IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
	:	Case No. 11-13511 (KJC)
FILENE'S BASEMENT, LLC, *et al*.,	:	(Jointly Administered)
	:	
Debtors.[1]	:	**Re: D.I. 159, 170**
	:	**Hearing Date: December 14, 2011 at 1:00 p.m.**
	:	**Obj. Deadline: December 7, 2011 at 4:00 p.m.**

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER (A) DISBANDING THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS APPOINTED BY THE UNITED STATES TRUSTEE OR, ALTERNATIVELY, (B) LIMITING THE SCOPE OF DUTIES AND FEES AND EXPENSES WHICH MAY BE INCURRED BY SUCH COMMITTEE

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors"), by its proposed co-counsel, Hahn & Hessen LLP and Richards, Layton & Finger, P.A., hereby moves (the "Motion"), pursuant to sections 105(a) and 1102(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2020 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disbanding the Official Committee of Equity Security Holders (the "Equity Committee") appointed by the United States Trustee for the District of Delaware (the "U.S. Trustee") on November 15, 2011, or, in the alternative, limiting the scope of the Equity Committee's duties in these chapter 11 cases and capping the fees and expenses which may be incurred by the professionals retained by the Equity Committee, and respectively states as follows:

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Filene's Basement, LLC (8277) ("Filene's"), Syms Corp. (5228) ("Syms"), Syms Clothing, Inc. (3869), and Syms Advertising Inc. (5234). The Debtors' address is One Syms Way, Secaucus, New Jersey 07094.

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SUMMARY ARGUMENT

1. In light of Debtors' counsel's statement to the Court at the first day hearing that this is one of those rare bankruptcy cases where equity holders of Syms appear to be in the money, the U.S. Trustee's decision to form quickly the Equity Committee appears at first blush to be unobjectionable. However, based on a more in depth evaluation of the underlying facts, the Committee believes that the U.S. Trustee's initial decision was misplaced given the unique facts and circumstances presented in these cases. Here, unlike most of the handful of potentially solvent cases where equity committees are appointed, the Debtors' management and directors own nearly 55% of the publically-traded common stock of Syms. Under applicable state law, management owes fiduciary duties to all shareholders equally and majority-controlled shareholders owe similar duties to minority shareholders. Consequently, the interests of management and the Debtors' Board of Directors are directly aligned with the interests of the Syms' minority equity holders.

2. Moreover, Debtors' management has engaged a team of highly qualified counsel and advisors to represent the interests of the Debtors' estates and their stakeholders, including all equity holders.[2] These are liquidation cases. All of the Debtors' and Committee's professionals are charged with the task of maximizing the value realized from the liquidation of the Debtors' assets and then figuring out a fair and equitable way to distribute that value under a plan to stakeholders. To the extent there are issues between Syms' equity holders and the creditors of the Debtors regarding the proposed distribution of value in a plan, the Debtors' existing

[2] Although the Debtors' have not yet filed their respective retention applications, they have, upon information and belief, engaged Skadden, Arps, Slate, Meagher & Flom LLP and Young Conaway Stargatt & Taylor, LLP, as their chief counsel and conflicts counsel, respectively, Rothschild as their investment banking firm, Alvarez & Marsal as their restructuring and financial advisory firm, Cushman & Wakefield as their real estate consulting and brokerage firm, and Hilco Consulting as their real property lease broker and IP broker.

management and its professionals are more than capable of representing the interests of all shareholders in those issues. There is simply no justification for burdening the estate with yet another layer of professionals for the Equity Committee, who will be charged with the very same tasks.

3. If, however, the justification for the appointment of the current Equity Committee comprised of a small minority of three common stockholders is because their interests may not be totally aligned with the majority shareholders on management as appears evident based on the public disputes they have had between them prepetition, then the Committee submits that those disputes involve inter-shareholder issues outside of the purview of this Court. These Debtors' estates and their creditors should not be saddled with the cost of paying for multiple sets of professionals to engage in individual shareholder disputes, particularly, where, as here, the lead proponents are well-heeled and able to afford their own counsel to represent their parochial self-interests.[3]

4. Alternatively, in the event that the Court is not inclined to disband the Equity Committee at this time, the Committee requests that the Court at a minimum enter an order limiting the scope of the Equity Committee's duties in these chapter 11 cases in order to avoid as best as possible any unnecessary duplication of effort and establish an overall reasonable cap on the aggregate amount of the fees and expenses that can be incurred by the Equity Committee's professionals absent obtaining a further order of this Court, after notice and a hearing. Such reasonable limitations will ensure that the Equity Committee has the ability to participate in any critical aspects of these cases in which the interests of equity holders may truly diverge from

[3] For example, the Chairperson of the Equity Committee, Esopus Creek Value Series Fund LP ("Esopus"), has already appeared in the case and retained counsel to file an objection to the GOB Motion. There is no reason to believe that Esopus would not be in a position to continue to advocate its interest if the need were to arise after the Equity Committee is dissolved.

those of the unsecured creditors or the majority shareholder on management, while at the same time minimizing in advance the real potential for duplication of effort and significantly increased cost.

