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

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| In re | Chapter 11 |
| FILENE'S BASEMENT, LLC, et al., | Case No. 11-13511 (KJC)<br>Jointly Administered |
| Debtors.[1] | **Hearing date:**<br>**December 14, 2011, at 1:00 p.m. (ET)** |
| | **Re D.I. 263** |

**OPPOSITION OF THE OFFICIAL COMMITTEE OF SYMS EQUITY SECURITY HOLDERS TO 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 Official Committee of Syms Corp. Equity Security Holders (the "Equity Committee"), by and through its undersigned counsel, submits this Opposition to the Motion of the Official Committee of Unsecured Creditors (the "UCC") for an Order Disbanding the Official Committee of Equity Security Holders 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 (the "Motion"). In support of its Opposition to the Motion, the Equity Committee respectfully 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), 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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## PRELIMINARY STATEMENT

1. Shortly after the Debtors filed these cases, the United States Trustee appointed the Equity Committee to represent the shareholders of Syms. The need for such a committee in these cases (the "Cases") is obvious. Although it has filed for bankruptcy, Syms is solvent by a wide margin: Based on its publicly traded share price, Syms has an equity value that easily surpasses $150 million. Syms's shareholders thus have a direct financial stake in all aspects of the Cases. And while Syms's creditors will be paid in full, not all creditors in the Cases are so fortunate. Syms's subsidiary, Filene's Basement, is insolvent. The unsecured creditors of Filene's Basement therefore would like nothing better than to capture some of Syms's equity value for themselves, whether through substantive consolidation or otherwise. So it would seem uncontroversial that Syms's shareholders need an official committee to advocate on their behalf. After all, when the intercompany issues that permeate the Cases come to a head, Filene's Basement's creditors will have a committee charged with representing their interests: the UCC. But without the Equity Committee, there is no committee or other body that will charged with representing solely the interests of Syms's shareholders.

2. The UCC now seeks to nullify the U.S. Trustee's decision to appoint the Equity Committee and leave Syms's shareholders without any official representation in the Cases. Although it concedes that Syms is solvent and that major intercompany disputes exist in the Cases, the UCC asserts a series of specious rationales for disbanding the Equity Committee. This Court need not even address the merits of those arguments, though, because all of them are premised on the notion that the U.S. Trustee's appointment decision is subject to *de novo* review. But precedent in this District makes clear that the U.S. Trustee's decision to appoint the Equity Committee may be reviewed only for an abuse of discretion. To show an abuse of discretion, the

UCC would need to establish that the U.S. Trustee's appointment of the Equity Committee was arbitrary or capricious. The UCC does not even attempt to satisfy this highly deferential standard, nor could it. The Court can and should deny the Motion for this reason alone.

3. Even if one accords the U.S. Trustee's decision no deference at all, it is clear that the U.S. Trustee made the right call. The UCC's principal argument to the contrary is that Syms's shareholders will be adequately represented in the Cases by the Debtors' existing management and board. This argument ignores that the Debtors' officers and directors owe *conflicting* duties to Filene's Basement and are potentially subject to claims by Syms's estate for their pre-petition actions. These conflicts of interest disqualify Debtors' management and board from adequately representing Syms's shareholders in the Cases. The Debtors' proposed professionals suffer the same disqualifying conflicts of interest.

4. If the Debtors and their management seem inadequate, the UCC insists that it too can serve as a "watchdog" for Syms's shareholders. In doing so, the UCC seems as oblivious to its own disabling conflicts of interest as it is to management's. Nowhere does the UCC acknowledge that its only real purpose in the Cases is to advance the interests of creditors of Filene's Basement, whose interests diverge from those of Syms's shareholders on issue after issue that will arise in the Cases. Nor does the UCC see fit to mention that it owes no fiduciary duty whatsoever to Syms's shareholders.

5. In contrast to the Debtors' insiders and the UCC, the Equity Committee owes its duties exclusively to Syms' shareholders. And while the Equity Committee will incur costs, it has already demonstrated value far in excess of any incremental costs. The Debtors, for example, did not take any action at the beginning of the Cases to preserve the Debtors' net operating losses ("NOLs"), an asset worth tens of millions of dollars to Syms and its

shareholders. After the Equity Committee was formed, it prompted the Debtors to file a joint motion with the Equity Committee to establish a trading order that would protect the value embedded in the Debtors' NOLs. Thus, it was the Equity Committee's actions that preserved this valuable asset for Syms's estate and its shareholders.

6. As an alternative to disbanding the Equity Committee, the UCC requests that this Court hinder the Equity Committee's ability to carry out its duties by imposing arbitrary caps on its professional fees and scope of work. The UCC argues that the Equity Committee will create "unnecessary and duplicative" expenses absent such limitations. As this Court has recognized, though, Syms's shareholders are the ones who are underwriting all professional fees in the Syms case—not just of the Equity Committee's professionals, but of all professionals chargeable to the Syms estate. Thus, the Equity Committee has a direct interest in limiting fees and expenses and preserving the resources of the Syms estate: Every dollar spent at the Syms level reduces the return to Syms's shareholders by equal measure. This is why the Equity Committee reached out to the UCC about coordinating activities to avoid unnecessary and duplicative expenses—only to be ignored. The UCC's stated concern with duplicative and unnecessary costs thus rings quite hollow.

