Docket #3456 Date Filed: 10/26/2020

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	Case No. 11–13511 (CSS)
FILENE'S BASEMENT, LLC, *et al.*	)	
	)	(Confirmed Plan)
	)	
Reorganized Debtors.[1]	)	
_____	)	**Related D.I. 3423, 3449, 3450**

MEMORANDUM ORDER

Before the Court is the *Reorganized Debtor's Motion for Entry of an Order (I) Enforcing the Terms of the Plan and Confirmation Order with Respect to Trust Settlement with Local 1102 Retirement Trust; and (II) Enforcing the Permanent Injunction in the Plan and Confirmation Order* (the "Motion"); the *Trustees' Objection to the Motion* (the "Objection"); and the *Debtor's Reply to the Objection* (the "Reply").[2] The reorganized debtors in the above-captioned jointly administered cases (the "Reorganized Debtors") ask the court to enforce the terms of the *Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries* (the "Plan") and the *Findings of Fact, Conclusions of Law and Order Confirming the Modified Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp*

[1] The Reorganized 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 Reorganized Debtors' address is 340 Madison Avenue, New York, NY 10173.

[2] Motion, Filene's Basement, LLC (No. 11-13511-CSS) (Nov. 2, 2011). The docket number for this filing is "3423" represented as "D.I. 3423." This Order will shorten all future citations to documents filed in case No. 11-13511 to their document's index number. Objection, D.I. 3449. Reply, D.I. 3450.

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and Its Subsidiaries (the "Confirmation Order") and the settlement embodied therein against the Local 1102 Retirement Trust (the "Trust").[3]

The issues before the Court are (1) what documents constitute the Plan, which both parties argue is unambiguous, and (2) what is the meaning of the terms of the Plan—including Article II of the Plan (the "Trust Settlement").[4]

The Reorganized Debtors argue that the language in the Plan, including the Trust Settlement, clearly does not contemplate the payment of more than the $6,408,848 dollar amount provided in the Plan.[5] The Reorganized Debtors further argue that the Plan consists solely of the Plan itself.[6]

The Trust argues that the language in the Plan, including the Trust Settlement, clearly contemplates the payment of interest on top of the $6,408,848 dollar amount discussed in the Plan.[7] The Trust also argues that appurtenant to, or included in, the Plan are the Trust's proof of claim and the disclosure statement that the Trust relied on to vote to accept the plan.[8] The Trust asks the Court to look at email communications between the parties to establish the intent of the parties at the time of drafting.[9]

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[3] Plan, D.I. 1931; Confirmation Order, D.I. 1983.

[4] Tr. of Hr'g June 10, 2020 (D.I. 3448) at 5:6–10; 12:4–12; and 28:24–29:7.

[5] Motion, D.I. 3423 at p. 2 ¶ 1.

[6] Reply, D.I. 3450 at p. 4–5 ¶¶ 12–14.

[7] Tr. of Hr'g June 10, 2020 (D.I. 3448) at 12:4–12.

[8] Tr. of Hr'g June 10, 2020 (D.I. 3448) at 19:1–14; 20:14–21:5.

[9] Objection, D.I. 3449 at p. 6–7 ¶ 15.

The Court finds that the unambiguous Plan is composed of the Plan itself—including all documents explicitly incorporated by the Plan; and that the plain terms of the Plan do not contemplate the payment of any amount more than the $6,408,848 dollar amount provided in the Plan.

JURISDICTION AND VENUE

This matter is properly before the Court: the Court has jurisdiction, pursuant to 28 U.S.C. §§ 157 and 1334; venue is proper in this District, pursuant to 28 U.S.C. §§ 1408 and 1409; this is a "core" proceeding, pursuant to § 157(b); and the Court has the judicial power to enter a final order. The Court specifically retained jurisdiction through the Plan and Confirmation Order to consider the relief sought by this Motion.[10]

BACKGROUND

On November 2, 2011 (the "Petition Date"), the Debtors, prior to becoming the Reorganized Debtors, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.[11]

On July 10, 2012, the Trust filed an amended priority claim against the Debtors in the amount of $6,408,848 (the "Trust Claim").[12]

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[10] Article XIII of the Plan provides that:

> Under Bankruptcy Code sections 105(a) and 1142 . . . the Bankruptcy Court shall retain jurisdiction over all matters arising out of, and related to, the Chapter 11 Cases and the Plan, including, among other things, jurisdiction to . . . (7) Hear and determine disputes arising in connection with the interpretation, implementation, consummation or enforcement of the Plan, including disputes arising under agreements, documents or instruments executed in connection with the Plan.