JURISDICTION

5. This court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

6. On November 2, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

7. On November 8, 2011, the U.S. Trustee appointed five of the Debtors' largest unsecured creditors to the Committee.[4] On the same day, the Committee retained Hahn & Hessen LLP as its counsel and LM+Co as its financial advisors. Richards, Layton & Finger, P.A. was subsequently retained by the Committee to act as its Delaware counsel.

8. On the Petition Date, the Debtors filed an Emergency Motion for Entry of Orders Pursuant to Bankruptcy Code Sections 105(a), 363(b), 364(e), 365(a) and 554(a), Bankruptcy Rules 2002, 6003, 6004, 9006(c), and 9014 and Local Rules 2002-1 and 9006-1 (A) Scheduling a Hearing and Approving the Form and Manner of Notice of the Motion and Hearing Thereon

[4] The members of the Committee are: (1) PVH Corp., (2) Vornado Realty Trust, (3) Rabina Properties, LLC, (4) Saul Zabar, Stanley Zabar and 2220 Broadway, LLC c/o Lori-Zee Corp., and (5) Rosenthal & Rosenthal, Inc.

and (B)(I) Approving the Debtors' Entry Into Agency Agreement, (II) Authorizing the Debtors to Sell Certain Assets Through Store Closing Sales, (III) Authorizing the Debtors to Abandon Unsold Property, (IV) Waiving Compliance With Contractual Store Closing Sale Restrictions and Exempting the Debtors From State Wage Pay Requirements and Laws Restricting Store Closing Sales, (V) Authorizing the Debtors' Assumption of October Agency Agreement and (VI) Granting Related Relief (the "GOB Motion").

9. On November 4, 2011, this Court entered an Order approving the GOB Motion on an interim basis [D.I. 80] (the "Interim Order").

10. A number of parties filed objections to the GOB Motion, including the Committee and Esopus. Many of the objections raised common issues, such as the effect of uncertain projections on the Guaranteed Percentage and provisions which contradicted existing leases with landlords.

11. On November 16, 2011, after extensive improvements were made following negotiations by the Committee's professionals with the Agents under the GOB Motion, this Court entered an Order Pursuant to Bankruptcy Code Sections 105(a), 363(b), 364(e), 365(a) and 554(a) and Bankruptcy Rules 2002, 6003, 6004, 6006, and 9014 (I) Approving the Debtors' Entry into Agency Agreement, (II) Authorizing the Debtors to Sell Certain Merchandise Through Store Closing Sales, (III) Authorizing the Debtors to Abandon Unsold Property, (IV) Waiving Compliance with Contractual Store Closing Sale Restrictions and Exempting the Debtors from Certain State Wage Pay Requirements and Laws Restricting Store Closing Sales, (V) Authorizing the Debtors' Assumption of October Agency Agreement and (VI) Granting Related Relief (the "GOB Order").

12. Upon information and belief, shortly after the Petition Date, counsel to Esopus contacted the U.S. Trustee and requested that she appoint an official committee of equity security holders. In a brief discussion with the assistant U.S. Trustee after the solicitation notice had already been sent out to shareholders, the Committee expressed its opposition to the appointment of an official committee of equity security holders in these cases. Notwithstanding the Committee's position, later that same day the U.S. Trustee formed the Equity Committee. The appointed members of the Equity Committee are (1) Esopus Creek Value Series Fund LP - Series "L", (2) Franklin Value Investors Trust, Franklin Balance Sheet Investment Fund, and (3) DS Fund I, LLC.

RELIEF REQUESTED

13. By this Motion, the Committee respectfully requests that this Court enter (a) an order disbanding immediately the Equity Committee or, alternatively, (b) if the Court determines not to disband the Equity Committee, limiting the scope of the Equity Committee's duties to preclude duplicative work in situations where the Equity Committee's interests are aligned with the Committee's and the Debtors' and capping the estates' liability for fees and expenses of the Equity Committee and its professionals at $500,000 in the aggregate, without prejudice to the Equity Committee's right to file a motion, on notice, to increase the cap for cause shown.

THE STANDARD OF REVIEW TO BE EMPLOYED BY THE COURT

14. Delaware bankruptcy courts and other courts in the Third Circuit have not definitively addressed whether a bankruptcy court should review a U.S. Trustee's decision to appoint an additional committee pursuant to § 1102(a)(1) under a *de novo* or abuse of discretion standard. The Committee submits that when considering whether to overturn a U.S. Trustee's decision to appoint or not appoint an official committee—as opposed to the appointment of a

specific member to a committee—this Court should employ a *de novo* standard of review. A number of bankruptcy courts in other circuits have held that a bankruptcy court should employ a *de novo* standard of review in this situation. *See, e.g.*, *In re McLean Indus., Inc.*, 70 B.R. 852, 857 (Bankr. S.D.N.Y. 1987) ("[T]he legislative history confirms that bankruptcy judges are to determine *de novo*, as they had previously, whether an additional committee is necessary to achieve adequate representation and thereby reflects the overall congressional distinction between administrative appointments and judicial functions."); *In re Texaco Inc.*, 79 B.R. 560, 566 (Bankr. S.D.N.Y. 1987) ("[A]n abuse of discretion standard does not apply with respect to the United States Trustee's initial exercise of discretion [to appoint an additional committee] because the concept of adequate representation is a legal issue which must be resolved judicially."); *In re Sharon Steel Corp.*, 100 B.R. 767, 776 (Bankr. W.D. Pa. 1979) ("Case law establishes that the decision of the U.S. Trustee with respect to the appointment of additional official committees . . . is subject to *de novo* review by the Bankruptcy Court in order to determine the adequacy of the representation.").

