

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

In re:

FILENE'S BASEMENT, L.L.C., *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 11-13511 (KJC)

Jointly Administered

**Obj. Deadline: July 2, 2012 @ 4:00 p.m. EDT**

**Hearing Date: July 9, 2012 @ 11:00 a.m. EDT**

**Docket Ref. No. 1364**

**LIMITED OBJECTION OF U.S. BANK NATIONAL ASSOCIATION,  
IN ITS CAPACITY AS TRUSTEE, TO THE DISCLOSURE STATEMENT  
WITH RESPECT TO THE JOINT CHAPTER 11 PLAN OF  
REORGANIZATION OF SYMS CORP. AND ITS SUBSIDIARIES**

U.S. Bank National Association ("U.S. Bank"), as Trustee under the Metropolitan Trust Agreement,<sup>2</sup> hereby submits this limited objection (the "Objection") to the *Disclosure Statement with Respect to the Joint Chapter 11 Plan of Reorganization of Syms Corp. and its Subsidiaries* (the "Disclosure Statement") (Docket No. 1364).

**SUMMARY OF OBJECTION**

The Disclosure Statement fails to provide adequate information regarding the amount of money the Debtors intend to reserve for payment of administrative expense claims. Since a plan that does not provide for full payment of all administrative expense claims on its effective date is not feasible, the Disclosure Statement must inform creditors of the amount the Debtors are intending to reserve for administrative expense claim payments, and the methodology the

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<sup>1</sup> The Debtors in these jointly administered cases are: Filene's Basement, LLC, Syms Corp., Syms Clothing, Inc., and Syms Advertising Inc. The Debtors' address is One Syms Way, Secaucus, New Jersey 07094.

<sup>2</sup> The Metropolitan Trust Agreement was made on the 20<sup>th</sup> of April 1977 between the Settlor named therein, who are the equitable owners of the Demised Land (defined herein), and First Pennsylvania Bank, N.A., as trustee.



Debtors used to determine their estimate of administrative expense claims. Absent this information, creditors cannot cast an informed vote for or against the Plan (defined herein), and this Court cannot determine that the Plan is feasible pursuant to 11 U.S.C. § 1129(a)(11).

## **I. BACKGROUND**

### **A. The Ground Lease**

U.S. Bank is the successor to First Pennsylvania Bank, N.A., as landlord under that certain *Severance Lease No. 5* (the “Ground Lease”), by and between First Pennsylvania Bank, N.A., as Landlord, and Hartz Mountain Metropolitan, as Tenant, for demised land located in Secaucus, New Jersey (the “Demised Land”). Syms Corp. (“Syms”) became the tenant under the Ground Lease pursuant to that certain *Assignment and Assumption of Ground Lease*, dated as of May 8, 1986, pursuant to which Syms agreed to assume all of the obligations of tenant under the Ground Lease.

Pursuant to Section 2.4 of the Ground Lease, Syms is responsible for paying certain amounts to U.S. Bank, including but not limited to Percentage Rent (as defined in the Ground Lease) for 2011 due and payable as of February 28, 2012. Section 2.4 provides, “Tenant further covenants and agrees to pay the Landlord...percentage rent in an amount equal to 15% per annum of the Annual Net Cash Flow of the Tenant.” The term “Annual Net Cash Flow” is defined as, among other things:

“...(2) all net excess refinancing proceeds received during any calendar year from any permanent mortgage refinancing of all or any part of the Demised Land and/or any building thereon.

For purposes of this paragraph “net excess refinancing proceeds” shall mean the amount by which the principal amount of any refinanced permanent mortgage covering a building on the Demised Land exceeds the unpaid principal balance of any existing mortgage covering such building, minus all costs and expenses incurred in connection with any such refinancing, including, but not limited to,

reasonable attorneys' fees of the mortgagor or lender, brokerage commissions and finders' fees, commitment fees, or other financing, inspection, appraisal and similar charges, mortgage inspection, appraisal and similar charges, mortgage title insurance charges, recording fees and mortgage taxes.

Ground Lease § 2.4(b).

**B. The 2011 Refinancing and Mortgage**

On August 27, 2009, Syms, and SYL, LLC as borrowers, and Bank of America, N.A., as Lender, Administrative Agent, and Collateral Agent ("BofA") entered into the Credit Agreement ("Credit Agreement") which, among other things, established a revolving credit facility and letter of credit facility in an aggregate amount not to exceed \$75,000,000. Filene's Basement, LLC ("Filene's", and together with Syms, the "Borrowers") became a borrower under the Credit Agreement pursuant to the First Amendment to Credit Agreement, executed on or about January 7, 2011.