[11] D.I. 1.

[12] D.I. 2118.

The Trust and the Debtors subsequently negotiated an agreement to settle the Trust Claim, the terms of which are set forth in the Trust Settlement.[13]

Specifically, Article II(B)(1) of the Plan sets forth the terms of the Trust Settlement as follows:

> (a) On the Effective Date, Syms will pay to the Local 1102 Retirement Trust the amount of $203,232, representing one minimum funding payment due April 21, 2012, plus interest accruing at a rate of 3.25% per year from April 21, 2012.
>
> (b) On November 15, Syms will pay Local 1102 Retirement Trust $406,464, representing (i) one minimum funding payment due July 1, 2012, plus interest accruing at a rate of 3.25% per year from July 1, 2012, and (ii) one minimum funding payment due November 1, 2012, plus interest accruing at a rate of 3.25% per year from November 1, 2012.
>
> (c) Syms will thereafter make quarterly payments to Local 1102 Retirement Trust in the amount of $203,232, beginning February 1, 2013 and on the first of every third month thereafter, until Local 1002 Retirement Trust's entire $6,408,848 claim is paid in full.[14]

On July 13, 2012, the Debtors filed the Plan and the Trust was served with notice of the confirmation hearing, the approved disclosure statement, and the Plan.[15] The Trust did not object to confirmation of the Plan and on August 30, 2012, the Court entered the Confirmation Order, which confirmed the Plan.[16]

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[13] Plan at Article II(B)(1).

[14] Plan at Article II(B)(1).

[15] D.I. 1642 (notice of the confirmation hearing); D.I. 1655 (referencing 1653–1) (Disclosure Statement); and D.I. 1640 (the Plan).

[16] D.I. 1640 and D.I. 1983; D.I. 1954 Exh. B. (Trust voting to accept the plan); The Plan became effective on September 14, 2012 (the "Effective Date"). D.I. 2031.

The Confirmation Order approved the Trust Settlement and the terms thereof and provides that the Trust Settlement shall be effectuated in accordance with the terms set forth in Article II of the Plan.

Paragraph 15 of the Confirmation Order provides that:

> [T]he Trust Settlement, and the terms thereof, as set forth in Plan, [is] hereby approved pursuant to Bankruptcy Rule 9019 as fair, equitable, reasonable, and in the best interest of the Debtors, their Estates and their creditors and interest holders, are binding on all entities affected thereby, and shall be effectuated in accordance with the terms thereof.

Paragraph 17 of the Confirmation Order further provides that:

> On the Effective Date, pursuant to Bankruptcy Rule 9019 and section 1123(b) of the Bankruptcy Code, the Trust Settlement, which represents a global compromise of the Claims filed in these Chapter 11 Cases by Local 1102 Retirement Trust, Filene's Local 1102 Union and Syms Local 1102 Union, for good and valuable consideration, is hereby approved and shall be effectuated in accordance with the terms set forth in Article II of the Plan and in each section of the Plan relevant thereto.

Since the Effective Date of the Plan, the Reorganized Debtors have made thirty-one payments in the amount of $203,232.00 to the Trust, plus one final payment in the amount of $108,656.00 on January 31, 2020, for the total amount of $6,408,848.[17]

On February 7, 2020, the Trust notified the Reorganized Debtors that they were in default of their obligations under the Plan.[18] Specifically, the Trust claimed that the Reorganized Debtors failed to pay the entirety of their scheduled withdrawal liability

[17] Reply at p. 6 ¶ 12.