15. Although bankruptcy courts in Delaware have applied an abuse of discretion standard of review in the context of § 1102, they have done so when reviewing the U.S. Trustee's appointment of or refusal to appoint particular members to a committee, *not* when reviewing the initial decision to form an additional committee. *See generally In re Columbia Gas Sys., Inc.*, 133 B.R. 174, 174–76 (Bankr. D. Del. 1991) (finding that a bankruptcy court could review the U.S. Trustee's refusal to appoint a specific creditor to the Official Committee of Unsecured Creditors and that such review was subject to an abuse of discretion standard); *see also Bodenstein v. Lentz (In re Mercury Fin. Co.)*, 240 B.R. 270, 275–78 (N.D. Ill. 1999)

(discussing other courts' interpretation of § 1102 and holding that the U.S. Trustee's decision regarding committee membership is subject to an abuse of discretion standard).

16. Here, the Committee is asking the Court to review the U.S. Trustee's initial decision to form an Equity Committee. The Committee is not questioning the size or makeup of the Equity Committee. As such, the appropriate standard of review for the Court to employ in this case is *de novo*. However, regardless of whether the Court applies a *de novo* or an abuse of discretion standard, the facts in these cases are sufficiently compelling to support a finding that the appointment of the Equity Committee was not warranted under either standard and should be overturned.

DISCUSSION

17. Section 1102(a)(1) of the Bankruptcy Code provides the U.S. Trustee with discretion to appoint an official committee of equity holders as the U.S. Trustee deems appropriate. 11 U.S.C. § 1102(a)(1) (2006). Unlike the appointment of an unsecured creditors' committee, which is mandatory in every chapter 11 case, the appointment of additional committees representing equity interests "should be the rare exception." *Exide Techs. v. State of Wisconsin Inv. Bd.*, 2002 U.S. Dist. LEXIS 27210, at *3–4 (D. Del. Dec. 23, 2002) (citing *In re Williams Commc'ns Grp., Inc.*, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002)). The legal standard for the appointment of an equity committee is well-established: an official equity committee "should not be appointed unless equity holders establish that (i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (ii) they are unable to represent their interests in the bankruptcy case without an official committee." *Exide Techs.*, 2002 U.S. Dist. LEXIS 27210, at *4; *see also In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Dec. 10, 2009)

(Memorandum Order Denying Motion of Caspian Capital Advisors for an Order Appointing an Official Committee of Equity Security Holders). "The second factor is critical because, in most cases, even those equity holders who do expect distribution in the case can adequately represent their interest without an official committee and can seek compensation if they make a substantial contribution in the case." *In re Williams Commc'ns Grp., Inc.*, 281 B.R. at 223. Here, the Syms' minority equity security holders are already adequately represented by management and have demonstrated that they can forcefully advocate their own interests even without an official committee if they believe it is in their best interests to do so.

18. With respect to the first prong whether there is a substantial likelihood that equity holders will receive a meaningful distribution, the Committee does not dispute the U.S. Trustee's determination on this point as it does appear that Syms' public shareholders will receive a distribution after all of the Debtors' creditors have been paid in full with interest. The Committee instead bases its Motion on the second prong regarding adequate representation.

19. Courts will consider various factors in deciding whether the interests of the equity holders are adequately represented. There is no statutory test for adequate representation, so it must be determined by the specific facts of the case. *See, e.g.*, *Victor v. Edison Bros. Stores (In re Edison Bros. Stores, Inc.)*, 1996 U.S. Dist. LEXIS 13768, at *11 (D. Del. Sept. 17, 1996). Among the factors that courts consider are (1) the number of shareholders; (2) the size and complexity of the case; and (3) whether the cost and delay of the additional committee outweighs the concern for adequate representation. *See, e.g.*, *id.*; *In re Kalvar Microfilm, Inc.*, 195 B.R. 599, 600 (Bankr. D. Del. 1996). The statute does not require that equity holders be "exclusively" represented, but merely that they be "adequately" represented. *See, e.g.*, *In re Spansion, Inc.*,

