing Plan documents shall release any person or entity other than the Debtors (as reorganized) and their estates from any liability to the United States that has arisen under non-bankruptcy law.
1894	ASM Capital, LP, CRT Special Investments LLC, Scoggin Worldwide Fund LTD and Spectrum Master Fund, Ltd. (collectively, the "Ad Hoc Committee")	The Ad Hoc Committee argues that the Plan violates Bankruptcy Code section 1129(a)(7) because it fails to provide for payment of postpetition interest on Syms Class 4 Claims. The Ad Hoc Committee argues further that the appropriate interest rate should be determined by the formula approach, developed by the Supreme Court in Till v. SCS Credit Corp., 541 U.S. 465 (2004).	The Debtors have modified the Plan to provide for payment of postpetition interest on Syms Class 4 Claims at the federal judgment rate in accordance with the majority rule followed in this District. See In re Tribune Co., 464 B.R. 126, 189 (Bankr. D. Del. 2011); In re W.R. Grace & Co., 2012 WL 2130981 (Bankr. D. Del. June 11, 2012); In re Washington Mutual, Inc., Case No. 08-12229, 2011 WL 57111 (Bankr. D. Del. Jan. 7, 2011) (citing In re Coram Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2004)).
1897	Ultra Stores, Inc. ("Ultra")	Ultra argues that the Plan improperly classifies Filene's general unsecured claims in Class 4 separately from Filene's rejection claims in Class 5. The claims are substantially similar, and the Debtors have failed to articulate a reasonable justification for the separate classification.	Filene's Short-Term creditors in Filene's Class 4 and Filene's Long-Term creditors in Filene's Class 5 are not substantially similar. Their separate classification and different treatment reflect differences in the respective strength of each group's claims that Filene's should be substantively consolidated into Syms. That separate classification is a product of a mediated settlement that reflects these differences and avoids the delay and expense of litigation.

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1919	U.S. Trustee	The U.S. Trustee argues that Article XII.D of the Plan improperly exculpates the Majority Shareholder and her professionals because, under applicable law, only estate fiduciaries may be exculpated for postpetition activities. In re Washington Mutual, 442 B.R. 314, 350-51 (Bankr. D. Del. 2011), In re Tribune Co., 464 B.R. 126, 189 (Bankr. D. Del. 2011).	Controlling shareholders, like directors, owe fiduciary duties to corporations and minority shareholders. See, e.g., Liss v. Fed. Ins. Co., No. A-0006-07T2, 2009 WL 231992 (N.J. Super. Ct. App. Div. Feb. 3, 2009); Berkowitz v. Power/Mate Corp., 342 A.2d 566 (N.J. Super. Ct. Ch. Div. 1975) (those who control a corporation owe a fiduciary duty to the corporation). Accordingly, the exculpation of the Majority Shareholder is proper. Moreover, the exculpation provisions constituted a portion of the consideration for the Majority Shareholder's transfer of control pursuant to the Plan Settlement. In light of the negotiated Plan indemnity being provided to the Majority Shareholder, an action against the Majority Shareholder will be, in essence, an action against Reorganized Syms. Finally, the Majority Shareholder is making a substantial contribution to the Plan, which has been overwhelmingly accepted and provides for payment in full of nearly all creditors, through her transfer of control and deferment of payment.
CONTRACT ASSUMPTION OBJECTION			
1843	Macy's, Inc. ("Macy's")	Macy's objects to the Debtors' attempted assumption of the Filene's trademark license agreement (the "License Agreement"). Macy's argues that the License Agreement cannot be assumed because, under the Lanham Act, the License Agreement is not assignable without the consent of Macy's and, in the Third Circuit, which follows the "hypothetical test," a debtor may not assume a contract, over the non-debtor counterparty's objection if the contract is non-assignable, see In re West Electronics, 852 F.2d 79 (3d Cir. 1988).	This argument fails on several grounds. First, the License Agreement is not an executory contract and instead is property of the estate that automatically vests with Reorganized Filene's. Second, even if the License Agreement is found to be an executory contract, the License Agreement may still be assumed pursuant to section 365 under West Electronics because (A) as an exclusive trademark, the License Agreement is freely assignable under non-bankruptcy law, (B) Filene's is permitted to assign the License Agreement to Reorganized Filene's without Macy's consent pursuant to its express terms, and (C) Filene's is permitted to assign the License Agreement to a hypothetical third-party assignee without Macy's consent pursuant to its express terms.