On March 8, 2011, Syms granted BofA a mortgage on the Demised Land as part of an amendment to the Credit Agreement ("Amendment") which, among other things, provided for an additional term loan to the Borrowers ("March 2011 Financing"). The security interest granted by the 2011 Mortgage included, among other property, the Demised Land.

The obligations and indebtedness secured by the 2011 Mortgage include all obligations and indebtedness under the Credit Agreement<sup>3</sup>, capped at \$23,400,000. According to the

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<sup>3</sup> The 2011 Mortgage states that it is granted

... to secure the due and punctual payment and performance of the following described indebtedness and obligations: (a) the Term Loan and all other Obligations (including all Other Liabilities); and (b) any and all additional advances made by any Credit Party, to protect or preserve the Mortgaged Property or the security interest created hereby on the Mortgaged Property, or for taxes, assessments or insurance premiums as hereinafter provided or for performance of any of Mortgagor's obligations hereunder or under the other Loan Documents or for any other purpose provided herein or in the other Loan Documents (whether or not the original Mortgagor remains the owner of the Mortgaged Property at the time of such advances).

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Debtors' filings, the outstanding obligation under the Credit Agreement at the time of the Debtors' bankruptcy filing was in an amount of at least \$33,220,760.81.

**C. U.S. Bank's Claims in the Bankruptcy Cases**

The Debtors filed their bankruptcy petitions on November 2, 2011 (the "Petition Date"). The cases are now jointly administered, and the Debtors continue to operate their businesses as debtors-in-possession. On November 8, 2011, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an Official Committee of Unsecured Creditors. On November 15, 2011, the U.S. Trustee formed the Official Committee of Syms Corp. Equity Security Holders. On May 24, 2012, the Debtors filed their *Joint Chapter 11 Plan of Reorganization of Syms Corp. and Its Subsidiaries* (the "Plan"), and the related Disclosure Statement.

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See 2011 Mortgage at 1 §C. The term "Obligations" is defined in the Credit Agreement as

(a) all advances to, and debts (including principal, interest, fees, costs, and expenses), liabilities, obligations, covenants, indemnities, and duties of, any Loan Party arising under any Loan Document or otherwise with respect to any Committed Loan or Letter of Credit (including payments in respect of reimbursement of disbursements, interest thereon and obligations to provide cash collateral therefore), whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest, fees, cost, expenses and indemnities that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Debtor Relief Laws naming such Person as the debtor in such proceeding, regardless of whether such interest, fees, costs, expenses and indemnities are allowed claims in such proceeding, and (b) any Other Liabilities.

See Credit Agreement at 27. The term "Other Liabilities" is defined in the Credit Agreement as

[A]ny obligation on account of (a) any Cash Management Services furnished to any of the Loan Parties or any of their Subsidiaries and/or (b) any Bank Product furnished to any of the Loan Parties and/or any of their Subsidiaries, as each may be amended from time to time.

See Credit Agreement at 28.

On February 29, 2012, U.S. Bank filed two proofs of claims for amounts due and owing pursuant to the Ground Lease: (1) an administrative claim for not less than \$3,510,000.00 (“Administrative Claim”) and (2) an unsecured claim for not less than \$17,000.00 (“Unsecured Claim”). As set forth in greater detail in the Statement of Claim attached to the Administrative Claim, the Administrative Claim is asserted against the Debtors’ estates as a result of Syms’ failure to pay the Percentage Rent when due on February 28, 2012.

On April 30, 2012, the Debtors filed a substantive objection to the Administrative Claim, classifying it as a “zero liability” claim. See *Debtors’ Third Omnibus (Substantive) Objection Pursuant to 11 U.S.C. §§ 365(d)(3), 502(b) and 503(b), Fed. R. Bankr. P. 3007 and DEL. BANKR. L.R. 3007-1 to (I) Overstated Claims, (II) Zero-Liability Claims, (III) Duplicate Claims, and (IV) Contingent Guarantee Claims* (“Claim Objection”) (D.I. 1205). A hearing on the Claim Objection was scheduled for June 11, 2012. However, the parties mutually agreed to continue the litigation on the Claim Objection pending the outcome of the Assumption Motion (described below).