421 B.R. 151, 163 (Bankr. D. Del. 2009); *In re Leap Wireless Int'l, Inc.*, 295 B.R. 135, 140 (Bankr. S.D. Cal. 2003).

20. Although shares that are widely held and publicly traded can weigh in favor of appointment of a committee, such facts are not dispositive as courts have found that "not every case with such a large number [of shareholders] will require an official equity committee." *In re Williams Commc'ns Grp., Inc.*, 281 B.R. at 223; *see also In re Kalvar Microfilm, Inc.*, 195 B.R. at 601 (court denied appointment of an equity committee even though the debtors' stock was publicly-traded and widely held). As noted by a number of courts, Congress declined to mandate the appointment of equity committees in the Bankruptcy Code, instead leaving the bankruptcy courts and the United States Trustee with the discretion to do so. *See, e.g.*, *In re Edison Bros. Stores, Inc.*, 1996 U.S. Dist. LEXIS 13768, at *13; *see also In re Williams Commc'ns Grp., Inc.*, 281 B.R. at 223.

21. Delaware courts have also declined to appoint an equity committee in cases where the concern for adequate representation is outweighed by the cost of the additional committee. *See, e.g., In re Kalvar Microfilm, Inc.*, 195 B.R. at 601. In *Kalvar*, the bankruptcy court expressed the exact same concern facing the Debtors' estates here, *i.e.*, the high additional cost that the appointment of an equity committee would entail retaining the services of law firms, financial advisors, and possibly other experts, who would incur "a hefty monthly fee." *Id.* Similarly, the Equity Committee has already engaged two law firms and one financial advisor.

MINORITY EQUITY HOLDERS ARE ADEQUATELY REPRESENTED

22. Syms' minority equity holders are more than adequately represented in these cases. First, the interests of the creditors and all equity holders are aligned because both seek to

maximize the value of the estates' assets. *See, e.g.*, *In re Williams Commc'ns Grp., Inc.*, 281 B.R. at 221 ("A higher valuation is in both the Creditors' Committee's and Shareholders' interest"); *In re Leap Wireless Int'l, Inc.*, 295 B.R. at 139–40 ("The economic interests of the bondholders and shareholders appear to be the same—that is, to find the highest realistic value for the company. And it is the fiduciary duty of the [Creditors' Committee] to do so."). Management, the Debtors' professionals, the Committee and the Committee's professionals are all working toward the same goal of maximizing value. To the extent there is any divergent interest between the Debtors and the Committee in how best to maximize values, the Committee is in place to act as a watchdog. There is simply no reasonable justification for forcing the Debtors' estates to pay for yet another set of professionals, representing a small minority group of shareholders, to essentially do the same thing.

23. Next, based on a recent filing by the Debtors' with the Securities and Exchange Commission (the "SEC"), the Debtors' existing management and Board of Directors appear to hold approximately 54.76% of Syms' outstanding stock.[5] In these cases, the interests of management, who are already adequately represented by counsel and advisors, are directly aligned with the interests of the minority equity holders, thus precluding the need for an additional committee.

24. One Delaware court has specifically addressed the issue of adequate representation in the context of a potentially solvent debtor. *See In re Edison Bros. Stores, Inc.*, 1996 U.S. Dist. LEXIS 13768, at *8 (bankruptcy court found that "the debtor is not hopelessly insolvent"). The court in *Edison* stated, "the statutory focus of § 1102(a)(2) is not whether the shareholders are 'exclusively' represented, but whether they are 'adequately' represented." *Id.* at

[5] A copy of the relevant section of the SEC filing is attached hereto as Exhibit 1.

*14; *see also In re Allied Holdings, Inc.*, 2007 Bankr. LEXIS 1597, at *3–8 (Bankr. N.D. Ga. Mar. 13, 2007). The district court in *Edison* upheld the bankruptcy court's finding that an equity holders committee was not warranted where management held thirty-five percent of the debtors' equity interest, the debtor's capital structure was not complex, and there were no facts supporting a conflict of loyalties between management and non-insider shareholders. *Id.* at *14–15 ("The bankruptcy court characterized management's 35 percent equity interests as a 'substantial' interest, which is 'just as interested in maintaining value as is the smallest public investor.'"). The court found no evidence that management's self-interest would preclude it from adequately representing the non-insider shareholders. *Id.* at *15.

25. Courts outside of Delaware have similarly followed the reasoning of the Delaware district court in *Edison*. *See, e.g.*, *In re Allied Holdings, Inc.*, 2007 Bankr. LEXIS 1597, at *6. In *Allied Holdings*, the bankruptcy court found that the appointment of an equity committee was not warranted where the debtors' board of directors collectively held over thirty-nine percent of the debtors' outstanding shares and actively took the equity shareholders' interests into account when making decisions. *Id.* at *7. In *Allied*, one of the movants, who was chairman of the debtors' board of directors and an officer of the debtors, testified on the issue of lack of adequate representation. *Id.* at *4–7. Although he supported the appointment of an equity committee because he believed it could help maximize the debtors' value, he testified that he and other members of the board understood that "one of [their] primary responsibilities as [members] of the board of directors is to 'protect' Shareholders." *Id.* at *5, 7. He further acknowledged "that he and the rest of the board of directors have been taking into account the interests of Shareholders in making decisions." *Id.* Under the circumstances, the court found that the

movants in that case had failed to meet their burden that the equity holders were not being adequately represented, and thus denied the appointment of an equity committee. *Id.* at *6–8.

