

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

|                                         |   |                                                  |
|-----------------------------------------|---|--------------------------------------------------|
| -----                                   | x | Chapter 11                                       |
|                                         | : |                                                  |
| In re:                                  | : | Case No. 11-13511 (KJC)                          |
|                                         | : |                                                  |
| FILENE'S BASEMENT, LLC, <u>et al.</u> , | : | Jointly Administered                             |
|                                         | : |                                                  |
| Debtors. <sup>1</sup>                   | : | Hrg. Date: [December 28, 2011 at 3:00 p.m. (ET)] |
|                                         | : | Obj. Due: [December 21, 2011 at 4:00 p.m. (ET)]  |
|                                         | : |                                                  |
|                                         | : | Related Docket Nos.: 318, 344                    |
| -----                                   | x |                                                  |

**DEBTORS' MOTION FOR APPOINTMENT OF AN EXAMINER  
TO INVESTIGATE POSSIBLE ESTATE CAUSES OF ACTION**

Syms Corp. ("Syms") and its affiliated debtors (collectively, the "Debtors") hereby file this motion pursuant to section 1104(c) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") and Federal Rule of Bankruptcy Procedure 2007.1 (the "Bankruptcy Rules"), for appointment of an examiner to investigate possible estate causes of action, as follows:

**PRELIMINARY STATEMENT**

1. The Debtors request appointment of an examiner to investigate possible estate causes of action against their directors and officers, and others as the examiner might determine, for breach of fiduciary duty, mismanagement, waste and any similar claims arising out of the directors' and officers' stewardship of the Debtors prior to the petition date. Such investigation should cover the time period from June 2009, when Syms acquired the assets and

<sup>1</sup> 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.



business of its Debtor subsidiary, Filene's Basement LLC ("Filene's"), to and including November 2, 2011, the date the Debtors commenced these chapter 11 cases (the "Petition Date").

2. The Debtors have filed this motion because Esopus Creek Value Series Fund, LP ("Esopus"), the chair of the Official Committee of Syms Corp. Equity Security Holders (the "Equity Committee"), has made statements, including in state court litigation, alleging purported prepetition mismanagement of Syms. Following the Petition Date, the Equity Committee adopted and renewed Esopus's allegations in the Equity Committee's opposition (the "Opposition") [Dkt. No. 318] to the motion of the Creditors' Committee to disband the Equity Committee (the "Motion to Disband") [Dkt. No. 263]. The Equity Committee made clear in its Opposition that such matters and possible related claims should be investigated.

3. The Debtors agree. With this Motion, the Debtors seek appointment of an examiner to undertake a prompt, impartial investigation of any alleged mismanagement and breaches of fiduciary duty by the Debtors' current and former officers and directors, and others as the examiner might determine. Such an investigation will benefit all parties in interest for at least four reasons. First, all parties in interest will benefit from an impartial, prompt assessment by an independent third party of whether there are any valuable officer and director claims that might be a source of recovery for stakeholders.

4. Second, the Debtors wish to move quickly towards formulation of a plan of reorganization or liquidation. An impartial, prompt assessment of the viability and value of such claims (if any) will be important for stakeholders in negotiating the terms of a plan. Such an assessment also will be an important and necessary component of a disclosure statement that provides adequate information for those determining whether to vote to accept or reject the plan.

5. Third, an independent, impartial third party is necessary to provide a neutral, cost-effective assessment that other parties in the case and the Court can rely upon. The Debtors' current board, management, and professionals obviously cannot lead the investigation process because their actions will fall within the scope of the investigation. Moreover, the Equity Committee and the Official Unsecured Creditors' Committee (the "Creditors' Committee") have made competing claims to the right to conduct any such investigation and to control any such causes of action.

6. The competition and adversity between the Committees is a consequence of the economic circumstances of these cases: whereas the parent Debtor, Syms, likely is solvent, Syms' primary subsidiary, Filene's, is not. The very different economic positions of the constituencies represented by the Equity Committee, on the one hand, and the Creditors' Committee, on the other, result in their divergent motivations and incentives. Also, the Committees' respective positions are colored by prepetition actions, motivations and agendas of their respective members. An independent examiner will have no economic motivations, incentives, or biases other than to conduct a fair and impartial investigation.

7. Finally, appointment of an independent examiner should conserve estate expenses. Because the Equity Committee and Esopus have made allegations that the Debtors' board and management mismanaged the Debtors prior to the petition date, there is no question that these alleged matters will be investigated. Each Committee has asserted that it should conduct any such investigation. Accordingly, it is a foregone conclusion that estate funds must be spent on an investigation. It will be most efficient and economical for a single independent and impartial examiner, rather than multiple sets of estate professionals with uncertain competing interests and agendas, to undertake and complete the investigation without delay.

## SUMMARY OF ALLEGATIONS

8. Esopus is a minority shareholder of Syms. According to certain of its public filings, it owns 1.76% of Syms stock. It has long criticized Syms in the press, at shareholders meetings and in litigation. Shortly before the petition date, Esopus filed a complaint against Syms in New Jersey state court (the "Complaint," a copy of which is Item No. 1 of the Compendium of Certain Public Documents [Dkt. No. 344] filed in these cases). In its Complaint, Esopus stated that it sought "to examine the books and records and minutes of Syms in order to investigate potential mismanagement of Syms and to investigate filing a derivative action due to Syms' failure to maximize shareholder value." Complaint at para. 4.

9. Esopus did not allege improper self dealing or breaches of the duty of loyalty. Rather, it criticized the Debtors' business judgment in entering into certain real estate leases; selling parcels of owned real estate; entering into a secured lending facility; and hiring Rothschild, Inc. to assist it in exploring various strategic alternatives. Esopus also criticized Syms for failing to integrate Filene's assets and operations into Syms's operations after the latter acquired the business of the former in 2009. In short, Esopus asserted that its allegations "form a credible basis from which a court can infer there is possible mismanagement that would warrant further investigation." Complaint at para. 20.

10. The New Jersey books and records litigation was stayed when the Debtors commenced their chapter 11 cases. No actual lawsuit asserting affirmative claims against any officers and directors was ever brought. However, the Equity Committee has adopted and renewed Esopus's allegations that there are possible estate claims against officers and directors arising out of the Debtors' pre-petition business decisions and activities. For example, in the Opposition of the Equity Committee to the Motion to Disband, the Equity Committee states that,

"[a]t a minimum, an investigation should be conducted into Syms's disastrous acquisition of Filene's Basement in 2009 and managements' subsequent decision to sink as much as \$39 million of Syms's money to cover Filene's Basement's losses." Opposition at para. 21.

11. As noted above, the Creditors' Committee and the Equity Committee have adopted conflicting positions regarding who should control any such investigation. The Creditors' Committee asserts in its Motion to Disband that it – and not the Equity Committee – "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." Motion to Disband at para. 32. The Equity Committee suggests that certain Creditors' Committee members would be implicated in any such investigation and hence, that the Creditors' Committee would be disqualified from participating in same. Opposition at n. 3, para. 33.

### **APPLICABLE AUTHORITY**

#### A. The Debtors Have Standing To Request An Examiner

12. The Debtors have standing to request the appointment of an examiner. Bankruptcy Code section 1104(c) provides that "a party in interest" may request appointment of an examiner. The Bankruptcy Code "clearly and unambiguously [provides] that a debtor is a party in interest who may seek the appointment of an examiner." See Keene Corp. v. Coleman (In re Keene Corp.), 164 B.R. 844, 855 (Bankr. S.D.N.Y. 1994) (finding "plain and unambiguous statutory language" permitted debtor to move for appointment of an examiner); see also In re Keene Corp., 205 B.R. 690, 707 (Bankr. S.D.N.Y. 1997) (denying creditors' committee's fee request for time spent challenging debtors' motion for an examiner as "not reasonably contemplated to confer a benefit on the estate", and criticizing the committee's "strenuous

opposition" as "based on the principle that if the debtor wants the examiner, it must be bad for creditors.").

B. Appointment of an Examiner is in the Best Interests of All Stakeholders

13. A bankruptcy court shall order the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of . . . mismanagement . . . of the debtor of or by current or former management, if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(c).

14. Appointment of an examiner under § 1104(c)(1) must be "in the interests of everyone with a stake in the case, including creditors, equity security holders, and other interests of the estate." In re Gliatech, Inc., 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004). The fact that "appointment [of an examiner] allows for a thorough, independent and expeditious examination to be made into serious allegations" and that "appointment also potentially avoids [] excessive expense to the estate" are factors that the court may consider in determining the "interests of creditors and the estate[.]" In re JNL Funding Corp., Case No. 10-73724 (AST) 2010 WL 3448221, at \*3 (Bankr. E.D.N.Y. Aug. 26, 2010) (finding appointment of examiner in the best interests of creditors and the estate and ordering appointment of an examiner "to conduct a prompt and cost-effective investigation into [] alleged prepetition [] activities by Debtor").

15. There can be no dispute that all stakeholders in these cases will benefit from an investigation into whether there are any viable estate causes of action arising out of prepetition business decisions and related actions and, if so, the possible value of any such causes of action. The Debtors further believe that it is important for such an investigation to be conducted

in the early stages of this case because, if any viable claims exist, they undoubtedly will comprise a form of plan currency that the Equity Committee and the Creditors' Committee will include as part of their negotiations over the proper allocation of value among the estates and their constituents.

16. Moreover, the Debtors intend to work with both Committees in advancing these cases to a quick plan-based resolution. A thorough, yet reasonably prompt investigation by an independent neutral will facilitate this objective. Importantly, the investigation can proceed at the same time as discussions among the Debtors, the Equity Committee and the Creditors' Committee concerning plan terms, disposition of the Debtors' real estate, and possible resolution of complicated questions concerning substantive consolidation of the Syms and Filene's estates. Accordingly, if an examiner assumes responsibility for investigating historic events, the Equity Committee, the Creditors' Committee, and the Debtors can focus their energies on resolving important business and plan issues.

17. The Debtors believe that an independent third party is needed to provide an impartial, prompt and cost-effective assessment of alleged mismanagement. The Debtors' current board, management, and professionals obviously cannot lead any investigation into pre-petition acts, as their actions clearly will fall within the scope of the investigation. Moreover, the Debtors respectfully submit that an examiner is better positioned than the Equity Committee and the Creditors' Committee to provide a prompt, credible and cost-effective investigation and report.

18. Both Committees have asserted competing rights to control the investigation contemplated by this Motion and any causes of action that might be determined to

exist. The two Committees have fundamentally different economic interests in these cases, because the Syms estate likely is solvent, whereas the Filene's estate likely is insolvent. The Committees also have fundamentally different interests with respect to substantive consolidation, with creditors of Filene's undoubtedly favoring consolidation, and shareholders of Syms opposing consolidation. The different objectives of the Committees will influence their postures and approaches with respect to any investigation. It is, therefore, appropriate, reasonable and equitable to appoint an impartial examiner to undertake the necessary investigation. A neutral examiner who has no economic stake in these cases or the subject matter of the investigation can be expected to deliver a timely, objective report.

19. Even if the two Committees could, in theory, agree on a joint approach to an investigation, the Debtors respectfully believe that their estates are better served by appointment of a single examiner, who will employ one independent law firm to investigate these matters. If both Committees were to undertake the necessary investigation, two competing sets of professionals would be involved. Moreover, neither Committee has any incentive to cede control of the investigation to the other. Even if control of the investigation were ceded to a single Committee, it would manage the investigation and reported conclusions in a manner designed to advance that Committee's particular agenda - - instead of conducting a prompt, impartial investigation for the benefit of the Court and all parties in interest.

**CONCLUSION**

WHEREFORE the Debtors respectfully request that this Court (i) enter an order, a proposed copy of which is attached hereto, appointing an examiner on the terms therein and (ii) granting the Debtors such other and further relief as is just and proper.

Dated: Wilmington, Delaware  
December 13, 2011

/s/ Mark S. Chehi  
Mark S. Chehi (I.D. No. 2855)  
Jason M. Liberi (I.D. No. 4425)  
Skadden, Arps, Slate, Meagher & Flom LLP  
One Rodney Square  
P.O. Box 636  
Wilmington, Delaware 19899-0636  
(302) 651-3000  
(302) 651-3001

- and -

Jay M. Goffman  
Mark A. McDermott  
Suzanne D.T. Lovett  
Skadden, Arps, Slate, Meagher & Flom LLP  
Four Times Square  
New York, New York 10036-6522  
(212) 735-3000  
(212) 735-2000

Proposed Counsel for Debtors and Debtors in  
Possession

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

----- X  
In re: : Chapter 11  
FILENE'S BASEMENT, LLC, et al., : Case No. 11-13511 (KJC)  
Debtors.<sup>1</sup> : Jointly Administered  
----- X **Related Docket No. \_\_\_\_**

**ORDER GRANTING DEBTORS' MOTION FOR APPOINTMENT OF AN EXAMINER  
TO INVESTIGATE POSSIBLE ESTATE CAUSES OF ACTION**

Upon consideration of the motion (the "Motion")<sup>2</sup> of the Debtors seeking entry of an order, pursuant to 11 U.S.C. § 1104(c), directing the appointment of an examiner to investigate certain matters related to the Debtors' chapter 11 cases; and the Court finding that: (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b); (iii) the relief requested in the Motion is authorized pursuant to § 1104(c)(1) of the Bankruptcy Code and Bankruptcy Rule 2007.1; (iv) proper and adequate notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary; (v) upon review of all the filings submitted to the Court in support of the Motion and any opposition or objection thereto; (vi) upon oral argument in support of and in opposition to the Motion, if any, and (vii) sufficient cause appearing therefore, it is hereby:

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

**ORDERED, ADJUDGED AND DECREED that:**

1. The Motion is GRANTED as set forth herein.
2. Under 11 U.S.C. § 1104(c), subject to approval by this Court, the Office of the United States Trustee ("U.S. Trustee") is directed to appoint an examiner (the "Examiner") on or before January \_\_\_\_, 2012.
3. The Examiner shall be vested with the authority, responsibility and power to investigate possible estate causes of action against the Debtors' directors and officers, and others as the Examiner might determine, for breach of fiduciary duty, mismanagement, waste and any similar claims arising out of the directors' and officers' stewardship of the Debtors prior to the petition date (the "Investigation"). The Investigation shall cover the time period from June 2009, when Syms acquired the assets and business of its Debtor subsidiary, Filene's Basement LLC ("Filene's"), to and including November 2, 2011, the date the Debtors commenced these chapter 11 cases (the "Petition Date").
4. The Examiner shall, before commencing the Investigation, meet and confer with the Debtors, the Committees and the U.S. Trustee, if the U.S. Trustee requests participation (the "Parties"). The Parties shall use their respective best efforts to coordinate with the Examiner and to avoid unnecessary interference with, or duplication of, the Investigation, and the Examiner in his or her conduct of the Investigation shall use best efforts to utilize relevant materials obtained by the Parties via informal and/or formal discovery to avoid unnecessary duplication of work performed to date. Nothing in this order shall be deemed to require any Party to waive any applicable privilege.

5. The Committees shall provide the Examiner with access to all materials they receive in response to discovery in these cases, and the Committees and the Examiner shall use best efforts to cooperate without slowing down each other's respective duties.

6. Until the Examiner has filed the reports required by this Order, neither the Examiner nor the Examiner's representatives or agents shall make any public disclosures concerning the performance of the Examiner's duties, except in hearings before the Court. The foregoing shall not prevent the Examiner from communicating with the Parties to further the cooperation provided for in this order.

7. The Examiner shall prepare and file an interim or final report within ninety (90) days after the date of the Examiner's appointment unless this time is extended for good cause shown, by order of this Court.

8. The Examiner may retain counsel and other professionals if he or she determines that such retention is necessary to discharge his or her duties, with such retention being subject to the approval of this Court under standards equivalent to those set forth in section 327(a) of the Bankruptcy Code.

9. The Examiner and any professionals retained by the Examiner pursuant to any order of this Court shall be compensated from the Debtors' estates subject to: (i) the standards set forth in section 330 of the Bankruptcy Code and (ii) further orders of this Court.

10. Within 10 business days after entry of the order approving the appointment of the Examiner is entered on the docket in these cases, the Examiner shall propose a work plan and shall provide his or her estimated costs for the Investigation, which shall be

subject to the approval of the Court on 10 days' notice to all parties that have requested notice pursuant to Federal Rule of Bankruptcy Procedure 2002. Notwithstanding the foregoing, the Examiner is authorized to begin the Investigation immediately upon his or her appointment.

11. The Examiner shall be a "party in interest" under section 1109(b) of the Bankruptcy Code with respect to matters that are within the scope of the duties delineated in this Order or as such duties may hereafter be modified by this Court, and shall be entitled to appear at hearings and be heard with respect to matters that are within the Examiner's duties.

12. Nothing in this Order shall impede the right of the U.S. Trustee or any other party in interest to request any other lawful relief, including but not limited to the expansion of the scope of the Examiner's Investigation.

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this order.

Dated: Wilmington, Delaware  
\_\_\_\_\_, 2011

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Honorable Kevin J. Carey  
UNITED STATES BANKRUPTCY JUDGE