7. Indeed, the irony of the UCC's Motion is that if there is any statutory committee whose role should be circumscribed in the Cases, it is the UCC. There is simply no reason for the UCC to incur professionals fees on behalf of Syms's creditors who will be paid in full. The only Syms constituency that needs representation is Syms's shareholders—who are appropriately represented by the Equity Committee. The Court therefore should limit the UCC's role to representing Filene's Basement's creditors and nothing else.

8. By bringing this Motion, the UCC has done a disservice to all the stakeholders in the Cases. At this critical juncture, the statutory committees should focus on maximizing the values of the estates for the benefit of their constituents, not trying to deprive a rival constituency of effective representation. The Court should not only deny the Motion, but also any request by the UCC's professionals for compensation in bringing it.

## ARGUMENT

### I. Legal Standard

#### A. The Trustee's Appointment of an Equity Committee Can Be Reviewed Only for an Abuse of Discretion

9. The UCC has presented the Motion as if the question before the Court was whether to appoint an Equity Committee in the first place. But that, of course, is not the question. The U.S. Trustee has already exercised her discretion to appoint a committee. The question before the Court is whether to overturn that decision. Both the text of section 1102(a)(1) and this District's precedent make clear that the U.S. Trustee's decision may be reviewed, if at all,[2] only under the deferential abuse of discretion standard.

10. Congress intended the U.S. Trustee to have broad discretion in deciding whether to appoint an equity committee. Section 1102(a)(1) of the Bankruptcy Code provides that the United States trustee "may appoint additional committees of . . . of equity security holders as the United States trustee *deems appropriate*." (emphasis added). Nothing in section

[2] Some courts have held that a court lacks the power to abolish an equity committee appointed by the U.S. Trustee pursuant to § 1102(a)(1). *See In re New Life Fellowship, Inc*., 202 B.R. 994, 995-96 (Bankr. W.D. Okla. 1996). While there is no controlling authority in this District on whether a court has the power to disband an equity committee, the Court need not decide the question here because the U.S. Trustee's appointment of the Equity Committee clearly survives review under an abuse of discretion standard.

1102(a)(1) requires the U.S. Trustee to apply a specific standard, or to consider any particular factors, in deciding whether to appoint an equity committee. Rather, the U.S. Trustee need only conclude, in his or her judgment, that an equity committee is "appropriate." The only meaning of this language is that the U.S. Trustee is to exercise discretion in the appointment.

11. Dissatisfied with the text of section 1102(a)(1), the UCC proposes to subject the U.S. Trustee's decision to *de novo* review under the adequate representation standard set forth in a distinct provision of the Bankruptcy Code, section 1102(a)(2). *See* Mot. ¶ 17. But section 1102(a)(2) applies only where a party in interest requests that a *court* appoint an additional committee of creditors or equity security holders. By contrast, the provision that applies here, section 1102(a)(1), does not limit the *U.S. Trustee's* discretion to appoint an additional committee to cases in which such a committee is necessary for adequate representation. If Congress had intended to so limit the U.S. Trustee's discretion, it could have done so. The only standard of review that is consistent with the text of section 1102(a)(1) is abuse of discretion.

12. In *In re Washington Mutual*, Judge Walrath reached the same conclusion, rejecting the argument that the U.S. Trustee's appointment of an equity committee was subject to *de novo* review. Judge Walrath explained that "Congress did suggest in the first instance it would be the United States Trustee to make that decision [of whether to appoint an equity committee], and I think that if I have the power to review it, it's clearly not within my power to substitute my judgment for that of the United States Trustee." Jan. 28, 2010 Tr. of Proceedings, *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW), at p. 58 (excerpt attached hereto as **Exhibit A**). Similarly, in *In re Imperial Distributing, Inc.*, District Court Judge Robinson concluded that the standard for reviewing the U.S. Trustee's appointment of an equity committee

is abuse of discretion. *See Mem. Order* in *In re Imperial Distributing*, Case No. 01-0140 (Bankr. D. Del. May 14, 2001) (upholding the U.S. Trustee's appointment, explaining that "[t]he integrity of the bankruptcy process rests in large measure on the committee structure, a statutory creation that ensures the presentation to the court of views adverse to, or at least different from, that of a debtor") (attached hereto as **Exhibit B**).

13. Consistent with Judge Walrath's and Judge Robinson's decisions in *Washington Mutual* and *Imperial Distributing*, courts in this District have held that the abuse of discretion standard governs the review of the U.S. Trustee's decision to change committee membership. *See, e.g.*, *In re Columbia Gas Sys., Inc*., 133 B.R. 174, 175-76 (Bankr. D. Del. 1991). The UCC tries to distinguish this precedent on the ground that, unlike in *Columbia Gas System*, it is challenging the U.S. Trustee's decision to form an equity committee in the first instance rather than a decision concerning the size or makeup of the committee. Mot. ¶ 16. But there is no basis in the text of section 1102 for applying a different standard to reviewing the U.S. Trustee's appointment of an equity committee from the standard that applies to a decision to add or remove specific committee members. To the contrary, the U.S. Trustee's statutory authority to change committee membership derives from the *same* statutory provision, section 1102(a)(1), that gives the U.S. Trustee power to appoint a committee in the first instance (as no other provision of section 1102 confers on the U.S. Trustee the power to change committee membership absent court order). Accordingly, the same standard of review must apply to both decisions. Under *Columbia Gas System*, that standard is abuse of discretion.