[18] Motion, D.I. 3423 at p. 4 ¶ 13.

installment payment due, and were $94,576 in arrears.[19] The Reorganized Debtors responded that the Plan only required them to pay $6,408,848.[20]

The Trust filed a complaint (the "Complaint"), initiating an action in the United States District Court for the Southern District of New York on May 1, 2020.[21] The Complaint claims that the final $108,656 payment on January 31, 2020, constituted a breach of Reorganized Debtors' obligations under the Trust Settlement because the Reorganized Debtors were required to make a full quarterly payments in the amount of $203,232, and subsequent quarterly payments until a total amount of $8,367,776 was paid in full.[22] The Complaint seeks judgment against the Reorganized Debtors for a total amount of $2,568,624, plus unliquidated amounts on account of the multiemployer pension plan.[23]

[19] Motion, D.I. 3423 at p. 8–9 ¶ 23; *Trustees of the Local 1102 Retirement Trust v. Trinity Place Holdings, Inc.*, C.A. No. 20-3419, D.I. 1 (S.D.N.Y. May 1, 2020).

[20] Motion, D.I. 3423 at p. 9 ¶ 24.

[21] Motion, D.I. 3423 at p. 9 ¶ 24. *Trustees of the Local 1102 Retirement Trust v. Trinity Place Holdings, Inc.*, C.A. No. 20-3419, D.I. 1 (S.D.N.Y. May 1, 2020).

[22] Motion, D.I. 3423 at p. 9 ¶ 24. *Trustees of the Local 1102 Retirement Trust v. Trinity Place Holdings, Inc.*, C.A. No. 20-3419, D.I. 1 (S.D.N.Y. May 1, 2020).

[23] *Trustees of the Local 1102 Retirement Trust v. Trinity Place Holdings, Inc.*, C.A. No. 20-3419, D.I. 1 (S.D.N.Y. May 1, 2020).

ANALYSIS

Interpreting the Plan

The Trust argues that the following documents are either part of the Plan or would otherwise be helpful to the Court in understanding the intent of the parties: (i) the Plan itself; (ii) a draft version of the disclosure statement; (iii) the proof of claim the Trust filed in the bankruptcy case; and (iv) email communications between the parties prior to the Confirmation Order being entered.[24]

In determining whether extrinsic evidence should be examined, the Delaware[25] Supreme Court stated:

> To determine what contractual parties intended, Delaware courts start with the text. "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions," without resort to extrinsic evidence. To aid in the interpretation of the text's meaning, "Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party." The contract must also be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term "mere surplusage." But general terms of the contract must yield to more specific terms.

[24] Tr. of Hr'g July 22, 2020 (D.I. 3455) at 19:15–19.

[25] Both the Trust and the Reorganized Debtors agree that the Plan should be interpreted in accordance with Delaware law. Reply, D.I. 3450 at p. 4 ¶ 12; Objection, D.I. 3449 at p.10 ¶ 29; Plan at Article I(E) ("[T]he State of Delaware shall govern the construction and implementation of the Plan and any agreements, documents, and instruments executed in connection with the Plan.").

> If, after applying these canons of contract interpretation, the contract is nonetheless "reasonably susceptible [to] two or more interpretations or may have two or more different meanings," then the contract is ambiguous and courts must resort to extrinsic evidence to determine the parties' contractual intent. [26]

Thus, the Court must answer two questions: (1) what documents constitute the Plan; and (2) how would a reasonable person interpret the terms of the Plan?

i. What Constitutes the Plan

The Trust argues that the claim mentioned in the following language "entire $6,408,848 *claim*" (emphasis added) is the proof of claim that the Trust filed during the bankruptcy case.[27] As such, the Trust Settlement should be interpreted to incorporate by reference the proof of claim the Trust filed. This is incorrect. The claim mentioned under the Trust Settlement does not refer to the proof of claim filed by the Trust.

The Plan defines the term "Claim" to mean "a 'claim' as defined in Bankruptcy Code section 101(5) . . . ."[28] Distinct from the term "Claim," the Plan also defines the term "Proof of Claim" to mean "a proof of claim, including, but not limited to, any Administrative Claim, filed with the Bankruptcy Court in connection with the Chapter 11 Cases pursuant to section 501 of the Bankruptcy Code."[29] If the parties wished for the Trust Settlement to incorporate the Trust's proof of claim by reference, the parties would

[26] *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846–47 (Del. 2019).