26. The facts presented here are nearly identical, if not even more compelling, than those in *Edison* and *Allied Holdings*. Here, Syms' management and directors hold nearly 55% of Syms' common stock, as opposed to only 35%, Syms' capital structure, a single class of common stock, is the simplest possible, and there are no facts showing that the majority shareholders serving on management are somehow acting in a manner detrimental to Syms' minority shareholders. Indeed, if anything, the facts show that management is acting in the best interest of all shareholders, having decided to engage in a process prepetition to identify the best strategic alternative for the companies and ultimately deciding to shutdown the retail operations and liquidate the Debtors' assets, thus electing to pursue a course which will ultimately result in their positions at the Debtors' being eliminated.

27. Further, under applicable state law, Syms' board and management are fiduciaries for the minority equity shareholders. *See, e.g.*, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (stating that it is a "basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders) (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)); *Maul v. Kirkman*, 637 A.2d 928, 939, 270 N.J. Super. 596, 617 (N.J. Super. Ct. App. Div. 1994) ("Corporate directors owe a fiduciary duty to the stockholders."). Further, as controlling shareholders, members of management have a heightened duty to protect the interest of the minority shareholders. *Berkowitz v. Power/Mate Corp.*, 135 N.J. Super. 36, 45, 342 A.2d 566, 571 (N.J. Super. Ct. Ch. Div. 1975) ("Those who control the affairs and conduct of a corporation, whether public or private, have a fiduciary duty to all the stockholders and the powers they have by virtue of their majority status are powers held by them in trust.").

So, not only are the interests of the Syms' minority and majority shareholders aligned, the shareholders on management and in their capacities as majority shareholders, have a fiduciary obligation to act in the best interests of the minority shareholders, which is the same role the Equity Committee is seeking to play here.

28. Further, shareholders are not precluded from participating in chapter 11 proceedings absent appointment of another official committee. Section 1109(b) of the Bankruptcy Code allows an equity security holder to raise, appear, and be heard on any issue in a chapter 11 case. 11 U.S.C. § 1109(b). In *Kalvar*, the shareholder who moved for appointment of an equity committee held over thirty percent of the preferred stock of the debtors. *In re Kalvar Microfilm, Inc.*, 195 B.R. at 601. The bankruptcy court held that absent appointment of an equity holders committee, the shareholder still "has a substantial stake and can continue to represent its own interests in future matters in this case." *Id.*; *see also In re Williams Commc'ns Grp., Inc.*, 281 B.R. at 223 (noting that the shareholders could still participate in the proceedings even though the court denied appointment of an equity holders committee). And, to the extent minority shareholders participate and make a "substantial contribution" to these cases, separate and apart from their own pecuniary, self-interest, they are further entitled to seek reimbursement of any costs pursuant to section 503(b)(3)(D) of the Bankruptcy Code. 11 U.S.C. § 503(b)(3)(D). Similarly, in the event these three minority shareholders sitting on the Equity Committee believe they need to advocate a specific position with the Court, they are free to do so, and in fact one has already done so on the GOB Motion. Given the current state of these chapter 11 cases, and the indisputable alignment of interests between majority equity holders on management and the minority shareholders, the minority equity shareholders simply cannot establish that a separate equity committee is "necessary" for their adequate representation.

AN EQUITY COMMITTEE IS NOT THE APPROPRIATE VEHICLE THROUGH WHICH TO PURSUE MINORITY SHAREHOLDER CLAIMS AGAINST MANAGEMENT

29. Given that the desire of the minority Syms' shareholders on the Equity Committee to maximize the (i) value of the Debtors' assets and (ii) potential recovery to all shareholders is shared equally by the majority-controlled shareholders on management and consequently, their interests are already adequately represented in these cases, the Committee is concerned that the minority shareholder members on the Equity Committee may have a different, more self-interested agenda for seeking the appointment of an Equity Committee in these cases. Namely, the Equity Committee intends on pursuing at the Debtors' estates' expense potential shareholder derivative and breach of fiduciary duty-type claims against former or existing officers and directors.[6]

30. Pursuing such officer and director claims appears to be a major focus of the Equity Committee. Upon information and belief, Esopus, who was the principal force behind the US Trustee's decision to form the Equity Committee in the first place, and is the chairperson of the Equity Committee, through the same co-counsel who has appeared on behalf of the Equity Committee in these cases, filed a complaint in New Jersey state court against Syms Corp. earlier this year seeking access to the company's books and records.[7] Upon information and belief, Esopus sought in that action information regarding alleged mismanagement of the company, efforts to sell the company, and Syms' acquisition of new leases.

[6] The Committee has not yet conducted any investigation into the prepetition acts or conduct of the Debtors' former and present officers and directors, and, therefore, takes no position with respect to whether any such claims exist or are meritorious.