### B. The UCC Effectively Concedes that the Trustee Did Not Abuse Her Discretion in Appointing the Equity Committee

14. To establish an abuse of discretion, the UCC must show that in appointing the Equity Committee, the U.S. Trustee "acted in an irrational, arbitrary, or capricious manner,

'clearly contrary to reason and not justified by the evidence.'" *In re Pierce*, 237 B.R. 748, 754 (Bankr. E.D. Cal. 1999) (quoting NORTON BANKRUPTCY LAW AND PRACTICE 2D, section 148:37); *accord In re SemCrude, L.P.*, 428 B.R. 590, 593 (D. Del. 2010). The UCC does not attempt to satisfy this standard, nor could it. It is undisputed that: (1) Syms is solvent and (2) Syms' shareholders need adequate representation in the Cases, particularly for the intercompany issues where their interests and those of creditors conflict. Indeed, given Syms's solvency and the presence of intercompany disputes, the U.S. Trustee would have abused her discretion only if she had refused to appoint the Equity Committee.

## II. Even under the *De Novo* Standard, an Equity Committee is Necessary to Adequately Represent Syms Equity Security Holders

15. The Motion fares no better under a *de novo* standard. Courts in this and other Circuits have held that an equity committee is appropriate where some or all of the following factors are present (a) the debtor is not "hopelessly insolvent"; (b) the interests of shareholders are otherwise not adequately represented; (c) the costs of adequate representation of shareholders will not significantly outweigh the benefits; (d) the case is complex; and (e) the debtor's shares are widely held. *See, e.g., In re Spansion, Inc.*, 421 B.R. 151, 156 (Bankr. D. Del. 2009); *Exide Techs. v. Wisc. Inv. Bd.*, 2002 WL 32332000, at *1 (D. Del. Dec. 23, 2002). All of these factors confirm the need for the Equity Committee.

### A. Syms Is Solvent

16. Solvency is the critical, threshold factor in deciding whether to appoint an equity committee. *See, e.g., In re Pilgrim's Pride Corp.*, 407 B.R. 211, 217 (Bankr. N.D. Tex. 2009); *In re Beker Indus. Corp.*, 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985). There is no dispute that Syms is solvent—and by a healthy margin. *See* Mot. ¶ 18. Syms's shareholders thus have a

direct financial stake in every aspect of these cases. Every dollar of value that Syms's estate gains in the cases is another dollar of value for its equity holders. Conversely, every dollar of value that is expended comes out of equity holders' pockets. This gives shareholders a powerful incentive to ensure that value is maximized and that Syms's bankruptcy is managed in the most efficient way possible. Indeed, Syms's shareholders are the only stakeholders with such an incentive.

### B. Syms's Equity Holders Are Not Otherwise Adequately Represented

17. In light of Syms's undisputed solvency, the question before the Court is not whether Syms's equity holders deserve representation, but *who* should represent them. As demonstrated below, the Equity Committee is the only entity that can do so adequately.

#### i. The Debtors' Management and Board Cannot Adequately Represent Syms's Shareholders Because They Have Conflicts of Interest and a History of Antagonism Toward Minority Shareholders

18. The UCC argues that the Debtors' existing management and board—having steered Syms into to bankruptcy—should stay behind the wheel when it comes to steering shareholders' interests through the Cases. *See* Mot. ¶ 2. But this argument falls flat for at least two reasons: Debtors' insiders are hopelessly conflicted and have a long history of antagonism toward Syms's minority shareholders. Syms's equity holders deserve much better.

***Conflicts of Interest***

19. The UCC's failure to acknowledge the Debtors' conflicts of interest does not make them any less glaring. The Debtors' management and board do not owe their duties just to Syms's shareholder or even just Syms's estate, as the UCC suggests. They owe their duties to each of the Debtors, including Filene's Basement. *See In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 669-71 (Bankr. S.D.N.Y. 2006). The Debtors' insiders thus are conflicted on any

issues where the interests of Syms and Filene's Basement diverge. Those divergent interests are particularly acute with respect to the many intercompany issues in the Cases, including among others (1) whether the estates should be substantively consolidated, (2) the allocation of claims and assets between Syms and Filene's Basement, (3) Syms's potential subrogation claims, and (4) the validity of alleged guarantees of certain of Filene's Basement's creditors. On every one of these issues, interests of Syms's shareholders and Filene's Basement's creditors are at odds.

20. Although the statutory committees must advocate for their respective constituents' interests in these disputes, the Debtors' management, board, and professionals must maintain Swiss-like neutrality with respect all intercompany issues. *See Adelphia*, 336 B.R. at 671 (granting motion "directing the Debtors, as a condition to their continued incumbency as debtors in possession, to continue their neutrality and to recuse themselves from the Interdebtor Disputes"). They cannot adequately represent the interests of Syms's shareholders while maintaining the required neutrality. *See Pilgrim's Pride*, 407 B.R. at 218-19 (holding that where creditors and shareholders had different interests of plan valuation, debtor's officers and directors could not adequately represent shareholders because they had an "inherent conflict").

21. The Debtors' conflicts are not confined to intercompany issues. Syms may have claims against its current or former officers and directors, and possibly their outside professionals, for their actions during the pre-petition period. At a minimum, an investigation should be conducted into Syms's disastrous acquisition of Filene's Basement in 2009 and management's subsequent decision to sink as much as $39 million of Syms's money to cover Filene's Basement's losses. Far from denying the need for such an investigation, the UCC declares itself ready to investigate whether the Debtors' insiders breached their duties to Syms (Mot. ¶ 32), ignoring (as discussed below) its own conflicts of interest with respect to those

issues.[3] While the UCC admits that it has no idea whether Syms's management and board in fact breached their fiduciary duties to shareholders (Mot. ¶ 29 n.6), it is nevertheless prepared to entrust those insiders with protecting shareholder interests in the Cases.