[27] Tr. of Hr'g July 22, 2020 (D.I. 3455) at 19:8–14.

[28] Plan at Article I(B)(1.30).

[29] Plan at Article I(B)(1.130).

have used the defined term "Proof of Claim" and not the generic term "claim." The Court finds that the Trust's proof of claim is extrinsic to the Plan and will not consider it in interpreting the Plan.

The Trust argues that the following language in Exhibit E, footnote five, of an unapproved draft of the disclosure statement stating that "the $6.9 million [Trust] withdrawal liability is paid over time in 44 quarterly installments" demonstrates that the Reorganized Debtors intended to repay $6,408,848 *plus interest* in a total amount of $8,977,472.[30]

While creditors, such as the Trust, rely on disclosure statements to determine whether to vote for a debtor's plan of reorganization, "disclosure statements are not contractual in nature and do not bind the parties."[31] Even if disclosure statements were found to be binding, the document the Trust points to is not the approved version of the disclosure statement, it is just a draft.[32] The disclosure statement approved by the Court was attached to the certification of counsel that was filed with a blackline and was on the docket CM/ECF—meaning that all parties in interest received it, including the Trust.[33] Subsequent to receiving the blackline, the Trust voted in favor of the plan, pursuant to the court-approved disclosure statement.[34] Thus, any argument based on the reliance of an unapproved disclosure statement fails.

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[30] D.I. 1641–2; Objection, D.I. 3449 at p. 16 ¶

[31] *In re Bridgepoint Nurseries, Inc.*, 190 B.R. 215, 223 (Bankr. D. N.J. 1996).

[32] *See Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996).

[33] D.I. 1655 (approving D.I. 1653); D.I. 1653–2 (blacklined disclosure statement).

[34] D.I. 1954.

Moreover, the approved disclosure statement modified the previous language in footnote five of Exhibit E to read: "the $6.4 million [Trust] withdrawal liability is paid over time in quarterly installments."[35] This language omits a specific number of quarterly payments that must be made under the Plan. Thus, the approved disclosure statement is irrelevant for purposes of the interpretation and the unapproved disclosure statement is extrinsic to the Plan and will not be used to interpret the Plan or the Trust Settlement.

Finally, the Trust argues that email communications between the parties clarifies the intent of the parties in drafting the Trust Settlement.[36] These email communications are clearly extrinsic to the Plan and will not be considered in determining the meaning of the Plan. Thus, the Court will look solely to the four corners of the Plan for its interpretation.

ii. Interpreting the Terms of the Plan

In accordance with Delaware law, when interpreting a contract the Court first looks at the entirety of the Plan from the perspective of what "a reasonable person in the position of the parties would have thought it meant"—not from the perspective of the intent of the parties at the time of drafting.[37] After reading the Plan, in its entirety, the Court determines that there is no ambiguity. As such, the Court proceeds with interpreting the terms of the Plan according to their plain meaning.

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[35] 1653–2 at page 112, Exhb. E.

[36] Objection, D.I. 3449 at p.6–7 ¶¶ 15–16; Tr. of Hr'g July 22, 2020 (D.I. 3455) at 19:8–14.

[37] *Bank of New York Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551 (Del. 2013).

The full and total amount of the Trust's claim under the Plan Settlement incorporated in the Plan is $6,408,848 and not $6,408,848 "plus interest." The parties to the settlement at issue were sophisticated and well represented. The settlement specifies that the "Trust filed a Claim against [the Reorganized Debtors] . . . *in the amount of* $6,408,848 . . . ."[38] Within the Plan, there is no mention of a specific number of quarterly payments or any language that might point an amount owed beyond the $6,408,848 stated in the Plan Settlement.

If the parties intended the full and total amount of the Trust's claim to include interest, they would have made certain that the terms of the settlement agreement were abundantly clear. For example, such terms might have read: "Trust filed a Claim against [the Reorganized Debtors] . . . in the amount of $6,408,848 *plus interest*."

