

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)

:

Debtors.¹ : Jointly Administered

:

: **Related Docket Nos. 263, 318, 319, 344**

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**DEBTORS' RESPONSE TO MOTION OF CREDITORS' COMMITTEE FOR ORDER
(A) DISBANDING EQUITY COMMITTEE OR, ALTERNATIVELY, (B) LIMITING
SCOPE OF EQUITY COMMITTEE'S DUTIES, FEES AND EXPENSES**

Syms Corp. ("Syms") and its affiliated debtors (collectively, the "Debtors") hereby respond to the motion (the "Motion to Disband") [Docket No. 263] of the Official Committee of Unsecured Creditors (the "Creditors Committee") for an Order (A) Disbanding The Official Committee Of Equity Security Holders Appointed By The United States Trustee (the "Equity Committee") Or, Alternatively, (B) Limiting The Scope Of Duties And Fees And Expenses Which May Be Incurred By Such Committee, as follows:²

SUMMARY RESPONSE

1. The Debtors do not expect an order of the Court disbanding the Equity Committee. They did not object to formation of the Equity Committee.

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.

² This Response refers from time to time to the 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 [Docket No. 318] (the "Opposition").



2. However, the Debtors have continuing concerns about the actions and objectives of certain members of the Equity Committee, including Esopus (as defined below) and its counsel (now counsel to the Equity Committee), in respect of Syms and Syms stock. The Debtors submit that Esopus and others may be using official committee status and estate resources to advance personal agendas.

3. The interests of Syms shareholders have been, are and will continue to be adequately represented by Syms and its board (the "Board"), including its chair, Marcy Syms, who owns or controls over 53% of the stock of Syms. They owe fiduciary duties to all shareholders, including those on the Equity Committee. Notwithstanding Equity Committee "conflicts" allegations seemingly asserted against nearly all others in these cases, the Debtors and their professionals are working to maximize value for all stakeholders consistent with their respective legal rights and priorities and the Bankruptcy Code.

4. The Court should issue any orders that are necessary and appropriate to (i) avoid unnecessary expense incurred or caused by any official committee, (ii) prevent misuse of official committee status by Esopus and its counsel and (iii) ensure the integrity of the chapter 11 process.

DEBTOR CONCERNS ABOUT ESOPUS

5. Shortly after the Debtors commenced their chapter 11 cases, the Office of the United States Trustee ("U.S. Trustee") solicited the Debtors' views about whether the U.S. Trustee should appoint an official equity committee in these cases. The U.S. Trustee indicated that one of Syms' minority shareholders, Esopus Creek Value Series Fund, LP ("Esopus")³, had contacted the U.S. Trustee and was seeking immediate formation of an official equity committee.

³ Upon information and belief, Esopus owns approximately 1.76% of Syms' stock.

6. The Debtors expressed concern to the U.S. Trustee about formation of an equity committee and appointment of Esopus as a committee member. The Debtors told the U.S. Trustee that Esopus had long been a dissident, litigious shareholder of Syms.

7. Esopus had brought a books and records action against Syms in a New Jersey state court litigation that alleged putative mismanagement and breach of fiduciary duty claims based admittedly upon its mere "suspicion" that Syms was being mismanaged. Esopus has never alleged - - nor could it - - improper self dealing or breaches of the duty of loyalty. The Esopus allegations in the New Jersey litigation appear to evidence Esopus disagreements with Board and management decisions that are protected by the business judgment rule. See Compendium Of Certain Public Documents (Item. Nos. 1-4) [Docket No. 344].

8. The Debtors defended vigorously against the Esopus books and records action in New Jersey in order to protect against improper disclosure of the Debtors' confidential business strategy materials, strategic process and advice. Prior to the commencement of the New Jersey litigation and these chapter 11 cases, Esopus made numerous public statements that were critical of the Debtors and reported in the press, which in turn raised suspicions about Esopus' stock trading strategy. Id. (Item Nos. 5-18). The Debtors were concerned that Esopus would disrupt the Debtors' strategic process or engage in improper stock trading activity while in possession of confidential Debtor information.

9. The Debtors' concerns about Esopus' veracity, actions, tactics and objectives (historically and as a member of the Equity Committee) are illustrated by contradictions between Esopus' allegations today attacking Syms' 2009 bankruptcy acquisition of Filene's Basement assets, and Esopus' statements in support of the transaction at the time. See Exhibit A hereto (6/19/2009 Esopus e-mail to Marcy Syms: "We [Esopus] just wanted to say

'Congratulations' on the successful acquisition of Filene's. Just a superb deal and kudos to your tireless efforts to get the brand after a grueling battle. We definitely think this is immediately accretive to Syms"). Compare Opposition at 9 ("an investigation should be conducted into Syms' disastrous acquisition of Filene's Basement in 2009").

10. Despite the Debtors' continuing concerns about the prepetition actions of Esopus in respect of Syms and Syms stock, the Debtors informed the U.S. Trustee on November 8, 2011 that they did not object to appointment of an official committee of equity security holders of Syms - - and advised the U.S. Trustee (with a copy to counsel for Esopus) of the following:

- (a) Syms shareholder rights and interests have been and will continue to be protected and advanced consistent with the fiduciary duties owed to them by the Syms' Board of Directors.
- (b) A primary objective of the Board (including Marcy Syms, its chairperson and Syms' majority shareholder) has been and will continue to be maximizing the value of the Debtors' assets and related values, consistent with the Boards' obligations under applicable law and the Bankruptcy Code.
- (c) There are numerous misstatements of fact and other inaccuracies in the Esopus letter to the U.S. Trustee requesting appointment of an equity committee.
- (d) The Debtors are concerned that appointment of an equity committee would cause undue delay or hinder the administration of the chapter 11 cases.
- (e) Additional costs and expenses of professionals and any unnecessary or inappropriate litigation caused by an equity committee (or any of its members or their affiliates) will reduce dollar for dollar values otherwise available for distribution to shareholders and other stakeholders.

See Exhibit B hereto (11/8/2011 letter to D. Klauder/U.S. Trustee).

11. Since then, the Debtors have worked with both the Equity Committee and Creditors' Committee on a wide variety of matters, sharing requested information and consulting with them. Such Debtor cooperation with the official committees continues.

12. However, the Debtors have continuing concerns about the role and agenda of Esopus and its counsel in their current roles as chair of the Equity Committee and its counsel, respectively. Among other things, Esopus and the Equity Committee and their counsel have adopted an excessively confrontational, time consuming and expensive posture in respect of almost every case administration matter, leading to unnecessary and wasteful duplication of efforts and professional fees. Moreover, the Equity Committee exaggerates its role by stating erroneously in its Opposition that "the Debtors did not take any actions at the outset of the Cases to preserve the Debtors' more than \$100 million of NOLs."⁴

13. The Debtors' concerns about Esopus and the Equity Committee are heightened by the reckless and unsubstantiated "conflicts" allegations in the Opposition filed by the Equity Committee. The Equity Committee makes conclusory allegations that the Debtors, their management and the Board - - and even the Debtors' professionals and "some members of the UCC itself" - - "may be implicated in the investigation of Syms' management" - - or otherwise are "hopelessly conflicted," "conflicted on any issues where the interests of Syms and Filene's Basement diverge," and have a "tangled web of relationships."

14. The Equity Committee allegations in its Opposition ignore innumerable precedents and applicable fiduciary duties that permit Debtor professionals to simultaneously represent more than one debtor entity, including parent and subsidiary entities with intercompany

⁴ The Debtors had previously considered and determined - - before agreeing with the Equity Committee to prepare and file a joint motion to restrict trading in Syms equity securities - - that a loss of NOLs due to trading in Syms common stock cannot occur as long as Marcy Syms continues to own or control over 50% of Syms common stock.

claims. Fiduciary duties owed by Syms and the Board to Syms shareholders are not incompatible with duties owed by Debtors and their professionals under the Bankruptcy Code.

15. In short, the Equity Committee's allegations try to impugn the Debtors, their management, the Board and their professionals. While all legitimate allegations deserve impartial investigation, it appears that Esopus, the Equity Committee and their counsel are biased towards bogging these cases down in tactical allegations and innuendo, instead of working constructively and promptly towards a plan that maximizes value for all stakeholders in accordance with their respective legal rights and priorities.

RESPONSE

16. On November 23, 2011, the Creditors Committee filed its Motion to Disband. The Debtors did not suggest, seek, request or procure the filing of the Motion to Disband. The Debtors respond to the Motion to Disband as follows:

- (a) The interests of all Syms shareholders (including minority shareholders) are adequately represented in the chapter 11 cases by Syms management and Board, because members of management and the Board hold or control over 53% of the outstanding common stock of Syms.
- (b) Syms and its Board are fiduciaries for all Syms shareholders.
- (c) The Equity Committee (and for that matter the Creditors' Committee) should not have an unlimited role in every aspect of the administration of these chapter 11 cases.
- (d) By appearing actively with counsel in these chapter 11 cases from the start, Esopus has demonstrated that it can adequately represent its particular interests and agendas in the chapter 11 case.
- (e) Esopus and its counsel spearheaded a deliberate and lengthy prepetition campaign against Syms and its majority shareholder (Marcy Syms), asserting putative breach of fiduciary duty and mismanagement allegations against the Board and Marcy Syms based upon its "suspicions" of mismanagement.

- (f) The prepetition motives, objectives and actions of Esopus and its counsel in respect of Syms and Syms stock remain unclear and may require investigation.
- (g) Esopus (now a member of the Equity Committee) and its counsel (now counsel to the Equity Committee) should not be permitted to use official committee status and estate resources to advance personal agendas.

CONCLUSION

17. The Debtors do not seek or expect an order of the Court disbanding the Equity Committee. However, the Debtors do seek and expect that the Court will issue any orders that are necessary and appropriate to (i) avoid unnecessary expense incurred or caused by any official committee, (ii) prevent misuse of official committee status by Esopus and its counsel and (iii) ensure the integrity of the chapter 11 process.

WHEREFORE the Debtors respectfully request that this Court enter an order granting the Debtors such relief as is just and proper.

Dated: Wilmington, Delaware
December 9, 2011

/s/ Mark S. Chehi

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Proposed Counsel for Debtors and Debtors in Possession

EXHIBIT A

June 19, 2009 Email to Marcy Syms



"Andrew Sole"
<andrewsole@esopuscreekvalue.com>

06/19/2009 10:00 AM

To marcysyms@syms.com

cc joecriscione@esopuscreekvalue.com

bcc

Subject Filenes

Marcy,

Good morning. We just wanted to say "Congratulations" on the successful acquisition of Filene's. Just a superb deal and kudos for your tireless efforts to get the brand after a grueling battle.

We definitely think this is immediately accretive to Syms, and the Filene's brand should prosper now that it is being managed by a company that does not over-leverage itself.

Again, congratulations and the best of luck with the deal.

Regards,
Andrew Sole

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EXHIBIT B

November 8, 2011 Letter to David Klauder

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CONFIDENTIAL

November 8, 2011

BY HAND AND E-MAIL

David M. Klauder, Esq.
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207
Wilmington, Delaware 19801

RE: Request for the Appointment of an Official Committee of
Equity Holders in *In re: Filene's Basement, LLC, et al.*, Case
No. 11-13511 (KJC) (Bankr. D. Del.) (Jointly Administered)

Dear Mr. Klauder:

This firm represents Syms Corp. ("Syms") and its affiliated debtors as debtors in possession in the above-referenced cases (collectively, the "Debtors").

This letter responds to the November 4, 2011 letter of Thomas B. Walper, Esq., as counsel for Esopus Creek Value Series Fund LP – Series "L" ("Esopus"), that requests appointment of an official committee of equity holders (the "Request Letter").

The Debtors do not object to appointment of an official committee of equity security holders of Syms Corp. However, as set forth more fully below, the Debtors hereby advise you of various concerns and corrections in respect of the Request Letter.

First, please be advised that Syms shareholder rights and interests have been and will continue to be protected and advanced consistent with the fiduciary duties owed to them by the Syms' Board of Directors (the "Board") - - whether or not an official committee of equity security holders is ever appointed in these chapter 11 cases. A primary objective of the Board (including Marcy Syms, its chairperson and Syms' majority shareholder) has been and will continue to be maximizing the value of the Debtors' assets and related values, consistent with the Board's obligations under applicable law and the Bankruptcy Code.¹

Second, there are numerous misstatements of fact and other inaccuracies in the Request Letter that should not go unnoticed. For instance, the Request Letter *misstates* each of the following: (i) that Marcy Syms is President of Syms (she is not); (ii) that Syms "failed to timely hold an annual meeting of stockholders" (Syms, however, timely held its annual meeting of shareholders on July 29, 2011 within the time period required by New Jersey law²); (iii) that "Ms. Syms was mismanaging the Debtors through improvident leases and other financial arrangements" (a conclusory allegation without support); (iv) that appointment of an equity committee is "supported by the complexity of these cases" (the chapter 11 cases are actually not complex, but rather straightforward liquidations of two debtor entities); (v) that the interests of equity holders are not adequately represented (ignoring that the Board is properly representing Syms shareholder interests, and that Ms. Syms' equity interests are aligned with those of other shareholders); and (vi) that "Ms. Syms has directly or indirectly appointed all members" of the Board (not true).

Third, the Debtors are concerned lest an equity committee interfere with an expeditious winddown of the Debtors' retail businesses as proposed in the Debtors' pending 'going out of business' motion that seeks to maximize value for all stakeholders, including Syms' shareholders. The appointment of an official equity committee should not cause undue delay or hinder the administration of these cases.

¹ See In re Spansion, Inc., 421 B.R. 151, 163 (Bankr. D. Del. 2009) ("It is expected that management would normally represent, among other interests, the interests of equity security holders."); In re Nat'l R.V. Holdings, Inc., 390 B.R. 690, 699 (Bankr. C.D. Cal. 2008) (holding that equity holders were adequately represented by the debtors, whose fiduciary duties extended to both creditors and equity holders).

² See N.J. Stat. Ann. 14A:5-2 (requiring date of annual meeting to be set within thirteen months of previous annual meeting).

David M. Klauder, Esq.
November 8, 2011
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Finally, the Debtors are very concerned about additional costs and expenses that may result if an equity committee were appointed in these cases.³ Professional fees and expenses incurred by an equity committee and any unnecessary or inappropriate litigation caused by an equity committee (or any of its members or their affiliates) will reduce dollar for dollar values otherwise available for distribution to shareholders and other stakeholders.

To the extent that the United States Trustee deems it appropriate to appoint an official equity committee, the Debtors look forward to working with that committee and the official creditors' committee in a constructive fashion to maximize value and bring these cases to successful conclusion.

Please do not hesitate to contact me should you wish to discuss these matters further. I am available at your convenience.

Very truly yours,



Mark S. Chehi

cc: Jay M. Goffman, Esq.
Thomas B. Walper, Esq. (by e-mail)
Robert J. Dehney, Esq. (by e-mail)

³ The "appointment of an equity committee raises cost concerns since such appointments are closely followed by applications to retain attorneys and accountants." In re Williams Commc'ns Group, Inc., 281 B.R. 216, 220(Bankr. S.D.N.Y. 2002) (citations omitted).