22. The UCC also maintains that because "the Debtors' management and directors" own a majority of Syms's shares, their interests are aligned with minority shareholders. Mot. ¶¶ 1, 11. To be clear, by "management and insiders," the UCC actually means only one person: Syms's CEO and Chair, Marcy Syms, whose name goes unmentioned in the UCC's Motion. Although Ms. Syms owns or controls the majority of Syms's publicly traded stock, her equity ownership cannot overcome the many conflicts of interest described above. *See Pilgrims Pride*, 407 B.R. at 218 (although debtors' officers and directors owned equity in debtors, they could not adequately represent shareholders because of conflicting duties to rival constituencies). Ms. Syms, for example, cannot be expected to adequately investigate and pursue claims against herself and other insiders simply because any recovery on such claims would be "shared equally" by all Syms's shareholders. Mot. ¶ 29.

23. Such unavoidable conflicts of interest distinguish this case from the two unpublished decisions on which the UCC relies: *In re Edison Bros. Stores, Inc.*, 1996 WL 534853 (D. Del. Sept. 17, 1996) and *In re Allied Holdings, Inc.*, 2007 WL 7138349 (Bankr. N.D. Ga. March 13, 2007). In *Edison*, the district court upheld a bankruptcy court's decision not to

[3] The UCC is also wrong in asserting that the "task of conducting an investigation into 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." Mot. ¶ 32. Section 1103 enumerates the specific powers of committees appointed under § 1102, which include the power to investigate a debtor. *See* 11 U.S.C. § 1103(c)(2). Nothing in § 1103 suggests that a creditors committee is the only statutory committee that may carry out such an investigation. To the contrary, § 1103 makes no distinction between the powers and responsibilities of a creditors' committee and an equity committee.

appoint an equity committee where management held a 35 percent equity interest in the debtor and the parties seeking a committee had failed to adduce any facts to suggest that management's interests were not aligned with non-insider shareholders. *See Edison*, 1996 WL 534853, at *5 (noting that "there were no facts to suggest management was not aligned with non-insider shareholders"). The proponents of an equity committee in *Allied Holdings* likewise failed to identify any conflicts of interest among the debtor's management. *See Allied*, 2007 WL 7138349, at *2-3. Notably, both *Edison* and *Allied Holdings* were single-debtor cases. In marked contrast to this case, then, the debtors' management did not owe duties to separate estates with competing, mutually inconsistent interests on intercompany issues. Nor was there any suggestion in either case that the debtor's insiders should be investigated.[4]

24. The severity of these conflicts is in no way mitigated by the Debtors' proposed retention of a who's who list of law firms, restructuring professionals, investment bankers, real estate advisors, and auctioneers, no matter how "highly qualified" (Mot. ¶ 2) those professionals may be. Regardless of who represents the Debtors, the Debtors' irredeemably conflicted management will call the shots. And to the extent that Debtors' professionals represent all the estates, they will suffer the same conflicts of interest as their clients.

25. Some of the Debtors' proposed professionals, moreover, have even more extensive conflicts. For example, Debtors' proposed lead bankruptcy counsel, Skadden, Arps, Meagher & Flom LLP ("Skadden"), has a tangled web of relationships with virtually every major constituency in the Cases, not the least of whom is Marcy Syms. According to its recently

[4] The courts in *Allied Holding* and *Edison*, moreover, were not being asked to second-guess a U.S. Trustee's decision to appoint an equity committee. In fact, the U.S. Trustee in both cases *opposed* the formation of an equity committee. *See Allied Holdings*, 2007 WL 7138349, at *1; *Edison*, 1996 WL 534853, at *1.

filed employment application, Skadden personally represents Ms. Syms in probate litigation in New York County Surrogate's Court. *See Declaration of Mark A. McDermott in Support of Debtors' Application for Order Pursuant to 11 U.S.C. §§ 327(a) and 329, Fed. R. Bankr. P. 2014 and 2016, and Del. Bankr. L.R. 2014-1 and 2016-1 Authorizing Employment and Retention of Skadden, Arps, Meagher & Flom LLP and Affiliates as Bankruptcy Counsel Nunc Pro Tunc to Petition Date* ("McDermott Decl.") 14 [Dkt. No. 285]. Skadden, then, is in no position to investigate, assess, or even ruminate on potential claims against Ms. Syms. Nor can it be expected to ruffle the UCC's feathers, as its lengthy client lists includes three of the five members of that committee. *Id*. ¶ 19.

***History of Antagonism Toward Minority Shareholders***

26. In addition to overlooking insiders' conflicts of interest, the UCC ignores the fact that the same people have a history of treating Syms's minority shareholders more like antagonists rather than the objects of their fiduciary duties. On more than one occasion, minority shareholders have been forced to resort to legal action to obtain basic information about Syms's financial condition to which they are entitled.

27. For example, in late 2007, under Ms. Syms's direction (and with the approval of its current board members), Syms *deregistered* as an SEC reporting entity, thereby exempting Syms from the mandatory disclosure obligations under the Securities Exchange Act of 1934. Two minority shareholders—including the Equity Committee's current chair, Esopus—were compelled to file suit to force Syms to register again as a reporting company. While acknowledging this suit in a footnote (Mot. ¶ 31 n.8), the UCC makes no reference to Syms's attempt at deregistering, and instead suggests that the litigation focused on whether Syms should be delisted from the NYSE.

28. More recently, Syms disclosed earlier this year that it had engaged Rothschild to conduct a "strategic review process," Esopus requested that the board allow it to inspect specific books and records that might have a bearing on potential mismanagement of the company. Ms. Syms and the other members of the board refused, forcing Esopus to file suit. The New Jersey Chancery Court held that Esopus was entitled to examine Syms's books and records, an order that was sustained on appeal. Notably, Skadden represented Syms in this litigation and incurred at least $740,000 in fees on the litigation—an indication of just how vigorously Syms's management fought to keep minority shareholders in the dark.[5]

29. While one would think that these lawsuits would cause the UCC to question management's ability to represent all shareholders, the UCC instead impugns the motives of the minority shareholders who brought them. The UCC thus labels Esopus an "activist minority shareholder" (Mot. ¶ 31), while not mentioning that Esopus's "activist" positions have consistently been vindicated by the courts. Though it is eager to question Esopus's motives, the UCC never questions the motives of Debtors' management and board in attempting to deny minority shareholders access to books and records or in trying to deregister Syms from any obligations to report under the securities laws.

30. The UCC also insinuates that the members of the Equity Committee may have a "self-interested agenda" for pursuing breach of fiduciary duty claims against Syms's current and former directors and officers. Mot. ¶ 30. But the UCC does not explain why it is improper for Equity Committee members to pursue actions that are in the self-interest of its members. After all, shareholders in a solvent entity always have a financial interest in their

[5] Skadden's employment application states—without explanation—that the firm wrote off more than $640,000 of these fees. McDermott Decl. ¶ 47 n.4.

corporation successfully pursuing claims on behalf of the corporation. Indeed, only two paragraphs after questioning the Equity Committee's motives, the UCC declares itself "highly motivated" to investigate and assert claims against management because its constituency would be the first beneficiary of any recoveries. Mot. ¶ 32. Thus, what is a vice for an Equity Committee—self-interest—is apparently a virtue for the UCC.

31. In sum, the UCC has failed to sustain its burden of showing that the Debtors' existing management and board can adequately represent Syms's shareholders.

**ii. The UCC Cannot Adequately Represent Syms's Shareholders**

32. The UCC is even less suited to represent Syms's shareholders than Debtors' management. The UCC owes its duties exclusively to the Debtors' creditors. *See, e.g.*, *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 342 B.R. 416, 423 (S.D.N.Y. 2006) ("[T]he Committee owes a duty only to its constituent creditors."). It owes no duties to Syms's shareholders. Not surprisingly, the UCC cites no case refusing to appoint an equity committee for a solvent debtor on the ground that an unsecured creditors committee can adequately represent shareholder interests, let alone one that takes the notion seriously. *Cf. In re Pilgrim's Pride Corp.*, 407 B.R. 211, 217 n.17 (Bankr. N.D. Tex. 2009) (assuming that a suggestion that the UCC could serve as an "adequate protector" of the interests of equity holders was made facetiously).

33. The UCC is simply wrong that the interests of the Debtors' creditors are aligned with Syms's shareholders. *See* Mot. ¶ 22. As discussed above, the interests of Filene's Basement creditors are directly adverse to those of Syms's shareholders on the intercompany issues that will dominate the Cases. Moreover, certain Filene's Basement's creditors—including some members of the UCC itself—may be implicated in the investigation of pre-petition actions

of Syms's management because, for example, they helped finance Syms's acquisition of Filene's Basement.[6]

34. Even the interests of Syms's creditors are not entirely harmonious with those of its shareholders. Because Syms has a substantial equity cushion, its creditors have little incentive to seek to maximize the value of Syms's estate, because any increase in that value will inure solely to the benefit of shareholders. For example, Syms's creditors have little incentive to maximize the long-term value of Syms's most important asset—real estate—when a quick liquidation would pay them in full. Courts have recognized that where, as here, a creditors committee lacks adequate financial incentives to maximize value, appointment of an equity committee is appropriate. *See, e.g., In re Oneida Ltd.*, 2006 WL 1288576, at *2-3 (Bankr. S.D.N.Y. 2006) (appointing an equity committee where unsecured creditors would be paid in full, explaining that the unsecured creditors committee lacked a "clear mission" and was "the least likely party in interest to challenge the status quo").

### C. The Benefits of Adequate Representation Outweigh the Costs

35. The Equity Committee has already proven its value to Syms's shareholders through its essential role in preserving the Debtors' NOLs. As this Court has recognized, moreover, Syms's shareholders are paying for the administrative costs of the Cases,

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[6] One of the UCC's members, Vornado Realty Trust, partly financed Syms' acquisition of Filene's Basement; other creditors may have contributed financing through lease or vendor credit. Another UCC member, Rabina Properties, LLC ("Rabina"), approached Skadden earlier this year about acquiring some of Syms' real estate, *see* McDermott Decl. ¶ 29, and later retained the UCC's proposed counsel, Hahn and Hessen LLP, for the potential transaction, which was not consummated. *See* Affidavit of Mark T. Power ¶ 7(k), attached as Exhibit A to the *Application for an Order Authorizing the Retention of Hahn & Hessen LLP as Co-Counsel For the Official Committee of Unsecured Creditors* [Dkt. No. 260].

including the costs that are spent on their outside professionals. The Equity Committee therefore has every incentive to discharge its duties as efficiently as possible and to ensure that other fiduciaries are doing the same. And that is precisely what the Equity Committee has done since the day of its appointment, for example, by pressing the Debtors to come up with a realistic budget from the outset and by requesting that the UCC coordinate efforts to avoid duplication.

36. Citing *In re Williams Communications Group, Inc.*, 281 B.R. 216 (Bankr. S.D.N.Y. 2002) and *In re Kalvar Microfilm, Inc*., 195 B.R. 599 (Bankr. D. Del. 1996), the UCC argues that shareholders should be forced to advocate for their interests alone and later seek reimbursement under section 503(b)(3). Mot. ¶ 28. *Williams* and *Kalvar*, however, are readily distinguishable. In *Williams*, the court declined a request to appoint an equity committee where it appeared that the debtors appeared hopelessly insolvent. *See Williams*, 281 B.R. at 220. Thus, one of the essential prerequisites for appointing an equity committee was absent. *Id*. While the *Williams* court also observed that the moving shareholders could appear in the case and subsequently seek compensation under section 503(b)(3), *id*. at 223-24, the court did not suggest that these avenues would offer a fair substitute for an equity committee where, as here, the relevant debtor has more than $150 million of equity value to protect and both the debtor's management and creditor's committee have conflicts of interest that prevent them from doing so.

37. In *Kalvar*, the court denied a motion to appoint an equity committee where the motion came "very late" in the case and thus the only remaining task for such a committee was to object to plan confirmation and litigate valuation. *Kalvar*, 195 B.R. at 601. The court also emphasized that the case was not complex, as the debtors were not "attempting to change the nature of its operations through the bankruptcy process, and relatively few operational issues have been brought before the court." *Id*. (emphasizing that there were "only about 220 docket

entries in the first three months of this case").[7] It was in that context that the court observed that the moving shareholder had a substantial stake in the debtors' preferred stock and could thus represent its own interests in future matters. *Id*.

38. Here, by contrast, the Cases are at their early stages and, regardless of whether the Debtors ultimately liquidate or reorganize, the "nature of [Syms's] operations" will change fundamentally after bankruptcy. And while the Equity Committee members collectively hold a substantial share of Syms's minority shares, none individually owns more than 10%. Accordingly, it is unreasonable to expect any shareholder to bear the cost of advocating for all other shareholders in the Cases.[8] *See Pilgrim's Pride*, 407 B.R. at 220 (concluding that it was unreasonable to ask the member of an unofficial equity committee to go out-of-pocket to cover the costs of advocating for shareholders in the valuation process); *Exide Techs*., 2002 WL 32332000, at *2 (although proponent of committee was "a substantial shareholder capable of representing itself in the bankruptcy proceeding," the bankruptcy court acted within its discretion in appointing an official committee of equity holders).

39. Even if an individual shareholder were willing to play such a role, it still would be no substitute for an official committee. Unlike the Equity Committee, individual shareholders do not owe fiduciary duties to their fellow shareholders. *See Beker*, 55 B.R. at 949 (appointing an equity committee and explaining that the fact "that some members of the class may have resources sufficient to protect their interests is of little significance," because those

[7] By contrast, a month into these cases, the docket entries numbered more than 300.

[8] Like the other principal cases on which the UCC relies, the U.S. Trustee opposed the appointment of an equity committee in both *Kalvar* and *Williams*. *See Kalvar*, 195 B.R. at 600; *Williams*, 281 B.R. at 218.

shareholders "do not have the fiduciary duty to represent their fellow security holders"). Individual shareholders, moreover, lack the express powers that a statutory committee enjoys under section 1103 of the Bankruptcy Code. 11 U.S.C. 1103(c). Without an official seat at the table, shareholders will be forced to wait on the sidelines until the Debtors seek relief from the Court and only then raise any objections. Given the UCC's transparent hostility to shareholders, the result likely will be a torrent of costly litigation that could have been avoided if shareholders continue to have an official committee to represent their interests. The net effect will be more, rather than less, costs to the Debtors' estates.

40. Finally, the Equity Committee already has proven its value. Most notably, it was the Equity Committee, not the UCC, that stepped in when the Debtors did not take any actions at the outset of the Cases to preserve the Debtors' more than $100 million of NOLs. At the Equity Committee's insistence, the Debtors agreed to move jointly with the Equity Committee for a trading order that would preserve the Debtors' NOLs—an asset that has enormous value to equity holders of Syms.

41. As this record makes clear, affording Syms's shareholders adequate representation is well worth the modest cost.

### D. The Remaining Factors All Support the U.S. Trustee's Decision to Appoint the Equity Committee

42. The UCC makes only a passing reference to the remaining two relevant factors—and for good reason. There is no dispute that Syms's shares are widely traded and, as the Debtors have noted, the Debtors' Cases "are both large and complex." Interim Compensation Order ¶ 15. Thus, these factors lend even further support for the U.S. Trustee's decision to appointment the Equity Committee.

## III. The Court Should Not Cap the Fees of the Equity Committee's Outside Professionals or Limit the Scope of the Equity Committee's Work

43. As a last-ditch fallback, the UCC argues that the Court should limit the scope of the Equity Committee's work or impose an arbitrary cap on the compensation of the Equity Committee's professionals. Mot. ¶ 18. It offers no coherent justification for impeding the Equity Committee in this way, and there is none. A committee should not be charged with fiduciary duties, but then arbitrarily hamstring their ability to discharge them. Certainly this court has the discretion to decide whether a fee award is reasonable and appropriate.

44. To the extent that this Court is inclined to limit the scope of work by a statutory committee, it should limit the UCC, not the Equity Committee. In particular, there is no reason for the UCC to represent Syms's creditors, who will be paid in full. Filene's Basement's creditors are the only creditors who need representation in the Cases to pursue issues that they have already joined like substantive consolidation. Accordingly, the Court should confine the UCC's role to representing Filene's Basement's creditors only.

## Conclusion

45. For the foregoing reasons, the Court should deny the Motion, limit the UCC's role in the Cases to representing Filene's Basement's creditors, and deny any request by the UCC for reimbursement of professional expenses incurred in connection with the Motion.

[Signature follows]

Dated: December 7, 2011
Wilmington, Delaware

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# **Exhibit A**

Excerpt of Transcript of Proceedings held on January 28, 2010, in *In re Washington Mutual, Inc.*, Case No. 08-12229 (Bankr. D. Del.) (MFW)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | . | Chapter 11 |
| | . | |
| WASHINGTON MUTUAL, INC., *et al.*, | . | Case No. 08-12229(MFW)<br>(Jointly Administered) |
| | . | |
| | . | January 28, 2010<br>4:00 p.m. |
| Debtors. | . | (Wilmington) |
| | . | |
| JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, | . | |
| | . | |
| Plaintiff, | . | |
| | . | |
| v. | . | Adv.Proc.No. 09-50551(MFW) |
| | . | |
| WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP., | . | |
| | . | |
| Defendant for all claims | . | |
| | . | |
| -and- | . | |
| | . | |
| FEDERAL DEPOSIT INSURANCE CORPORATION, | . | |
| Additional Defendant for Interpleader claim | . | |
| WASHINGTON MUTUAL, INC. AND WMI INVESTMENT CORP., | . | |
| | . | |
| Plaintiffs, | . | |
| | . | |
| v. | . | Adv.Proc.No. 09-50934(MFW) |
| | . | |
| JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, | . | |
| | . | |
| Defendant. | . | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

| | |
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

discoverable or admissible evidence. Thanks.

THE COURT: Thank you. Well, let me issue my ruling. First on the appropriate standard. I'm not sure the United States Trustee is suggesting that the Court has no power to review, but the US Trustee suggests that 1102(a)(2) gives the United States Trustee authority to appoint additional committees. And I'll quote the language, because I think it is significant as, excuse me, 1102(a)(1), as the United States Trustee deems appropriate. The Committee argues that the Court has no power, therefore, to review that appointment by the US Trustee. And there is at least one case that does suggest that. The New Life Fellowship case. But I disagree. I think that to suggest that the Court has no power to review that appointment, particularly where there might be changed circumstances that affect that, I think the Williams and the Texaco cases suggest that the Court does have the power to review it. While I don't agree with the standard they suggest, I think that clearly the Court has to have some power to review the US Trustee's decision in that regard. I think the standard of review, however, is not *de novo*. Clearly Congress did suggest that in the first instance it would be the United States Trustee to make that decision, and I think that if I have the power to review it, it's clearly not within my power to substitute my judgment for that of the United States Trustee. So I do agree with

the Imperial decision and the Edison decision that it's an abuse of discretion. Whether reviewing under (a)(1) or the other provisions of §1102. I think that in this instance, we all know what the standard is for abuse of discretion. Whether the United States Trustee acted irrationally, capriciously, or arbitrarily. And I, quite frankly, cannot find that on the record before me. There is clearly evidence both ways as to the insolvency of the Debtor. And if the Debtors' pleadings filed in this case are accepted, I think the Debtor believes that it is not hopelessly insolvent. That it has legitimate claims against others that would result in there being sufficient funds in this estate to pay all creditors in full. I don't have to find that the Debtor is going to win those. I think the standard is not to make a final determination as to whether the Debtor is insolvent, just whether I can determine that the Debtor is hopelessly insolvent. And again, on this record, I cannot find that. I think the evidence that the debt and equity in this case are still trading, at any number, establishes that at least the market thinks that the Debtor is not hopelessly insolvent. With respect to whether there's adequate protection of the interests of the Equity Committee, excuse me, the equity holders, which is the other prong of a determination of whether or not the decision was inappropriate. I think that certainly falls in favor of the equity. While the Debtor

clearly is representing all constituents in this case, and fulfilling its fiduciary duty, I think that the fact that we have §1102 in the Code makes it clear that there are instances where other parties have a right to be, have a right to have a place at the table. And the US Trustee has made a determination that the equity should be present, and I don't think they're wrong. Even if I were reviewing this under a *de novo* review. I think that at this point it is appropriate to have the equity represented in this case. With respect to Black Horse Capital's request that I reconstitute it, I won't make them go through the motions of filing a separate motion, because I think that under this case, I think there's certainly sufficient representation of the preferreds on the existing Equity Committee, that no reconstitution need be done. So I don't think they've met the 1102(a)(4) standard, even had they filed a motion. So I will deny the Debtors' motion and I will deny Black Horse Capital's - -

MR. ROSEN: Your Honor?

THE COURT: - - request in its response.

MR. ROSEN: Your Honor, not that I'm glutton here, but we did file alternative relief.

THE COURT: Ah. Thank you. I do have comments on that. With respect to the issue of capping the fees, I've been instructed that I can't cap fees without a full

evidentiary hearing, and I'm not, I am not prepared today to impose a cap under the Federal Mogul case. But I think it's clear that I do have the power to monitor the case, and that power can be exercised in two ways. First with respect to any retention applications that are filed by the Equity Committee. And if professionals are appointed, my power to review the fee applications, I think gives me sufficient power to assure that, I'll use a colloquialism, they don't run amuck. I think the parties certainly have heard the arguments as to what the role of the Equity Committee is in this case, and I have not heard anything from counsel for the Equity Committee that they don't understand their role here. So with that said, I will not grant the alternative relief of capping the fees. But will exercise my authority with respect to retention applications and fee applications. All right. The Debtor will get me a form of order?

MR. ROSEN: We will, Your Honor.

THE COURT: Okay.

MR. ROSEN: Your Honor, I know that there are many people in the courtroom who came for this motion just now. Perhaps - -

THE COURT: Let's take a short break and then we'll go on with the remainder of the agenda.

MR. ROSEN: Thank you, Your Honor.

(Whereupon at 5:33 p.m. a recess was taken in the

**Exhibit B**

Memorandum Order from *In re Imperial Distributing, Inc.*, Case No. 01-0140 (Bankr. D. Del.)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| IN RE: | ) | Chapter 11 |
| | ) | |
| IMPERIAL DISTRIBUTING, INC., et al., | ) | Case No. 01-0140 |
| | ) | |
| | ) | |
| Debtors. | ) | Jointly Administered |

**MEMORANDUM ORDER**

At Wilmington this 14th day of May, 2001, having reviewed the papers submitted in connection with the motion of the Offical Committee of Unsecured Creditors for an order directing the United States Trustee to disband the Official Committee of Equity Security Holders;

IT IS ORDERED that said motion (D.I. 542) is denied, for the reasons that follow:

1. Section 1102(a)(1) provides that the United States Trustee, "as soon as practicable after the order for relief under chapter 11," "shall appoint a committee of creditors holding unsecured claims and **may appoint additional committees of** creditors or of **equity security holders as the United States deems appropriate.**" (Emphasis added)

2. The court finds that the Official Committee of Equity Security Holders ("the Equity Committee") was timely appointed by the United States Trustee pursuant to 11 U.S.C. § 1102(a)(1).

3. The movant asserts that

> the appointment of the Equity Committee constituted an abuse of discretion by the United States Trustee, given the insolvency of these Debtors, and that the administrative burden outweighs the benefits associated with the continued existence of the Equity Committee. Any costs associated with attempting to recover from an insolvent estate are properly borne by those equity holders who decide to embark on such a hopeless cause, not by the creditors whose recoveries would be adversely impacted by the expense and delay created by the continued existence of the Equity Committee.

(D.I. 853)

4. The United States Trustee argues in response that it is too early in the proceedings to state with assurance that debtors are "hopelessly insolvent." More significantly, the United States Trustee contends that the decision to appoint an additional committee under § 1102(a)(1) is grounded on the appearance that

> the interests of the debtors' management shareholders are fundamentally adverse to those of non-management shareholders, and that debtors' management cannot adequately perform their fiduciary duty in representing the interests of non-management shareholders. Among other things, management shareholders are slated to receive stock options and retention bonuses and severance payments in addition to any distributions they might receive in their capacity as general shareholders. This disparity in treatment strongly suggests that management shareholders have already placed, and will continue to place their self-interest ahead of the interests of the shareholders whom they purport to represent.

(D.I. 611 at 7-8)

5. Based on the reasoning of In re Edison Bros. Stores, Inc., No. 96-177-SLR, 1996 WL 534853, at *3 (D. Del. 1996), the court will review the United States Trustee's appointment of the Equity Committee pursuant to 11 U.S.C. § 1102(a)(1) for abuse of discretion.[1]

6. The court concludes that the Unites States Trustee has not abused her discretion under the facts of record. Whether or not the estate is insolvent, there are circumstances where the process is as important as the ultimate outcome of the case. The integrity of the bankruptcy process rests in large measure on the committee structure, a statutory creation that ensures the presentation to the court of views adverse to, or at least different from, that of a debtor (presumably to better divine the truth). The United States Trustee has been given the authority under 11 U.S.C. § 1102(a) to protect this analytical framework. Although the court is concerned about excessive costs to the estate in this case,[2] the court will not disturb at this

---

[1]In In re Edison Bros. Stores, Inc., the district court reviewed the bankruptcy court's discretionary decision under 11 U.S.C. § 1102(a)(2) for abuse of discretion.

[2]Certainly there are ways to control excessive costs short of disbanding the Equity Committee altogether.

juncture the United States Trustee's decision to have an Equity Committee review the transaction at issue.

United States District Judge

## CERTIFICATE OF SERVICE

I, Matthew B. Harvey, certify that I am not less than 18 years of age, and that service of the foregoing **Opposition Of The Official Committee Of Syms Equity Security Holders To 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** was caused to be made on December 7, 2011, in the manner indicated upon the parties identified in the attached service list.

Dated: December 7, 2011

*/s/ Matthew B. Harvey*
Matthew B. Harvey (No. 5186)

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