

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

In re:

FILENE'S BASEMENT, LLC, et al.,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 11-13511 (KJC)  
Jointly Administered

**Re: Docket No. 1640**

**PRELIMINARY OBJECTION OF AD HOC COMMITTEE OF CLASS 4 SYMS  
CREDITORS TO THE SECOND AMENDED JOINT CHAPTER 11 PLAN  
OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES**

ASM Capital, LP ("ASM"), CRT Special Investments LLC, Scoggin Worldwide Fund LTD, and Spectrum Master Fund, Ltd. (collectively, the "Ad Hoc Committee of Class 4 Syms Creditors" or the "Ad Hoc Committee") by and through its undersigned counsel, hereby files this preliminary objection<sup>2</sup> to the Second Amended Joint Chapter 11 Plan of Reorganization (the "Plan") of Syms Corp. ("Syms") and Its Subsidiaries (collectively, the "Debtors") [Docket No. 1641], and in support thereof, the Ad Hoc Committee of Class 4 Syms Creditors states as follows:

**PRELIMINARY STATEMENT**

1. The Ad Hoc Committee appreciates that the Plan is the product of significant negotiations between the Debtors, the Official Committee of Unsecured Creditors (the "Creditors Committee"), the Official Committee of Syms Corp. Equity Security Holders (the "Equity

<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, NJ 07094.

<sup>2</sup> Because the deadline to object to the Plan is August 21, 2012, the deadline for voting is August 23, 2012, and the deadline for the Claims Agent to file a ballot report is August 28, 2012, the Ad Hoc Committee is filing this preliminary objection. In the event that the Class 4 Syms class votes to reject the Plan, the Ad Hoc Committee intends to raise other issues, including, without limitation, whether the Plan is fair and equitable and whether the Plan violates with the absolute priority rule.



Committee”), and Marcy Syms (together with the Laura Merns Living Trust, dated February 14, 2003, and the Marcy Syms Revocable Living Trust, dated January 12, 1990, “Ms. Syms”). But the fact that these constituencies were able to agree upon terms of a plan does not make it confirmable, and in this case, the Plan is not.

2. Specifically, there is no question that the Syms estate is fully solvent. In the Disclosure Statement, the Debtors repeatedly reiterated their belief that the Syms estate is solvent and its creditors will be paid in full. At the July 13, 2012 hearing, the Debtors’ counsel stated repeatedly that Syms is solvent. Notwithstanding Syms’ solvency and the fact that, by the terms of the Plan, Syms’ equityholders are retaining their interests (and in fact, Marcy Syms will be paid on account of her equity interests prior to unsecured creditors having been paid in full), the Plan does not provide that Syms creditors will receive any interest on account of their claims from the petition date through the effective date. Accordingly, the Plan violates Sections 726(a)(5) and (6) and 1129(a) of the Bankruptcy Code.

3. Additionally, the Plan does not provide that Syms general unsecured claimss (the “Syms Class 4 Claims”) will be paid in full on the effective date. In fact, the Plan includes no temporal requirement for the payment of the Syms Class 4 Claims but yet the Plan does not require the payment of any post-confirmation interest to holders of the Syms Class 4 Claims (the “Syms Class 4 Creditors”), other than providing that the Syms Class 4 Creditors will receive interest upon the remaining outstanding portion of their claims if such claims remain unpaid on October 1, 2015. Accordingly, if the Debtors remit final payment on account of the Syms Class 4 Claims on September 30, 2015, the Debtors (and more specifically, the equity holders) will, in effect, have received approximately three (3) years of an interest free loan from the Syms Class 4 Creditors.

4. The proposed treatment under the Plan violates the best interests of creditors test set forth in 11 U.S.C. § 1129(a)(7), including Section 1129(a)(7)(A)(ii) of the Bankruptcy Code, because the Debtors are not providing the Class 4 Syms Creditors with a present value equal to the amount of the Class 4 Syms Claims on the effective date. The Plan therefore may not be confirmed.

5. Further, the Debtors' object failure to propose that the Syms Class 4 Creditors receive any interest is so far removed from the standards required for confirmation that the Court should deny the Plan because the Plan does not comply with the applicable provisions of title 11 and the Plan was not proposed in good in food faith. 11 U.S.C. § 1129(a)(1) and (3).

6. For the foregoing reasons, and without prejudice to the Ad Hoc Committee of Class 4 Syms Creditors' right to further object, for any reason, including the violation of the absolute priority rule, confirmation of the Plan should be denied.

### **BACKGROUND**

7. On July 13, 2012, the Debtors filed a disclosure statement [Docket No. 1641] (as subsequently modified, the "Disclosure Statement") and the Plan [Docket No. 1640].

8. The Plan provides, among other things, that Ms. Syms will sell all 7,857,794 of her shares to reorganized Syms for a total of \$19,565,590, subject to a reduction in resolution of certain claims. In exchange for the sale of the stock, Ms. Syms will receive: (i) payments aggregating \$17,791,668, \$10,725,761 of which shall be paid prior to the full payment of Syms' general unsecured creditors classified in Class 4 of the Plan, (ii) credits of approximately \$1,174,000 in connection with a certain split-dollar life insurance policy on Ms. Syms, (iii) the assignment of Certain Intellectual Property Assets to Marcy Syms (see Plan Supplement, Annex II), and (iv) releases of all claims by that the Debtors, the Debtors' estates, the reorganized

debtors or any individual claimant could have asserted based upon or relating to, among other things, the Debtors or the Debtors' Chapter 11 cases.

9. Pursuant to the terms of the Plan, current equity holders - and only current equity holders who are qualified as "accredited investors" – shall have the right to purchase stock in the reorganized debtors for \$2.49 per share.

10. The Plan also provides, in relevant part, for the following treatment of Syms' Class 4 Claims:

Syms Class 4: Syms General Unsecured Claims (Impaired) - Syms Class 4 consists of Syms General Unsecured Claims. After all Allowed Senior Claims have been paid in full or, to the extent not paid in full, funds sufficient to satisfy such Claims have been placed in a segregated reserve, and as and to the extent practicable as Excess Cash becomes available, each Holder of an Allowed Syms General Unsecured Claim shall receive, on the later of (a) the Initial Distribution Date or (b) the Distribution Date(s) immediately following the date on which such Holder's Syms General Unsecured Claim becomes an Allowed Syms General Unsecured Claim (1) one or more cash payments from 60% of the first available distributable Excess Cash until the Initial Majority Shareholder Payment is made in full from the other 40% of the first available distributable Excess Cash, and then cash payments aggregating not more than 100% of the Allowed amount of its Allowed Syms General Unsecured Claim, or (2) such other less favorable treatment as to which such Holder and Syms shall have agreed upon in writing, in full satisfaction, settlement, release, and discharge of and in exchange for its Allowed Syms General Unsecured Claim. Interest shall accrue at a rate of 7.0% per annum on any unpaid Plan Distribution to Holders of Allowed Syms General Unsecured Claims from and after October 1, 2015. Interest shall be paid in kind and compounded annually.

Plan, Section C, V.4.

11. On July 13, 2012, ASM filed an objection to the Disclosure Statement [Docket No. 1641] in which ASM asserted that the Plan could not be confirmed because (i) the Plan did not provide for interest as required under Section 1129 of the Bankruptcy Code, including violating the best interest of creditors test, and (ii) absent an affirmative vote from Syms Class 4

creditors, the terms of the Plan violated the absolute priority rule by permitting Ms. Syms to receive, among other things, payment on account of her equity interests prior to the Syms Class 4 claims being paid in full.

12. After the July 13, 2012 hearing, the Debtors revised the Disclosure Statement to state that “[t]he Plan Proponents, with the Creditors' Committee's consent, reserve the right to modify the Plan to include interest paid to the Syms Unsecured Creditors in an amount required under the Bankruptcy Code, if it is determined to be necessary under applicable confirmation standards.” Disclosure Statement, Section V.2.C.iii. On July 13, 2012, the Court entered an Order (I) Approving Disclosure Statement; (II) Approving Ballot Solicitation And Tabulation Procedures, Key Dates And Deadlines Related Thereto, Forms Of Ballots, And Manner Of Notice; And (III) Fixing Date, Time And Place For Confirmation Hearing And Deadline for Filing Objections Thereto [Docket No. 1655].

13. The deadline to object to confirmation of the Plan is August 21, 2012, and the voting deadline is August 23, 2012. Accordingly, it is unclear whether the Syms Class 4 Creditors (or any other impaired class of creditors under the Plan) will vote to reject the Plan.

#### **OBJECTION TO CONFIRMATION**

14. The Ad Hoc Committee objects to confirmation of the Plan because it does not provide for any interest to be paid to creditors on account of their claims from the date of the petition until confirmation. The Debtors' failure to provide for interest is a violation of the best interests of creditors test set forth in section 1129(a)(7) of the Bankruptcy Code.

15. The Ad Hoc Committee further objects to confirmation of the Plan because it does not provide for any interest after the effective date, other than providing that the Syms Class 4 creditors will receive interest upon the remaining outstanding portion of their claims if such

claims remain unpaid as of October 1, 2015. Accordingly, if the Debtors remit payment to Syms Class 4 Creditors on September 30, 2015, they will have received approximately three (3) years of an interest free loan. Such proposed treatment violates section 1129(a)(7) of the Bankruptcy Code.

16. Based upon the Debtors' failure to provide interest to creditors as required, the Plan does not comply with the requirements of title 11, and confirmation should be denied pursuant to 11 U.S.C. § 1129(a)(1). Further, by failing to provide creditors with any interest while permitting equity holders to retain their interests, the Plan was not proposed in good faith as required under 11 U.S.C. § 1129(a)(3) and confirmation of the Plan should be denied.

#### **BASIS FOR OBJECTION TO CONFIRMATION**

##### **A. Syms' Class 4 Claims are entitled to Postpetition, Pre-Effective Date Interest.**

17. As recently noted by Judge Walrath, "the general rule is that unsecured creditors are not entitled to recover post-petition interest. . . .[however] there is an exception to the general rule. . . when the debtor is solvent." In re Washington Mut., Inc., 461 B.R. 200, 241 (Bankr. D. Del. 2011), vacated in part by 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (internal citations omitted). The reason for allowing unsecured creditors' interest in such circumstances is because, "under a chapter 7 liquidation, where the debtor is solvent, unsecured creditors are entitled to post-petition interest on their claims before shareholders receive any distribution." Id. The basis for such allowance is grounded in Section 726(a)(5) and (6) of the Bankruptcy Code,<sup>3</sup> which is made applicable to Chapter 11 confirmation as set forth in the best interest of creditors

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<sup>3</sup> Section 726(a) of the Bankruptcy Code provides, in relevant part, as follows:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

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(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and  
(6) sixth, to the debtor.

11 U.S.C. § 726(a).  
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test in Section 1129(a)(7) of the Bankruptcy Code.<sup>4</sup> Id. (citing Kitrosser v. The CIT Grp./Factoring, Inc., 177 B.R. 458, 469 (S.D.N.Y. 1995) and In re Premier Etm't Biloxi LLC, 445 B.R. 582, 644 (Bankr. S.D. Miss. 2010)).

18. In the Disclosure Statement, the Debtors stated that they believe that the Syms estate is solvent. Disclosure Statement, Section I.A (“The Debtors believe that Syms is solvent due to the significant value of its real estate holdings. Accordingly, Syms anticipates paying all its creditors in full, including creditors to whom Syms provided guarantees of certain of Filene's liabilities”) and Section X.B (“... the Debtors believe Syms is solvent and all its creditors are being paid in full.”)

19. As a matter of law, because the Debtors are solvent and the the Plan does not provide Class 4 Syms Claims with postpetition, pre effective date interest, the Plan cannot be confirmed.

**B. If Syms' Class 4 Claims are not paid in full on the effective date, such claims are entitled to Post Effective Date Interest.**

20. As a preliminary matter, it is unclear how much the Debtors will distribute on account of Syms Class 4 Claims on the effective date, however it is readily apparent by the proposed treatment of the Syms Class 4 Claims under the Plan that such claims will not be paid in full on the effective date. The Plan cannot be confirmed because the Plan does not provide for

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<sup>4</sup> Section 1129(a)(7) of the Bankruptcy Code provides, in relevant part, as follows  
(7) With respect to each impaired class of claims or interests—  
(A) each holder of a claim or interest of such class—  
(i) has accepted the plan; or  
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

11 U.S.C. § 1129(a)(7).

the payment of any post effective date interest on account of Syms Class 4 Claims which remain unpaid after the effective date.

21. Section 1129(a)(7) of the Bankruptcy Code requires that, absent acceptance of treatment to the contrary, each holder of a claim or interest of such class will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date. 11 U.S.C. § 1129(a)(7)(A).

22. Here, the Debtors have made no such provision to ensure that Syms Class 4 Creditors will receive as much as if the estate of Syms – a debtor whose estate is being jointly administered but not substantively consolidated with the Filene’s estate<sup>5</sup> – was liquidated. As noted in Colliers, “while it may be easy to identify ‘property,’ the plan proponent must also show its present value.” Collier on Bankruptcy, 1129.02[7][b][ii]. (emphasis added). Present value is intimately tied to its interest rate; if the interest rate is too low, the best interests of creditors test may not be met. Id.

23. The leading case addressing the appropriate rates of interest is Till v. SCS Credit Corp., 541 U.S. 465, 479-80 (2004). In Till, a plurality of the Court adopted the formula approach to determine an adequate rate of interest. The formula approach begins by “looking to the national prime rate, the risk of inflation, and the risk of default. Id. Till involved the peculiar facts where the debtor sought to cram down a proposed Chapter 13 plan over the objection of a secured creditor, and the Court was required to address whether the plan met the requirements of

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<sup>5</sup> Although the Creditors Committee did not require payment of interest as required for confirmation, the Ad Hoc Committee does not strongly condemn the Creditors Committee for their role in the proposed settlement reached with the Debtors, the Equity Committee and Ms. Syms. The Ad Hoc Committee understands and appreciates that the Creditors Committee could not serve two masters and, faced with a Hobson’s choice, determined that the settlement was in the best interests of all creditors, generally, even though the costs of the proposed settlement would ultimately be borne at the sole expense of Syms Class 4 Creditors which are entitled to full payment, plus interest.



Section 1325 of the Bankruptcy Code, including the appropriate rate of interest to be provided by the Debtor. While these Debtors are not involved in a Chapter 13 case, and the issue before this Court does not involve the objection of secured creditors, it is worthy of note that the Till plurality noted that the Court was addressing the “present value” of the creditors’ claim as of the effective date of the bankruptcy plan. Till, 541 U.S. at 469 n.4. Further, the Court stated that “the Bankruptcy Code includes numerous provisions that, like the cramdown provision, require a court to discoun[t] ... [a] stream of deferred payments back to the[ir] present dollar value.” Among those provisions expressly cited to address the present value of deferred payments was Section 1129(a)(7)(A)(ii), the same section addressed in this case. See Till, 541 U.S. at 458-59 and n.10. Accordingly, the appropriate interest rate to be provided for those Syms Class 4 Claims not paid on the effective date should be calculated using the formula approach, which starts at prime rate and goes up based upon the likely costs of inflation and risk.

24. Of course, here the Debtors have made no provision whatsoever as to any interest to be provided on account of the Syms Class 4 Claims not paid on the effective date.<sup>6</sup> Accordingly, the Plan cannot be confirmed.

**C. The Plan was not proposed in good faith and does not comply with the provisions of title 11.**

25. As set forth hereinabove, because the Plan does not provide for any interest for Syms Class 4 Claims, it does not comply with the provisions of title 11 and therefore cannot be confirmed pursuant to 11 U.S.C. § 1129(a)(1).

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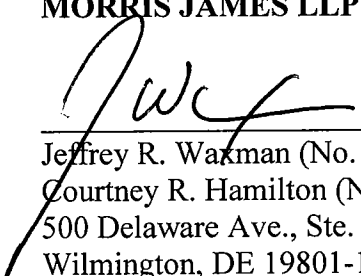
<sup>6</sup> In the event that the Plan Proponents’ amend the Plan prior to the confirmation hearing to include interest, the Ad Hoc Committee expressly reserves its right to require that the Plan Proponents introduce evidence as to the appropriateness of such proposed interest at the confirmation hearing. Further, the Plan Proponents must provide the Ad Hoc Committee with such evidence with reasonable time to permit the Ad Hoc Committee an opportunity to review the evidence prior to the confirmation hearing, in accordance with the fundamental principles of due process. Further, the Ad Hoc Committee expressly reserves its right to introduce evidence as to appropriate interest rates.

26. Notwithstanding the Bankruptcy Code's clear requirements as to interest, the Debtors' acknowledgement that the Syms estate is solvent, and ASM's objection to the Disclosure Statement which raised the issue of interest, the Debtors still have not amended the Plan to provide for either (i) postpetition, pre effective date interest for Syms Class 4 Claims or (ii) post effective date interest for Syms Class 4 Claims to the extent that such claims remain unpaid after the effective date. Accordingly, the Debtors knowingly proposed and solicited approval of a plan that it knew was patently unconfirmable, and therefore the Plan was not proposed in good faith. Accordingly, the Plan cannot be confirmed pursuant to 11 U.S.C. § 1129(a)(3).

WHEREFORE, the Ad Hoc Committee of Class 4 Syms Creditors respectfully requests entry of an Order (i) sustaining the Ad Hoc Committee of Class 4 Syms Creditors Objection to the confirmation of the Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries, and (ii) granting to the Ad Hoc Committee of Class 4 Syms Creditors such other and further relief as may be just and equitable.<sup>7</sup>

Dated: August 21, 2012

**MORRIS JAMES LLP**



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Creditors

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<sup>7</sup> The Ad Hoc Committee of Class 4 Syms Creditors expressly reserves the right to seek legal fees and expenses in connection with the preparation and prosecution of this objection to confirmation pursuant to 11 U.S.C. § 503(b)(3)(D).

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
FILENE'S BASEMENT, LLC, *et al.*, ) Case No.: 11-13511 (KJC)  
)  
) Jointly Administered  
Debtors. )  
\_\_\_\_\_ )

**AFFIDAVIT OF JAMIE L. DAWSON, PARALEGAL**

STATE OF DELAWARE :  
: SS:  
NEW CASTLE COUNTY :

I, Jamie L. Dawson, certify that I am, and at all times during the service, have been an employee of Morris James LLP, not less than 18 years of age and not a party to the matter concerning which service was made. I certify further that on August 21, 2012, I caused to be served:

**PRELIMINARY OBJECTION OF AD HOC COMMITTEE OF CLASS 4 SYMS CREDITORS TO THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES**

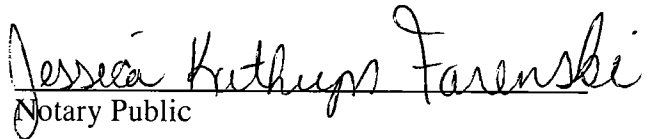
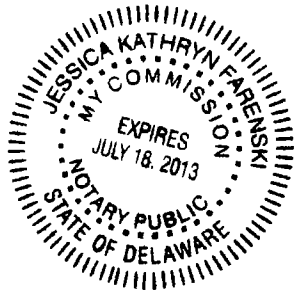
Service was completed upon the following parties listed below in the manner indicated thereon.

Date: August 21, 2012



\_\_\_\_\_  
Jamie L. Dawson

SWORN AND SUBSCRIBED before me this 21st day of August, 2012.

  
\_\_\_\_\_  
Notary Public

**VIA ELECTRONIC MAIL & HAND  
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