[7] The Committee has been made aware of the existence of the New Jersey litigation and is seeking copies of the relevant pleadings, which it will make available to the Court at the hearing on this Motion.

31. Further, Esopus appears to be a Syms' activist minority shareholder. For example, in response to Esopus' concern that the date of its annual shareholder meeting failed to comply with New Jersey law that requires annual meetings to be held no more than thirteen months apart, Syms Corp. moved up the date of its most recent annual shareholders' meeting from August 5, 2011 to July 29, 2011. Syms Corp., Current Report (Form 8-K) (July 8, 2011). The Committee has reason to believe that Esopus has taken other adversarial positions against the Debtors' management in the past few years.[8] These actions show that Esopus has been actively advocating its interests without the need for an official equity committee.

32. As a threshold matter, to the extent any viable derivative claims against former or existing officers and directors of the Debtors exist, those claims constitute assets of the Debtors' estates. The members of the Equity Committee are stayed from pursuing any such claims individually. Further, it is the Committee -- not the Equity Committee -- who is the appropriate party to investigate and pursue any such derivative claims for the benefit of unsecured creditors and potential indirect benefit of the equity holders. Indeed, the task of conducting an investigation of the prepetition conduct or motives of Debtors' management falls directly within the scope of duties the Committee is charged with fulfilling under 11 U.S.C. § 1103. Here, the Committee is highly motivated to investigate and, if appropriate, pursue all potential claims against management as its creditor constituency would be the first beneficiary of any recoveries realized from such claims. Consequently, any interest minority equity holders have in such an

[8] For example, Esopus was a party to similar litigation against Syms in 2008. Esopus and Barington Capital, L.P., both minority equity holders in Syms, initiated a lawsuit, also in New Jersey State court, against Syms seeking a preliminary injunction prohibiting Syms from de-listing its shares from the New York Stock Exchange. In that litigation, the minority equity shareholders also alleged various shareholder mismanagement claims and breaches of fiduciary duty.

investigation is aligned with and will be adequately represented by the interests of the Committee in pursuing such claims.

33. Likewise, to the extent the Equity Committee is seeking to pursue claims that individual shareholders hold in their own right, such a securities-fraud type claims, it is up to individual shareholders to bring those claims. The Debtors' estates should not be forced to bear the burden of paying the Equity Committee's professionals to pursue those non-estate, individual claims.

THE COST OF AN ADDITIONAL COMMITTEE IS UNWARRANTED

34. The Debtors' estates are already bearing the expenses of multiple professionals retained by the Debtors and the Committee. The Equity Committee has already retained two law firms, as well as a financial advisory firm. All of the Debtors' and Committee's professionals are charged with the task of maximizing the value realized from the liquidation of the Debtors' assets and then figuring out a fair and equitable way to distribute that value under a plan to stakeholders. To the extent there are issues between Syms' equity holders and the creditors of the Debtors regarding the proposed distribution of value in a plan, the Debtors' existing management and its professionals are more than capable of representing the interests of all shareholders in those issues. Indeed, management has the most at stake in those disputes. There is simply no justification for burdening these estates with yet another layer of professionals for the Equity Committee, who have the same goals and will be charged fulfilling with the very same tasks in these cases.

35. Further, as has been demonstrated multiple times in the past, the three minority shareholders on the Equity Committee have the ability and wherewithal to represent themselves

in these cases. And if they can demonstrate a substantial contribution in these cases beyond pursuing their own parochial, self-interested agenda, the minority equity holders can file a motion seeking reimbursement from the Debtors of amounts paid to their professionals under section 503(b)(3)(D) of the Bankruptcy Code.

ALTERNATIVE RELIEF, LIMITATION ON SCOPE, FEES AND EXPENSES

36. While the Committee continues to maintain that the Equity Committee is not warranted in these chapter 11 cases, should the Court decide not to disband the Equity Committee, the Committee respectfully requests that the Court, as an alternative, impose a cap on the fees and expenses of the Equity Committee and its professionals for which the Debtors will be liable.

37. The Committee also respectfully requests that the Court limit the scope of the work to be performed by any professionals retained by the Equity Committee. In most instances, the interests of the Equity Committee are aligned with those of the Committee. In those situations, it is unnecessary and duplicative to have two sets of professionals working on and billing the estates to pursue the same interests. The scope of duties which the Equity Committee's professionals should be allowed to perform should be limited to those issues where the interests of equity holders truly diverge from those of unsecured creditors, for example, focusing specifically on the negotiations of the terms of a plan of liquidation and confirmation of such plan.

38. The Committee also requests that the liability of the estates for all fees and expenses incurred by the Equity Committee and its professionals not exceed $500,000 in the aggregate (the "Fee Cap"). Such relief is necessary and appropriate in the context of these cases.

Imposition of the Fee Cap will ensure that the Equity Committee pursues only those legitimate goals for which the interests of equity holders truly diverge from those of unsecured creditors. The Fee Cap will further prevent duplicative and unnecessary costs of administering these chapter 11 cases. While the Committee believes that the Fee Cap is more than adequate to ensure that the Equity Committee has sufficient resources to participate fully in these chapter 11 cases, the Committee does not oppose the order providing that the fee cap amount may be increased by further order of the Court upon a showing of good cause by the Equity Committee, after notice and a hearing.