On May 8, 2012, the Debtors filed a motion seeking to assume the Ground Lease. *Debtors’ Motion for Order Pursuant to 11 U.S.C. §§ 105(a) and 365(a) and Fed. R. Bankr. P. 6006 and 9014 Authorizing Syms Corp. to Assume Unexpired Lease of Non-Residential Real Property for Property Located at One Syms Way, Secaucus, New Jersey* (the “Assumption Motion”) (Docket No. 1247). The Assumption Motion denies that the amounts asserted in the Administrative Claim are owed to U.S. Bank, and proposes to pay U.S. Bank \$5,026.55 to cure the default under the Ground Lease as required by section 365 of the Bankruptcy Code.

In response to the Assumption Motion, U.S. Bank and the Debtors have engaged in negotiations to resolve the cure dispute. The Parties have agreed to treat the cure dispute as a contested matter under Fed. R. Bankr. P. 9014, and conduct discovery prior to a hearing on the

Assumption Motion and have filed a proposed scheduling order setting certain timeframes for discovery. However, it is doubtful the litigation related to the Assumption Motion will be completed prior to a confirmation hearing on the Plan.

**D. Disclosure Statement**

The Disclosure Statement defines “Administrative Claim” as “...includ[ing] pre-petition claims held by providers of goods for the value of any such goods shipped to Syms [and Filene’s] within 20 days of the Petition Date in the ordinary course of business, along with post-petition claims held by persons who provided goods and services to Syms after the petition date, including landlords for unpaid post-petition rent, utility providers, and professionals.” Disclosure Statement at 2 & 4 (describing Administrative Claims against Syms and Filene’s, respectively). The Disclosure Statement further provides that the Debtors estimate the amount of the Administrative Claims against Syms and Filene’s is \$19.5 million and \$11.4 million, respectively (“Debtors’ Administrative Claim Estimate”). Disclosure Statement at 2 & 4. The Disclosure Statement does not include a list of asserted or filed administrative claims, or otherwise indicate how the Debtors arrived at the Debtors’ Administrative Claim Estimate.

The Disclosure Statement provides that Administrative Claims will be paid “...after the later of, (i) the Initial Distribution Date or (ii) the Distribution Date immediately following the date on which an Administrative Claim becomes an Allowed Administrative Claim.” Disclosure Statement at 24. The Debtors have estimated the aggregate amount of the Allowed Administrative Claims will be exactly the same aggregate amount as the Debtors’ Administrative Claim Estimate: \$19.5 million for Syms and \$11.4 million for Filene’s. As with the Debtors’ Administrative Claim Estimate, the Disclosure Statement does not indicate how the Debtors arrived at their calculation of Allowed Administrative Claims.

The Disclosure Statement and Plan provide for the creation of an “Administrative Claim Reserve” in an unknown amount. Specifically, the Disclosure Statement provides that:

On or before the Effective Date, the Debtors shall fund the Administrative Claims Reserve in an amount equal to an estimate of all Administrative Claims. The Debtors shall (i) segregate and shall not commingle the Cash held therein and (ii) pay each Allowed Administrative Claim, upon entry of a Final Order allowing such Claim or on such other date provided herein. In the event that Cash remains in the Administrative Claims Reserve after payment of all Allowed Administrative Claims, such residual Cash shall be used to make distributions to Holders of Claims and Interests as provided for in the Plan.

Disclosure Statement at 32.

The Disclosure Statement does not indicate (i) how the Debtors will estimate the amount of all Administrative Claims, or (ii) whether the amount in the Administrative Claims Reserve will be equal to the Debtors’ Administrative Claim Estimate or some other amount. In any event, the Disclosure Statement and Plan do not provide any notification to creditors, and specifically administrative claimants, that specific asserted administrative claims such as U.S. Bank’s Administrative Claim are included in either the Debtors’ Administrative Claim Estimate or the Administrative Claims Reserve.

By way of contrast, the only other reserve the Plan provides for is a Professional Fee Reserve. Article VII.I.(a) of the Disclosure Statement provides that the Professional Fee Reserve shall be funded in an amount of the aggregate Professional Fee Estimate. The Term Professional Fee Estimate is defined to mean “(i) with respect to any Professional, a good faith estimate of such Professional’s accrued unpaid Professional Fee Claims to be provided by each Professional in writing to the Debtors prior to the commencement of the Confirmation Hearing....” Unlike the Administrative Claims Reserve, it is very clear how the amount of the Professional Fee Reserve will be calculated, and further, it is clear that based upon the process that has been established, the Professional Fee Reserve will likely be sufficient to cover the amounts the

reserve is intended to pay.

The same cannot be said for the Administrative Claims Reserve. Article VII.I.(b) of the Disclosure Statement provides that “the Debtors shall fund the Administrative Claims Reserve in an amount equal to an estimate of all Administrative Claims.” Thus, the Debtors are not even committing to fund the Administrative Claims Reserve with the amount that they estimate will ultimately be Allowed Administrative Claims (\$19.5M for Syms and \$11.4M for Filenes.)

There is a simple solution to this disclosure deficiency. The Debtors simply need to revise the first sentence of Article VII.I.(b) of the Disclosure Statement to state “On or before the Effective Date, the Debtors shall fund the Administrative Claims Reserve in an amount equal to the Face Amount of all Administrative Claims.”

## **II. ARGUMENT**

U.S. Bank objects to approval of the Disclosure Statement because it does not provide adequate information regarding the Administrative Claims Reserve. Specifically, the Disclosure Statement (i) does not indicate the amount of the Administrative Claims Reserve, (ii) does not indicate how the Debtors will calculate the amount of the Administrative Claims Reserve, (iii) indicate how the Debtors calculated the amount of the Debtors’ Administrative Claim Estimate, or (iv) what relationship, if any, the Debtors’ Administrative Claim Estimate has to the Administrative Claims Reserve. Instead, the Disclosure Statement (and Plan) state that the Debtors will fund the Administrative Claims Reserve in an amount equal to “an estimate” of all Administrative Claims. Given that the Bankruptcy Code requires administrative expenses must be paid on or before the effective date of a plan, the Debtors’ ability to calculate and fund the correct amount of administrative claims is of critical importance to creditors who are expected to vote on the plan. Creditors such as U.S. Bank who have also asserted administrative claims have



no idea if their administrative claims are part of the Debtors' Administrative Claim Estimate or the Administrative Claims Reserve.

“The primary purpose of a disclosure statement is to give creditors information necessary to decide whether to accept the plan.” *In re Dakota Rail, Inc.*, 104 B.R. 138, 142 (Bankr. D. Minn. 1989). Section 1125(b) of the Bankruptcy Code requires that a disclosure statement contain “adequate information.” Specifically, a disclosure statement must contain:

...information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan...

11 U.S.C. §1125(a)(1). It is the debtor's burden to submit a disclosure statement that contains adequate information to allow a reasonable holder to make an informed judgment about the plan. *Gen. Elec. Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184, 188 (3d Cir. 1988). A disclosure statement that fails to provide interested parties with the information needed to evaluate a plan should be rejected. *See Dakota Rail*, 104 B.R. at 150; *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 982 (Bankr. N.D.N.Y. 1988).

Whether the information contained in a disclosure statement is adequate is determined on a case-by-case basis within the sound discretion of the bankruptcy court. *See e.g., In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001). The risk of defective disclosure is on the discloser, and the proponent should be biased towards more disclosure than less. *Official Committee of Unsecured Creditors v. H.B. Michelson (In re H.B. Michelson)*, 141 B.R. 715, 720 (Bankr. E.D. Cal. 1992).

In this case, the Disclosure Statement does not contain adequate information to permit

creditors to cast an informed vote on the Plan. The Debtors have not disclosed how they arrived at their own estimate of the amount of Administrative Claims, and what the amount of the Administrative Claims Reserve will be.

The above information is critically important to all creditors entitled to vote on the Plan, but absolutely necessary to administrative claimants such as U.S. Bank. The Disclosure Statement, as currently written, asks creditors to vote on the Plan without having the ability to gauge whether the Debtors have or will have sufficient funds to pay administrative claims. The Debtors' disclosure deficiencies are amplified by the enormous swing that would result if U.S. Bank's Administrative Claim was, or was not, included in the Administrative Claims Reserve. The Debtors "estimate" \$19.5 million in "Administrative Claims" against Syms. The Debtors also have asserted they have "zero liability" on account of U.S. Bank's timely filed and properly asserted Administrative Claim for amounts in excess of \$3.5 million. If the Administrative Claims Reserve wrongly excludes U.S. Bank's Administrative Claim, correcting the amount will increase the Administrative Claims Reserve as it relates to Syms to over \$23 million. Even assuming the Debtors have not wrongly excluded any other large asserted administrative claims, inclusion of U.S. Bank's Administrative Claim alone would require an 11.3% increase in the amount of the Administrative Claims Reserve.

### **III. CONCLUSION**

**WHEREFORE**, U.S. Bank respectfully requests that approval of the Disclosure Statement be conditioned on the inclusion therein of the additional language proposed above to clarify the amount of the Administrative Claims Reserve.

Dated: July 2, 2012

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