The Plan Settlement mentions interest in subsections (a) and (b). The "interest accruing" mentioned in (a) and (b) of the Plan Settlement had already been calculated into the payments. The language in subsection (a) states: "the amount of $203,232, representing one minimum funding payment due April 21, 2012, plus interest accruing at a rate of 3.25% per year from April 21, 2012."[39] Subsection (b) provides for the two payments in the amount of $406,464 which payments consist of a "minimum funding payment" together with "interest accruing" as of the due dates of those payments.[40] Subsection (c) does not mention interest but mentions that the continuing payments will

[38] Plan at Article II(B) (emphasis added).

[39] Plan at Article II(B)(a)

[40] Plan at Article II(B)(b).

be in the amount of $203,232. Thus, the "interest accruing" mentioned in (a) and (b) is interest that is accruing but already accounted for, and included, in the full and total amount of the claim. Breaking the payments down in subsections (a) and (b) is to help the parties understand how the payment amount of $203,232 was reached. The parties, in reading subsection (c) of the settlement can then understand that the remaining quarterly payments of $203,232 are to continue only until a total amount of $6,408,848 is paid to the Trust. Indeed, the parties state that payment stops when the "entire $6,408,848 claim is paid in full" and did not state that payment stops when the entire $6,408,848 claim, *plus interest*, is paid in full. Thus, a reasonable person in the position of the parties at the time of drafting would have understood that $6,408,848 is the full and complete amount the Trust was owed. The Delaware Supreme Court, in a similar case, stated:

> Alternatively, if we read the $[6,408,848] as the base price and the $[2,568,624] as some arbitrary, unexplained interest or carry, calculated pursuant to a formula not found within the four corners of the contract, we would render the explicit $[6,408,848] [claim] term meaningless or mere surplusage.[41]

The Trust argues that reading "claim" under the Trust Settlement to exclude interest, in light of the entirety of the Plan, would create an absurdity where unsecured creditors receive the full value of their claims plus interest under the terms of the Plan while the Trust receives only the full value of its claim without any interest.[42]

[41] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

[42] Objection, D.I. 3449 at p. 12, ¶ 31; Tr. of Hr'g July 22, 2020 (D.I. 3455) at 17:2–8.

An "absurd result" is "one that no reasonable person would have accepted when entering the contract."[43] This is a high standard to meet.

It is somewhat unusual for unsecured creditor 'A' to agree to receive less than unsecured creditor 'B' under the terms of the same bankruptcy plan. While unusual, the different treatment of creditors within the same class does not "stretch[] the bounds of reason to conclude" that the Trust could have had a reason to settle its claims for terms less favorable than what other unsecured creditors were receiving under the Plan.[44] Indeed, the claim held by the Trust under the Trust Settlement is carefully excluded from the remaining unsecured claims under the Plan.[45] This careful exclusion could precisely be because of the different treatment the Trust was to receive under the Trust Settlement in the Plan. The Court finds that an unusual outcome is not the same as an absurdity and the Trust's absurdity argument fails.

In sum, under the unambiguous terms of the Plan, the Reorganized Debtors have paid the full amount owed to Trust. No further payments are required under the terms of the Plan.

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[43] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

[44] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

[45] The Plan explicitly excludes the Trust and its settlement claim from the unsecured claims. Plan at Article V(B)(4) ("For the avoidance of doubt, Syms Class 4 does not include Syms Class 5 Syms Union Pension Plan Claims."); Plan at Article V(D)(4) ("For the avoidance of doubt, Filene's Class 4 does not include Filene's Class 6 Filene's Union Pension Plan Claims."); Plan at Article V(D)(5) ("For the avoidance of doubt, Filene's Class 5 does not include Filene's Class 6 Filene's Union Pension Plan Claims.")

CONCLUSION

For the reasons set forth above, the Motion seeking the entry of an order enforcing the Confirmation Order and Plan and the settlement embodied therein against the Trust is GRANTED.

Christopher S. Sontchi
Chief United States Bankruptcy Judge

Dated: October 26, 2020