39. Section 382(a) of the Bankruptcy Code permits the Court to limit the compensation of professionals. 11 U.S.C. § 328(a). Bankruptcy courts in Delaware have previously imposed fee caps on equity committees. *See, e.g.*, *Comm. Of Equity Sec. Holders v. Official Comm. Of Unsecured Creditors (In re Fed. Mogul-Global Inc.)*, 348 F.3d 390, 403 (3d Cir. 2003) (holding that § 328(a) "authorizes the imposition of caps on the fees that a professional may charge, even if the committee that submitted the application at issue did not propose that limitation"). The Committee submits that the Fee Cap is appropriate under the circumstances of these chapter 11 cases.

40. Furthermore, bankruptcy courts in Delaware have also held that the Bankruptcy Code permits limiting the scope of work of an equity committee's professionals when it was duplicative of the work of other professionals already employed by other parties in the case. *Id.* at 393, 405 ("11 U.S.C. § 1103(b) does not prohibit a Bankruptcy Court from instructing a financial advisor to an equity security holders' committee to rely on data previously compiled by professionals retained by the debtors in a reorganization proceeding" and thus the bankruptcy court did not violate the provision "by considering the availability of financial information from

the Debtors in determining the amount at which to set the fee cap"). The Committee submits that limitations in scope of work and on fees and expenses are appropriate here given the unique circumstances of these cases in the event the Court is not inclined to disband the Equity Committee altogether.

NOTICE

41. Notice of this Motion will be given to: (i) the Debtors; (ii) proposed co-counsel to the Equity Committee; (iii) the United States Trustee for the District of Delaware; (iv) counsel to the agent for the Prepetition lenders; and (v) all parties entitled to notice pursuant to Local Bankruptcy Rule 9013-1(m).

NO PRIOR REQUEST

42. No prior request for the relief requested herein has been made to this or any other Court.

CONCLUSION

Based on the foregoing, the appointment of the Equity Committee, given the unique facts and circumstances of these cases, is not justified. The equity holders are already adequately represented in these cases, and the appointment of the Equity Committee at this point in time will add unnecessary and duplicative costs to estates that can ill afford it.

WHEREFORE, the Committee respectfully requests that this Court (a) enter an order, in substantially the same form as the proposed form of order attached hereto as Exhibit 2, directing the U.S. Trustee to disband the Equity Committee and (b) grant such other and further relief as may be just and proper.

Dated: Wilmington, Delaware
November 23, 2011

Respectfully submitted,

RICHARDS, LAYTON & FINGER, P.A.

/s/ Zachary I. Shapiro
Michael J. Merchant (No. 3854)
Paul N. Heath (No. 3704)
Zachary I. Shapiro (No. 5103)
Marisa Terranova (No. 5396)
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920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

-and-

HAHN & HESSEN LLP

Mark T. Power
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New York, New York 10022
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Proposed Co-Counsel to The Official Committee of Unsecured Creditors of Filene's Basement, LLC, et al.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 11-13511 (KJC)
FILENE'S BASEMENT, LLC, *et al.*,	:	
	:	(Jointly Administered)
Debtors. [1]	:	
	:	**Hearing Date: December 14, 2011 at 1:00 p.m. (EST)**
	:	**Objection Deadline: December 7, 2011 at 4:00 p.m. (EST)**

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that, on November 23, 2011, the Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors in possession filed the **Motion of the Official Committee of Unsecured Creditors for an Order (A) Disbanding the Official Committee of Equity Security Holders Appointed by the United States Trustee or, Alternatively, (B) Limiting the Scope of Duties and Fees and Expenses Which May be Incurred By Such Committee** (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be filed in writing with the Bankruptcy Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the proposed undersigned counsel to the Committee on or before **December 7, 2011 at 4:00 p.m. (Eastern Standard Time).**

PLEASE TAKE FURTHER NOTICE that if an objection is timely filed, served and received, and such objection is not otherwise timely resolved, a hearing to consider such

[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.

objection and the Motion will be held before The Honorable Kevin J. Carey at the Bankruptcy Court, 824 North Market Street, 5th Floor, Courtroom 5, Wilmington, Delaware 19801 on **December 14, 2011 at 1:00 p.m. (Eastern Standard Time).**

IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: November 23, 2011
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.

/s/ Zachary I. Shapiro
Michael J. Merchant (No. 3854)
Paul N. Heath (No. 3704)
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Proposed Co-Counsel to The Official Committee of Unsecured Creditors of Filene's Basement, LLC, et al.

EXHIBIT 1

DEF 14A 1 v226678_def14a.htm

SCHEDULE 14A INFORMATION
Proxy Statement Pursuant to Section 14(a) of the
Securities Exchange Act of 1934

Filed by the Registrant ☒

Filed by a Party other than the Registrant ☐

Check the appropriate box:

- ☐ Preliminary Proxy Statement
- ☐ **Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**
- ☒ Definitive Proxy Statement
- ☐ Definitive Additional Materials
- ☐ Soliciting Material Pursuant to ss.240.14a-11(c) or ss.240.14a-12

SYMS CORP

(Name of Registrant as Specified in Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

- ☒ No fee required.
- ☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(4) and 0-11.
  - (1) Title of each class of securities to which transaction applies:
  - (2) Aggregate number of securities to which transaction applies:
  - (3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (Set forth the amount on which the filing fee is calculated and state how it was determined):
  - (4) Proposed maximum aggregate value of transaction:
  - (5) Total fee paid:
- ☐ Fee paid previously with preliminary materials.
- ☐ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a) (2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.
  - (1) Amount Previously Paid:
  - (2) Form, Schedule or Registration Statement No.:
  - (3) Filing Party:
  - (4) Date Filed:

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SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT

The following table sets forth the beneficial ownership of shares of Common Stock as of June 15, 2011, except as otherwise set forth in the notes below, for:

- each director and nominee;
- each executive officer named in the summary compensation table;
- each person owning of record or known by us, based on information provided to us by the persons named below, to own beneficially more than 5% of our common stock; and
- all directors and executive officers as a group.

Each person named in the table has sole voting and investment power with respect to all shares of Common stock shown as beneficially owned by such person, except as otherwise set forth in the notes to the table.

Name and Address of Beneficial Owner	Amount and Nature of Beneficial Ownership of Common Stock	Percent of Class
Marcy Syms One Syms Way Secaucus, NJ 07094	7,955,294 (1)	54.7%
Franklin Resources, Inc. 777 Mariners Island Blvd. San Mateo, CA 94404	1,430,000 (2)	9.9%
Dimensional Fund Advisors, Inc. 6300 Bee Cave Road Austin, TX 78746	1,216,537 (3)	8.4%
Bernard H. Tenenbaum	100	*
Beth L. Bronner	—	—
Henry M. Chidgey	—	—
Thomas E. Zanecchia	—	—
All directors and executive officers as a group (10 persons)	7,955,394	54.7%

* Less than one percent

(1) Represents (a) 946,932 shares of Company common stock owned directly by Marcy Syms, (b) 697,592 shares of Company common stock held in the Laura Merns Living Trust, dated February 14, 2003 (the "Merns Trust"), (c) 6,213,270 shares of Company common stock held in the Marcy Syms Revocable Living Trust, dated January 12, 1990, as amended (the "Marcy Syms Trust"), of which 5,896,087 shares of Company common stock was transferred to the Marcy Syms Trust from the Cortlandt Enterprises Limited Liability Partnership upon its dissolution in 2009 and (d) fully vested options entitling Marcy Syms to purchase 97,500 shares of Company common stock. Marcy Syms is the sole Trustee of the Merns Trust; she disclaims beneficial ownership of the shares owned by the Merns Trust except to the extent of her pecuniary interest in the Merns Trust. Marcy Syms retains the sole voting power with respect to the 6,213,270 shares of Company common stock held by the Marcy Syms Trust and the right to revoke the Marcy Syms Trust at any time.

(2) Franklin Resources, Inc. ("Franklin") has sole voting and dispositive power with respect to 1,430,000 shares. This information is based upon a Form 13F publicly filed by Franklin in May 2011.

(3) Dimensional Fund Advisors, Inc. ("Dimensional") has sole dispositive power with respect to 1,216,537 shares. This information is based upon a Schedule 13G publicly filed by Dimensional in February 2011.

Of the directors, Messrs. Chidgey and Zanecchia and Ms. Bronner do not beneficially own any shares of Company common stock. Other than Marcy Syms, none of the executive officers named in the summary compensation table, beneficially own any shares of Company common stock.

EXHIBIT 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER GRANTING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION FOR AN ORDER DISBANDING THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS APPOINTED BY THE UNITED STATES TRUSTEE

Upon the motion, dated November 23, 2011 (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors"), for the entry of an order, pursuant to sections 105(a) and 1102 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2020 and 9014 of the Federal Rules of Bankruptcy Procedure, directing the United States Trustee for the District of Delaware (the "U.S. Trustee") to disband the Official Committee of Equity Security Holders (the "Equity Committee"), formed on November 15, 2011, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given to counsel for the Debtors, proposed counsel for the Equity Committee, the Office of

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.

the United States Trustee for the District of Delaware and all other parties who have filed a notice of appearance in these chapter 11 cases; and it appearing that no other or further notice is required; and the Court having determined that disbandment of the Equity Committee is in the best interest of the Debtors' estates, their creditors, and all parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, that the Motion is hereby granted; and it is further

ORDERED, that the U.S. Trustee is hereby directed to disband the Equity Committee in its entirety, effective as of the date of its formation by the Office of the United States Trustee; and it is further

ORDERED, that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

Dated: Wilmington, Delaware
December __, 2011

_____
THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE