Hearing Date and Time: June 25, 2014 at 10:00 a.m. (Prevailing Eastern Time)
Response Date and Time: June 2, 2014 at 4:00 p.m. (Prevailing Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re DEWEY & LEBOEUF LLP, Debtor,	Case No. 12-12321 (MG) Chapter 11
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, Plaintiff, -against- STEPHEN H. DICARMINE AND JOEL I. SANDERS, Defendants.	Adv. Pro. No. 13-01765 (MG)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Ned H. Bassen
Kathryn A. Coleman
Christopher Gartman
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: 212-837-6000
Fax: 212-422-4726

Attorneys for Defendant Joel I. Sanders

Austin V. Campriello
Mary Beth Buchanan
Kathryn E. Gebert
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
Telephone: 212-541-2000
Fax: 212-541-4630

Attorneys for Defendant Stephen DiCarmine

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(Continued)

Page(s)

Defendants Joel I. Sanders and Stephen H. DiCarmine, by and through their undersigned counsel, respectfully submit this memorandum of law in support of their motion (the "Motion") to dismiss the Complaint filed by Alan M. Jacobs, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust (the "Trustee" or "Plaintiff") on November 27, 2013 (the "Complaint"), for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6), as made applicable to this case by Fed. R. Bankr. P. ("Bankruptcy Rule") 7012, and for failure to plead its claims with particularity as required by Rule 8, made applicable to this case by Bankruptcy Rule 7008.

PRELIMINARY STATEMENT

Extraordinarily, the Trustee is seeking here to expand existing avoidance law to make recoverable employees' wages, paid in the ordinary course and in accordance with employment contracts.. Even more incredibly, the Trustee seeks to do so as to a period of time that the judicial record already has established that Debtor Dewey & LeBoeuf LLP ("Dewey") was likely solvent and the firm's financial records show as much. The Trustee -- who has all of Dewey's books and records at his disposal and has been involved in the case for more than a year -- has failed to properly plead any facts that either support the expansion of current avoidance law or contravene prior sworn testimony regarding Dewey's solvency. This is a textbook case of a complaint that warrants dismissal on a number of grounds.

This action is not about any alleged misconduct by DiCarmine or Sanders. Indeed, the Trustee already has released them from any such civil claims. Rather, the Trustee's Complaint seeks to avoid and recover, as preferences and/or constructive fraudulent transfers, compensation that Dewey paid and contractual commitments that Dewey made to DiCarmine and Sanders, former Dewey employees, within six years prior to the Petition Date. The Trustee

seeks to recover such payments even though he acknowledges that the payments were made pursuant to employment contracts entered into at about the time of the Dewey/LeBoeuf merger, and that both DiCarmine and Sanders had received substantial compensation as senior officers of LeBoeuf during the years prior to the Dewey merger. Moreover, although the Trustee makes general allegations regarding lack of fair consideration and reasonably equivalent value, he does not allege, because he cannot, that DiCarmine's or Sanders' services had no value, or even insignificant value, and does not at any point assert what he considers to be fair value.

As shown in more detail below, the Complaint should be dismissed because it fails to state a claim. The Complaint does not set forth the required information – all of which is available to the Trustee – and it lacks plausibility and, indeed, credibility. The Trustee's Complaint cannot overcome the self evident fact that DiCarmine and Sanders provided contemporaneous and/or subsequent value as senior managers in merging LeBoeuf Lamb and Dewey Ballantine, inter alia, and the payments to them were made in the ordinary course pursuant to existing contracts.

Moreover, the various allegations regarding insolvency and financial condition fail because they lack necessary details which are available to the Trustee, improperly seek to include obligations which are not properly considered liabilities for preference and fraudulent conveyance law, are contradicted by other allegations of the Complaint itself , and are belied by the fact that Dewey was a going concern up until it filed the bankruptcy petition. They are also squarely at odds with testimony proffered by Dewey in obtaining Court approval of the PCP Plan that was the cornerstone of its plan of liquidation, viz., that Dewey was likely solvent through at least December 31, 2011.

Thus, when it benefitted Dewey to represent that it could not show insolvency earlier than January 1, 2012, the debtor in possession did so. But now that this fundamental position would bar the majority of the claims here, the debtor's successor, the Trustee, has changed the story to now claim that Dewey was insolvent years before January 1, 2012, in order to seek to avoid and recover years' worth of justifiably earned compensation. It would be inequitable to allow these inconsistent positions to be asserted, and this is precisely the type of unfairness that the doctrine of estoppel is intended to bar. Since insolvency is a required element of Plaintiff's First and Second Claims for Relief, each of those claims should be dismissed with respect to any and all payments and/or obligations sought to be avoided through at least December 31, 2011.

Finally, Plaintiff's objections to the proofs of claim filed by Messrs. DiCarmine and Sanders fail for the reasons stated in the papers previously filed by Messrs. DiCarmine and Sanders in response to the Debtor's objection to their proofs of claim, which are incorporated by reference herein, as well as for failure to plead with the required specificity. See In re Dewey & LeBoeuf LLP, No. 12-12321 (MG) (Bankr. S.D.N.Y.) (Docket Nos. 1774-1777).

For these reasons and those below, the Complaint should be dismissed.

BACKGROUND

The Employment Agreements

Messrs. DiCarmine and Sanders served as Dewey's Executive Director and Chief Financial Officer, respectively, from Dewey's inception in 2007 until May 11, 2012. Neither was a Dewey partner.

Each of Mr. DiCarmine and Mr. Sanders entered into an Employment and Long Term Incentive Plan Agreement with Dewey dated as of August 29, 2007 (the "DiCarmine Employment Agreement" and the "Sanders Employment Agreement"; and, together, the

"Employment Agreements"). (Compl. ¶¶ 38-39.) The DiCarmine Employment Agreement provides for a base salary of no less than $950,000.00 per year, (Id. ¶ 41), and a guaranteed bonus of no less than $200,000.00 each year starting on January 1, 2008 and each year thereafter through and up to December 31, 2013. (Id. ¶ 42.) The Sanders Employment Agreement has a similar structure, specifying a base salary of no less than $900,000 per year, (Id. ¶ 41), and a guaranteed bonus of no less than $200,000 each year starting on January 1, 2008 and each year thereafter through and up to December 31, 2013. (Id. ¶ 42.) The Employment Agreements also provided for an additional annual bonus in a discretionary amount, (Id. ¶ 43), as well as required annual payments totaling $200,000 to an irrevocable grantor trust. (Id. ¶ 44.)

Dewey's Bankruptcy

On May 28, 2012 (the "Petition Date"), Dewey filed its bankruptcy case. (Id. ¶ 37.)

On September 7, 2012, DiCarmine timely filed proof of claim number 1068 (the "DiCarmine Proof of Claim") and Sanders timely filed proof of claim number 1069 (the "Sanders Proof of Claim"; collectively, the "Proofs of Claim"). (Id. ¶ 75.)

On September 27, 2013, the Trustee objected to the Proofs of Claim (Docket No. 1714) (the "Claim Objection"). On October 22, 2013, Messrs. DiCarmine and Sanders responded to the Claim Objection (the "Claim Objection Responses"). See In re Dewey & LeBoeuf LLP, No. 12-12321 (MG) (Bankr. S.D.N.Y.) (Docket Nos. 1774-1777).

On August 29, 2012, Dewey filed its Motion (the "PCP Motion") for Entry of an Order, Pursuant to Bankruptcy Rule 9019 and 11 U.S.C. §§ 105(a) and 362, Approving Partner Contribution Settlement Agreements and Mutual Releases for Participating Partners (the "PCP"). See id. (Docket No. 399). On September 20, 2012, Dewey filed a list of 444 former Dewey partners who agreed to participate in the PCP. See id. (Docket No. 497). On September 20 and

21, 2012, the Court held evidentiary hearings and oral argument on the PCP Motion. By a Memorandum Opinion and Order dated October 9, 2012, the Court approved the PCP. See id. (Docket No. 538) ("PCP Decision").

On May 30, 2013, this Court entered an Order in Dewey's chapter 11 case, (Docket No. 1472), approving the settlement agreement (the "XL Settlement Agreement") among the Trustee, non-party Steven Davis, and XL Specialty Insurance Company, the primary insurer for Dewey's management liability policy. Pursuant to the XL Settlement Agreement, in exchange for $19 million, the Trustee released all "Insureds", including DiCarmine and Sanders, from all civil claims other than claims under chapter 5 of the Bankruptcy Code and "unfinished business" claims.

The Complaint

The Complaint asserts six causes of action against Mr. Sanders, Dewey's former Chief Financial Officer, and Mr. DiCarmine, Dewey's former Executive Director.

The First Claim for Relief seeks, pursuant to sections 547 and 550 of the Bankruptcy Code, to avoid and recover as preferential transfers payments made to Messrs. DiCarmine and Sanders within one year prior to the Petition Date totaling, respectively, approximately $2.8 million and $2.845 million. (Compl. ¶¶ 89-99.)

The Second Claim for Relief seeks, pursuant to sections 277 and 278 of New York Debtor Creditor Law and sections 544 and 550 of the Bankruptcy Code, to avoid and recover as constructive fraudulent transfers payments made to Messrs. DiCarmine and Sanders within six years prior to the Petition Date totaling, respectively, $11,017,839 and $10,800,743. (Compl. ¶¶ 100-111.)

The Third Claim for Relief seeks, pursuant to sections 548(a)(1)(B)(ii)(IV) and 550 of the Bankruptcy Code, to avoid and recover as constructive fraudulent transfers payments

made to Messrs. DiCarmine and Sanders within two years prior to the Petition Date totaling, respectively, approximately $4.95 million and $4.845 million. (Compl. ¶¶ 112-120.)

The Fourth Claim for Relief seeks, pursuant to sections 548(a)(1)(B)(ii)(IV) and 550 of the Bankruptcy Code, to avoid and recover as constructive fraudulent transfers "any and all future obligations that the Debtor may owe the Defendants under their Employment Contracts" under to the extent such obligations were incurred by the Debtor to Messrs. DiCarmine and Sanders within two years prior to the Petition Date. (Compl. ¶¶ 113-127, p. 33.)

The Fifth Claim for Relief seeks a declaratory judgment that the Debtor either has no indemnification obligations to Messrs. DiCarmine or Sanders, or, in the alternative, has satisfied such obligations by obtaining management liability insurance policies under which Messrs. DiCarmine and Sanders are insureds. (Compl. ¶¶ 128-132.)

The Sixth Claim for Relief seeks a declaratory judgment ruling that the Debtor's termination of Messrs. DiCarmine and Sanders did not give rise to obligations on account of their terminations. (Compl. ¶¶ 123-136.)

Finally, the Complaint incorporates the Debtor's previously asserted objection to the Proofs of Claim and seeks to disallow such claims based upon several asserted defenses. (Compl. ¶¶ 137-144.)

JURISDICTION AND VENUE

This Court has jurisdiction to hear this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court in this district pursuant to 28 U.S.C. § 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)(B) & (O).[1]

---

1. To the extent necessary, Messrs. DiCarmine and Sanders consent to the entry of final judgments by the Court.

ARGUMENT

I. JUDICIAL AND EQUITABLE ESTOPPEL BAR THE FIRST AND SECOND CLAIMS FOR RELIEF ON SOLVENCY GROUNDS.

Plaintiff's First and Second Claims for Relief – those for which insolvency is a necessary element – should be barred in full or in part on grounds of judicial and/or equitable estoppel based upon the representations made to the Court by Dewey and its representatives regarding Dewey's solvency in connection with its request for approval of the PCP.

In New Hampshire v. Maine, the Court discussed judicial estoppel as follows: "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." 532 U.S. 742, 749 (2001) (quoting Davis v. Wakeless, 156 U.S. 680, 689 (1895)). "This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" Id. (citations omitted.) "[C]ourts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," . . . by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." Id. at 749-50 (collecting cases).

While "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," "several factors typically inform the decision whether to apply the doctrine in a particular case:"

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an

> unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted). The court noted that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." Id. at 751.

In recently holding that a litigation trust created under Adelphia Communications Corporation's plan of reorganization was judicially estopped from pursuing a fraudulent transfer claim, the Second Circuit applied judicial estoppel, stating "the risk to judicial integrity if we were to allow a party, after the consummation of a bankruptcy, to take a position that unravels key decisions in the proceedings." Adelphia Recovery Trust v. Goldman, Sachs & Co., --- F.3d ---, 2014 WL 1327864, *4 (2d Cir. April 4, 2014) (the debtor had taken the position throughout the case that funds in a certain bank account belonged to a subsidiary of the debtor, and the debtor then tried to allege that it owned the accounts to avoid transfers made from it). Here, it would be a huge blow to judicial integrity to unravel a position that was integral to Dewey's efforts to obtain approval of the PCP, and, correspondingly, its plan of liquidation, over a year after consummation of the Dewey plan.[2] Indeed, "[a] different ruling would threaten the integrity of the bankruptcy process by encouraging parties to alter their positions . . . as they deem their litigation needs to change, leaving courts to unravel previously closed proceedings. Doing so would allow parties an opportunity to 'play [ ] fast and loose' with the requirements of the bankruptcy process and inject an unacceptable level of uncertainty into its results-exactly the result that the doctrine of judicial estoppel is intended to avoid." Id. at *7 (citing Wight v.

---

2. While the statements at issue were made by Dewey and/or its representatives, Plaintiff is bound by such statements because it is assignee of and thus a successor to Dewey. See id. at *6 n. 3 ("A party may be bound by the position taken by its predecessors in interest in prior proceedings.").

BankAmerica Corp., 219 F.3d 79, 89 (2d Cir. 2000)) (citing In re Adelphia Recovery Trust, 634 F.3d 678, 696 (2d Cir. 2011) for the proposition that the "integrity of judicial process [is] threatened by parties taking a short term position that risks being inconsistent with its future position")).

Under New York law, equitable estoppel is warranted where there is:

> (1) An act constituting a concealment of facts or a false misrepresentation;
> (2) An intention or expectation that such acts will be relied upon;
> (3) Actual or constructive knowledge of the true facts by the wrongdoers;
> (4) Reliance upon the misrepresentations which causes the innocent party to change its position to its substantial detriment.

Gen. Electric Capital Corp. v. Eva Armadora, S.A., 37 F.3d 41, 45 (2d Cir. 1994).

Here, in connection with the PCP, Dewey's representative, Mr. Pauker, made, among others, the following statements to the Court:

> [W]hat we found is that as of the end of 2011, on a going-concern basis, if that was used, the firm would have likely been solvent. On an asset-by-asset basis, it could have been solvent, it could have been insolvent, depending on some of the factors that I mentioned earlier. (Declaration of Ned H. Bassen, filed simultaneously herewith, Ex. A (Sep. 21, 2012 Hr'g Tr.) at 83:7-83:11.)
>
> In this particular case, if you look to how the firm was operating as of December 31st, 2011, the firm was still generating, you know, north of 850 million dollars a year of revenues; 800,000 dollars per partner profit. It's true the partners weren't getting paid as much as they wanted to, but that had been going on for years. They were still staying. Not every partnership pays its partners -- meets all their expectations. What -- the proximate reason that this firm failed is that the partners, the assets Your Honor was referring to, walked out the door. As of that year end, that hadn't happened. (Id. at 84:2-84:13.)
>
> I concluded at 12/31[/11], it was – I concluded that if a finder of fact determined that the firm was viable as a going concern as of that date, then the firm would be balance sheet solvent using the

> enterprise value method, and the firm – because the firm, on an asset-by-asset basis would have its AR and UBT valued using its traditional collection rate, if you valued it on an asset-by-asset basis on a going-concern basis, they would likely be solvent on that date. But they could be insolvent, depending on other variables. (Id. at 87:2-10.)
>
> So then we had to think about earlier times. There's been a lot of conversation in this courtroom about earlier in 2011, earlier in 2010. So what did those mean? Well, in truth, the biggest difference -- and this drove a lot of our thinking -- in considering the earlier points in time – is the firm was that much more likely to have been found as – by a finder of fact to have been operating as a going concern as of that period in time. The firm had been three years post-merger, had continued operating, its partners had not been leaving. It had been generating, as I said, 800,000 dollars per partner. Maybe low by some New York firm standards, but not so bad on a national basis. So if there was a dispute over solvency and these issues came out, the further you went back, the more likely it was that a finder of fact, in a contest, was going to say one of two things: either that the AR and UBT were reasonable as of that date to be valued using their ordinary and customary realization rates; or in the alternative, that it was reasonable to value the enterprise, as you said, based on the value of all of its assets, which is you value it based on its revenue and profit generating position capability, which is basically revenue multiples or EBITDA multiples. And that is a very traditional way that we do thing [sic], which is on an enterprise, rather than an asset-by-asset basis in fraudulent conveyance analysis. (Id. at 88:15-8:14.)
>
> Because it goes to the question of reasonable expectations, was the firm viable as a going concern. And I would say, as long as the partners were there and stuck there and had a reasonable prospect of reorganizing and were looking for either merger partners or to change the partner compensation system, the firm still had a reasonable shot at continuing as a going concern. At some point that ceased to be. Probably that was some point in 2012, between January and March/April, when people were leaving. It could have been a little bit earlier. (Id. at 99:3-99:13.)

To reach these conclusions, Dewey's Chief Restructuring Officer, Mr. Mitchell, testified that:

> We looked at and noted the firm's clean audit opinion at the end of 2010. We noted that the firm had been able to refinance a

> significant portion of its debt in 2010. And so from those two things, we concluded that third-party professionals had taken a good look at the finances of the firm and at least they had presumably concluded that they were confident in issuing a clean audit opinion, on the one hand, and confident in having their clients refinance the firm, on the other. We looked at the firm's financials in 2011, which were unaudited. And we looked at the firm's balance sheet at the beginning of 2012 and its financials in 2012.

(Id. at 28:18-29:4.)

Based upon those representations, this Court noted as follows in its PCP Decision:

> Based on investigations of the Debtor's finances by the Debtor's professionals, Pauker and Mitchell testified that there was strong evidence to support the assertion that the Debtor was insolvent in 2012, but insolvency would be more difficult to prove for 2011, and even harder for 2010. [Sep. 21, 2012 Hr'g Tr.] at 33:7-17; 81:8-19. . . . Further complicating the issue, the firm had a clean audit opinion issued in 2010 and was able to refinance a significant portion of its debt, and in 2011 the average partner generated revenue of $800,000. (Id. at 28:18-25; 88:24-25.)

PCP Decision at 23.

The foregoing references are totally inconsistent with the Complaint's unsupported allegation that Dewey was insolvent "by at least January 1, 2009." (Compl. ¶ 33.) In addition, the statements make clear that Dewey and its representatives (i) represented to the Court that Dewey was likely solvent through at least December 31, 2011, (ii) analyzed whether or not Dewey was insolvent and, if so, as of what date, and were therefore knowledgeable about Dewey's financial condition, (iii) touted Dewey's pre-2012 solvency as a basis for requesting approval of the PCP Motion and intended for the Court to rely on the representations regarding Dewey's financial condition, and (iv) succeeded in persuading the Court to approve the PCP on the basis of the representations. If the allegations of the Complaint are true regarding Dewey's solvency are true, then the representations cited above in connection with the PCP were

constitute a concealment of facts or a false misrepresentation. Messrs. DiCarmine and Sanders relied to their detriment on such misrepresentations by continuing to incur costs and expenses subject to indemnification from Dewey on account of ongoing civil litigation against them.

Based upon the foregoing, judicial and equitable estoppel should be applied to bar the First and Second Claim for relief in full or in part.

II. THE COMPLAINT FAILS TO SATISFY FUNDAMENTAL PLEADING REQUIREMENTS.

The Complaint should be dismissed because it fails to comply with fundamental pleading requirements for the reasons below.

A. The Pleading Standards.

The Supreme Court has ruled that, under Rule 8(a), "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A properly pled complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. In considering a motion to dismiss, therefore, the Court need not – and should not – blindly accept "threadbare recitals of a cause of action's elements" as true. Iqbal, 556 U.S. at 663. Rather, after assuming the veracity of only the well-pleaded factual allegations, the Court should "determine whether they plausibly give rise to an entitlement to relief." Id. at 664.

Pursuant to Rule 12(b)(6), made applicable to this action by Bankruptcy Rule 7012, a complaint may be dismissed for failure to state a claim.[3] "Courts in this Circuit have

---

[3] On such a motion, the Court may consider (i) "documents attached to the complaint as an exhibit or incorporated in it by reference"; (ii) "matters of which judicial notice may be taken"; and (iii) "documents

routinely dismissed adversary complaints where plaintiffs have failed to "raise a right to relief above the speculative level." In re Lehman Bros. Holdings Inc., No. 08-13555 JMP, 2011 WL 2006341, at *2 (Bankr. S.D.N.Y. May 23, 2011) (internal quotation marks omitted). See, e.g., In re Residential Capital, LLC, No. 12-12020, 2014 WL 274415 (Bankr. S.D.N.Y. Jan. 24, 2014); In re Lyondell Chem. Co., 491 B.R. 41 (Bankr. S.D.N.Y. 2013), aff'd, 505 B.R. 409 (S.D.N.Y. 2014); In re JMK Constr. Grp., Ltd., 502 B.R. 396 (Bankr. S.D.N.Y. 2013).

B. The Complaint Fails to Plead a Preference Claim.

To plead a preference claim under section 547 of the Bankruptcy Code, a plaintiff must allege that the payment sought to be avoided "is a transfer of the debtor's property, to or for the benefit of a creditor, on account of the debtor's antecedent debt, made less than ninety days [one year for insiders] before bankruptcy while the debtor is insolvent, that enables the creditor to receive more than it would in a Chapter 7 liquidation." In re Jones Truck Lines, Inc., 130 F.3d 323, 326 (8th Cir. 1997).

The purpose of preference law is to equalize treatment of creditors and prevent last-minute grabs for the debtor's assets. These principles do not apply to regular payments of wages, or regular payments on contracts which provide for periodic payments for value provided such as payments of periodic rent pursuant to a lease or payments for utility services.

Section 547(c) of the Bankruptcy Code sets forth various defenses to preference claims. As shown in more detail below, the following defenses bar the First Claim for Relief because the payments sought to be avoided were made pursuant to employment agreements and/or a regular pattern and practice: contemporaneous exchange for (547(c)(1)); ordinary course

---

either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." In re Lyondell Chem. Co., 491 B.R. 41, 50 (Bankr. S.D.N.Y. 2013) (internal quotation marks omitted), aff'd, 505 B.R. 409 (S.D.N.Y. 2014).

of business/ordinary business terms (547(c)(2)); and subsequent advance for new value (547 (c)(4)).[4] Each is discussed below.

1. Contemporaneous Exchange – 547(c)(1).

The regular payment of wages, like rent and other periodic payments, involves an exchange of current value. In theory, the employees could receive payment for each day (or hour worked) and no preference would be involved. But this is clearly impractical, and courts recognized that the intention of the parties is that the payments be essentially simultaneous but, for convenience, are postponed and aggregated for a short period of time. But such payments do not undermine preference principles because the employees are constantly rendering consideration (i.e., work) for payment; the situation is analogous to payment COD and bears no resemblance to payment of trade debts which are necessarily delayed for billing and payment. Moreover, in such situations, the debtor doesn't even receive billings—it just pays. The fact that the payments are made pursuant to an employment contract makes no difference because it is the work performed that furnishes the consideration.

Thus, a preferential transfer is protected by the contemporaneous exchange for new value exception found in § 547(c)(1) where "(1) the transferee delivered new value, (2) the

4. Although the § 547(c) provisions are affirmative defenses, see 11 U.S.C. § 547(g), "a complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense if the defense appears on the face of the complaint." Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 505 B.R. 135, 141 (S.D.N.Y. 2013) (applying § 546(g) affirmative defense to dismiss preference and fraudulent transfer claims); In re Enron Corp., 341 B.R. 451, 455 n.3 (Bankr. S.D.N.Y. 2006) (applying 546(g) to dismiss fraudulent transfer claims and noting that "based upon the allegations of the Complaint and other material which the Court may consider, it can determine, as a matter of law, the application of the safe harbor provisions."); In re Crucible Materials Corp., No. 09-11582 MFW, 2012 WL 5360945, at *5 (Bankr. D. Del. Oct. 31, 2012) (dismissing preference claims based on ordinary course defense); In re Dreier LLP, 453 B.R. 499, 516 (Bankr. S.D.N.Y. 2011) (dismissing preference claim based on contemporaneous exchange defense); see also Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 74 (2d Cir. 1998); Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001) (holding a complaint may be dismissed under Rule 12(b)(6) if an affirmative defense is apparent on the face of the complaint). Additionally, "[i]n deciding whether an affirmative defense is clear from the complaint itself, a court may consider documents incorporated by the complaint." In re Tri-State Telecommunications, Inc., No. BR 11-13005, 2012 WL 4904537, at *6 (Bankr. E.D. Pa. Oct. 15, 2012). This extends even to documents that are not physically attached to the complaint but are merely referred to in the complaint and are central to the claim. Id. (citing Pryor v. Nat'l Collegiate Athletic Ass'n., 288 F.3d 548, 560 (3d Cir. 2002)).

parties intended the exchange to be contemporaneous, and (3) the exchange was, in fact, substantially contemporaneous." In re Dreier LLP, 453 B.R. 499, 515 (Bankr. S.D.N.Y. 2011). "'New value' for § 547(c) purposes includes 'money or money's worth in goods, services, or new credit.'" In re Jones Truck Lines, Inc., 130 F.3d at 327 (quoting 11 U.S.C. § 547(a)(2)). This defense maintains the "distributive equality" policy behind the preference statute by ensuring that the transfers "rest upon current consideration" and "negat[ing] the incentive a [creditor] might otherwise have to petition the debtor into bankruptcy." In re Child World, Inc., 173 B.R. 473, 477-78 (Bankr. S.D.N.Y. 1994) (affirming summary judgment for transferee because lease obligations were not antecedent debts or, in the alternative, rent payments were for contemporaneous value).

Here, Exhibit B to the Complaint demonstrates that the wage payments at issue were regularly recurring bi-monthly payments made to Messrs. DiCarmine and Sanders on or around the 15th and last day of each month. The guaranteed bonus payments were made on or around the same date each year, and the discretionary bonus payments were made on a regular schedule each year, generally bi-monthly. These payments were made for employment services rendered by Messrs. DiCarmine and Sanders during those corresponding time periods. Thus, Messrs. DiCarmine and Sanders, as any other employee, earned wages as they worked on a daily basis. Had they not been paid, they would not have worked. This is a textbook contemporaneous exchange for value.

Courts in this District have granted motions to dismiss based on a new value defense. See, e.g., In re Dreier LLP, 453 B.R. 499 (Bankr. S.D.N.Y. 2011). In Dreier, the creditor was alleged to have given $9 million in exchange for a security interest in property. Id. at 515. According to the complaint, the $9 million was approved and disbursed on the same day

as the Second Amended Revolving Line of Credit and the liens were granted "[a]s part of the Second Amended Revolving Line of Credit." Id. at 515-16. Thus, there was value and it was intended to be contemporaneous. Additionally, the court noted that the lien was granted the following business day which was "as *substantially* contemporaneous as it gets." Id.

The Eighth's Circuit's opinion in In re Jones Truck Lines, Inc., 130 F.3d 323, is also particularly applicable here. In relevant part, the debtor in Jones Truck Lines sought to recover contributions that had been made to employee benefit plans on behalf of its employees. The court held that the payments were contemporaneous exchanges of new value because they were in exchange for continued labor by employees. Id. at 327-28. In the alternative, the court found that the payments (except for the very last one) were for subsequent new value. The court held that the debtor received "new value" in the form of the continued service of its employees. Id. at 327. Additionally, the court explained that "[a]bsent contrary evidence, the value of employee services is presumed to equal the wages and benefits the employer contracted to pay." Id. at 328 n.4; see also In re Nomus-N. Carolina, Inc., No. 01-50373, 2004 WL 574510, at *1 (Bankr. M.D.N.C. Mar. 2, 2004) ("These services constituted new value. Value of an employee['s] services is presumed to equal wages and benefits that an employer contracted to pay."). The same is true here. Thus, the First Claim for Relief should be dismissed.

2. New Value – 547(c)(4).

Should the employment services provided by Messrs. DiCarmine and Sanders not be found to be contemporaneous exchanges, such services constitute subsequent new value under § 547(c)(4) of the Bankruptcy Code.

Section 547(c)(4) is designed (1) "to encourage trade creditors to continue dealing with troubled businesses" and (2) "to treat fairly a creditor who has replenished the estate after having received a preference." In re Pillowtex Corp., 416 B.R. 123, 130 (Bankr. D. Del. 2009).

Here, there is no question that Messrs. DiCarmine and Sanders provided new value by rendering post-payment services.

In Jones Truck Lines, the court held that, if the transfers made to various employee benefit plans were *not* contemporaneous new value transfers then they *were* transfers for subsequent value (i.e. the employees' labor). In re Jones Truck Lines, Inc., 130 F.3d at 328 ("If Jones received no contemporaneous new value for the weekly payments, then it necessarily received subsequent new value for each payment (except the last one) because its employees continued working.").

Similarly, in In re Data Tech Indus., Inc., No. 91-13702S, 1992 WL 37500 (Bankr. E.D. Pa. Feb. 21, 1992), the court held that the § 547(c)(4) defense precluded avoidance where the transferee was a former salesperson of the debtor who had received commissions payments from the debtor. The court held that the creditor had "clearly advanced his services to the Debtor after each of the payments in issue, and the Debtor has not met its burden of proving that Ames was ever fully compensated for his past services." 1992 WL 37500, at *3.

As in the contemporaneous transfer context, "[n]ew value involving the provision of services is deemed given on the date the personal services are rendered." 5 Collier on Bankruptcy ¶ 547.04 (16th ed.)).

Thus, whether under the contemporaneous exchange or subsequent advance defense, the First Claim for Relief should be dismissed because new value was provided for the payments and obligations at issue.

3. Ordinary Course – 547(c)(2).

The First Claim for Relief is also barred under § 547(c)(2) because the Complaint fails to sufficiently plead that the payments and obligations sought to be avoided were made and/or incurred outside the ordinary course of business or on non-ordinary business terms.

The ordinary course defense exists to protect "recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." In re Montgomery Ward, LLC, 348 B.R. 662, 673 (Bankr. D. Del. 2006). Here, as in In re NMI Sys., Inc., 179 B.R. 357 (Bankr. D.D.C. 1995), the salary payments made to Messrs. DiCarmine and Sanders were made "like clock-work and started before the commencement of the one-year period preceding the filing of the debtor['s] bankruptcy petition[]." 179 B.R. at 372-73.

Payments to employees for employment services are clearly in the ordinary course of any business. Moreover, the methods of payment here were well within Dewey's past practices with Messrs. DiCarmine and Sanders, and there is no question that the payments did not involve any special or unusual "collection" activity.

Indeed, as Exhibit B to the Complaint makes clear, the payments at issue were made to Messrs. DiCarmine and Sanders for years before the commencement of the statutory preference period in approximately the same amounts, and on or around the same dates each month and year. Thus, there is "no suggestion that" Mr. DiCarmine or Mr. Sanders "was, in bad faith, being singled out for favorable treatment" with respect to salary and bonus payments. In re NMI Sys., Inc., 179 B.R. at 372-73 (finding that defendant's bonus draws were in ordinary course); cf. In re Indus. & Mun. Eng'g, Inc., 127 B.R. 848, 850 (Bankr. C.D. Ill. 1990) (payments based on settlement agreement not in ordinary course because defendant "no longer worked for the Debtor and whether he was paid or not paid would not deny the Debtor of services needed for its operations").

In In re Crucible Materials Corp., the defendant raised an ordinary course defense on a motion to dismiss, based on the argument that "the Trustee's preference claim fails as a

matter of law because the payment was consistent with Crucible's payment practice under the Financing Lease for nearly twenty-five years." No. 09-11582 MFW, 2012 WL 5360945, at *4 (Bankr. D. Del. Oct. 31, 2012). The plaintiff argued that the defense was too fact-intensive to be appropriate for a motion to dismiss. The court disagreed, noting that the "Complaint states that Crucible made payments pursuant to the Financing Lease's amortization schedule from the time it executed the Assignment in 1985 until the April 1, 2009 payment" and therefore "the allegations of the Complaint itself are sufficient to establish that Crucible was making periodic payments to Onondaga and that the April 1, 2009, payment was made in the ordinary course of business." Id. at *5.

Plaintiff's contention that the Employment Agreements were not entered into in the ordinary course of business because they were executed before Dewey came into existence is legally irrelevant. First, the Trustee does not offer any reason why the Employment Agreements were not legally effective once Dewey come into existence, nor has the Trustee alleged that the persons negotiating the Employment Agreements were not authorized to do so. Moreover, even if the Employment Agreements were not legally effective, there is no question that Messrs. DiCarmine and Sanders rendered services pursuant to those Employment Agreements and were entitled to be paid for the services. Finally, principles of ratification are particularly applicable here where Dewey took numerous acts pursuant to the Employment Agreements over a period of more than four years. Numerous cases recognize these principles in the employment situation.

In Johnson v. Johnson, the First Department found that a plaintiff had ratified an agreement to share in the proceeds of collectively purchased lottery tickets. 594 N.Y.S.2d 259, 259-60 (1st Dep't 1993). He was "prevent[ed] from now attacking its validity" because he had

"voluntarily adher[ed] to the terms of the agreement for four years" and there was a signed and witnessed agreement setting out the intent to share proceeds. Id.

Similarly, in RLI Ins. Co. v. Athan Contracting Corp., 667 F. Supp. 2d 229, 231 (E.D.N.Y. 2009), an employee of a contractor procured a bid bond from a surety and successfully bid on a project, allegedly without authorization of the contractor. The owner of the contractor made statements and acted in a manner that made it appear as if the company intended to treat the employee's actions as authorized (e.g. he checked in with the employee about the status of the project and told employees of the surety company that he thought that the contractor would be able to finish the job). The court held that the owner's conduct and statements ratified the contract even if the company had not accepted any of the benefits of the contract. RLI Ins. Co., 667 F. Supp. 2d at 235 ("[W]here the principal knows of an unauthorized act taken on his behalf and remains silent, he is deemed to have ratified the act." (internal quotation marks omitted)); see also Velez v. Vassallo, 203 F. Supp. 2d 312, 322 (S.D.N.Y. 2002) (noting that "[r]atification may be inferred from the knowledge of the principal coupled with a failure to timely repudiate, where the party seeking a finding of ratification has in some way relied on the principal's silence" (internal quotation marks omitted)). The owner did not have to have knowledge of every detail of the transaction. Instead, his knowledge that his employee (1) had procured a bond, and (2) had successfully bid on the project was "enough knowledge to render [his] subsequent actions . . . a ratification." RLI Ins. Co., 667 F. Supp. 2d at 236.

Accordingly, the First Claim for Relief should be dismissed.

4. Insolvency – 547(b)(3).

The First Claim for Relief also fails under § 547(b)(3) because Plaintiff cannot establish that Dewey was insolvent when it made the payments or incurred the obligations at issue.

Pleading Insolvency Generally

The relevant definition of insolvency for the Complaint's § 547 and NYDCL causes of action (the First and Second Claims for Relief) is balance sheet insolvency. See In re Trinsum Grp., Inc., 460 B.R. 379, 392 (Bankr. S.D.N.Y. 2011) (noting insolvency under NYDCL and Bankruptcy Code are "analogous"); In re Nirvana Rest. Inc., 337 B.R. 495, 506 (Bankr. S.D.N.Y. 2006) ("Section 271, like its Bankruptcy Code analogue, 11 U.S.C. § 101(32), uses a balance sheet test."); Seligson v. New York Produce Exch., 394 F. Supp. 125, 129 (S.D.N.Y. 1975) ("The meaning of the term 'insolvency' in § 271 of the New York Debtor and Creditor Law has been held to be 'insolvency in the bankruptcy sense.'").

For both the NYDCL and § 547 causes of action a plaintiff has the burden of pleading insolvency, except that there is a presumption of insolvency during the 90 days preceding the petition date for purposes of § 547. In re Trinity Innovative Enterprises, LLC, No. 09-20579REF, 2010 WL 5462495, at *4 n.4 (Bankr. E.D. Pa. Dec. 27, 2010) (noting that the "Trustee need not plead . . . detailed facts establishing Debtor's insolvency during the ninety day period"); In re Caremerica, Inc., 409 B.R. 737, 752 (Bankr. E.D.N.C. 2009).

Insolvency must be alleged consistent with the pleading standards of Iqbal and Twombly. Id. Thus, legal conclusions are not adequate. Rather, a plaintiff must plead "factual assertions in support of the debtor's insolvency" at the time of each alleged transfer. Id. at 752. "[M]ere recitation of an element of a § 547 preference claim" is not adequate. Id. at 765.

Here, the Complaint's conclusory allegations, (see, e.g., Compl. ¶¶ 97, 109), fail to properly plead that Dewey was insolvent during the periods at issue.

The Complaint's Allegations of Insolvency

The Complaint fails to specify what the proper test of insolvency is for its claims or what the result is under such test. (See, e.g., Compl. ¶ 33-36, 97, 109.) As noted above, the

insolvency test relevant here measures the transferor's assets compared to its liabilities – balance sheet solvency.[5] Here, the Complaint acknowledges that Dewey's balance sheet showed that "assets exceeded liabilities by $117 million as of December 31, 2008." (Compl. ¶ 34.) Dewey's audited 2008, 2009 and 2010 financial statements similarly show balance sheet solvency for the years ending December 31, 2008, 2009 and 2010, respectively.[6] (See Bassen Decl. Exs. B-D). Courts in this District have dismissed complaints that included specific positive information about the debtor's financial position combined with a conclusory allegation of insolvency. Lippe v. Bairnco Corp., 230 B.R. 906, 915 (S.D.N.Y. 1999) (dismissing complaint because the "conclusory allegation [of insolvency] is contradicted by more specific allegations in the amended complaint.") In so holding, the Lippe court held that "[g]eneral, conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint." Id. (quoting Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995)).

It is also worth noting that the Trustee despite possessing all of Dewey's books and records, the Trustee has not attached any balance sheet or other financial information to back up his allegation of insolvency. The reason is simple: they contradict his ability to prove balance sheet insolvency.

The Other Insolvency Tests Do Not Apply to Plaintiff's Claims

The Complaint tries to dispute the clear-cut balance sheet solvency reflected on Dewey's financial statements in a number of ways. First, Plaintiff attempts to distort the relevant inquiry by discussing non-balance sheet concepts like Dewey's cash flow, capitalization and ability to pay debts as they came due. However, these tests are irrelevant to Plaintiff's claims.

---

[5] Thus, the Complaint's allegations relating to inadequate capitalization and inability to pay debts as they come due are irrelevant to his claims. (See, e.g., Compl. ¶ 33, 35, 36.)

6. Upon information and belief, audited financial statements were not prepared for 2011 or 2012.

See Chen v. New Trend Apparel, Inc., No. 11 CIV. 324 GBD MHD, 2014 WL 1265916, at *30 (S.D.N.Y. Mar. 27, 2014) ("The DCL's measure of insolvency focuses on companies in serious overall financial trouble, as opposed to companies experiencing a temporary lack of liquidity. For this reason, under the DCL, [c]ash flow is not a factor, and an inability to pay current obligations as they mature does not show insolvency." (citations and internal quotes omitted; alteration in original)); Morgan Guar. Trust Co. v. Hellenic Lines Ltd., 621 F. Supp. 198, 220 (S.D.N.Y. 1985); see also In re B. Moss Clothing Co., Ltd., No. 08-33980 NLW, 2011 WL 3878387, at *7 (Bankr. D.N.J. Aug. 31, 2011) (noting that "[o]perating losses are certainly an indication that insolvency may result at a future time, but without more does not establish insolvency at or about the time of the payments to the shareholders. As a result, this portion of Count II fails to state a claim on which relief can be granted.") Moreover, the Complaint ignores the fact that Dewey in fact paid its debts as they came due and survived as a going concern through the Petition Date.

Long-term Debts and Partner Compensation are Irrelevant to the Solvency Analysis

Next, the Complaint tries to rebut the balance sheet solvency reflected on Dewey's audited financial statements by claiming that various liabilities (e.g. "obligations to retirees, future property lease obligations, equipment lease obligations, and other contractual payment obligations") were not reflected in the financial statement. This is wrong; a determination of insolvency should not include all future liabilities for the following reasons:

> If a debtor's future rents can be counted as liabilities, it would seem that all projectable costs of doing business in the future could be counted as liabilities. In the context of the Debtor law firm, future compensation to partners might as easily be counted as liabilities as future rents. In the case of a debtor-manufacturer, we might as well consider its projected purchases of raw materials as liabilities. It is plain to see that, under this sort of analysis, no business which had projectable costs going forward could ever be determined to be solvent. It is also clear that simply because a

> debtor is able to project debts which fall due in the future should not render that debtor's liabilities as the equivalent at present due obligations countable as current liabilities.

In re Labrum & Doak, LLP, 227 B.R. 383, 388-89 (Bankr. E.D. Pa. 1998); Eerie World Entm't, L.L.C. v. Bergrin, No. 02 CIV.6513 SAAS, 2004 WL 2712197, at *2 n.25 (S.D.N.Y. Nov. 23, 2004) (citing and quoting Labrum & Doak for the same principle). If a plaintiff intends to include future liabilities, then it needs to compensate for the fact that liabilities generally come with a corresponding asset. For example, including Dewey's "equipment lease" obligations, as the Complaint advocates, should come along with a corresponding value of the use of the equipment by Dewey. See In re Labrum & Doak, LLP, 227 B.R. 383, 389 (Bankr. E.D. Pa. 1998) ("As the Defendants argue, if such liabilities are carried forward, it is only fair that allowances be made for the value of the Debtor's future leaseholds. However, Scherf offers no such allowances and simply counts all of the future rents due as liabilities, without any adjustments.").

Furthermore, inclusion of future liabilities ignores that a business would be making such payments in installments as a going concern. In re Labrum & Doak, LLP, 227 B.R. 383, 389 (Bankr. E.D. Pa. 1998) ("[T]his would render any business with substantial projectable future expenses artificially deemed insolvent.").

Thus, according to Labrum & Doak, "[i]n light of these consideration[s], we find it far more logical *not* to count the Debtor's entire contingent future rent liability in an insolvency analysis then to count it at all." 227 B.R. at 389; In re Prime Realty, Inc., 380 B.R. 529, 537 n.2 (B.A.P. 8th Cir. 2007) ("The Court also notes that Prime's long term obligation to RCS and Dahlke pursuant to the Purchase Contracts are not considered liabilities on Prime's balance sheet in the insolvency analysis.").

Here, the Complaint also fails to account for the fact that any analysis of Dewey's financial condition must account for the fact that it was a law firm, with the sui generis issues that every law firm must deal with. Although the Trustee makes the bald allegation that "Dewey was not generally paying its debts as the came due" a number of times, his only example is that the firm renegotiated the terms of certain payments due to retired partners of LeBoeuf. He has no other examples. Under the Trustee's theory of insolvency, every law firm would be insolvent at inception[7] and thereafter, if target compensation to partners was treated as debts. But the truth is that Dewey continued as a going concern through May 2012. It had plenty of cash to pay its debt obligations,[8] even during the years in question that were in the midst of a worldwide financial crisis, resulting in decreased revenues for law firms worldwide. Dewey's ultimate problem was that its partners -- and the associated revenue they generated -- walked out the door shortly before the Petition Date. Taken together, these factors contradict the Complaint's baseless allegations. Any problems Dewey may have had with making distributions to partners, active or retired, is irrelevant to the Trustee's claims since such obligations are not debts for the purpose of determining solvency. Rather, they are distributions on account of equity.

Based upon the foregoing, and for the reasons stated below at Point I, Plaintiff cannot establish that Dewey was insolvent at the times relevant to his claims.

---

[7] Courts have rejected contentions that a business is insolvent from its inception. See, e.g., Baldi v. Samuel Son & Co., Ltd., 548 F.3d 579 (7th Cir. 2008).

[8] See Bassen Decl. Ex. B at 2 (showing net assets totaling $116,871,811 as of December 31, 2008); Ex. C at 2 (showing net assets totaling $97,478,337 as of December 31, 2009); Ex. D at 2 (showing net assets totaling $62,995,663 as of December 31, 2010).

C. The Complaint Fails to Plead a Fraudulent Transfer Claim.

1. Section 548.

Pursuant to § 548(a)(1)(B)(ii)(IV) of the Bankruptcy Code, a "trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer or obligation; and . . . made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." 11 U.S.C. § 548(a)(1)(B)(ii)(IV). Section 548(c) of the Bankruptcy Code bars the recovery of avoided transfers for the benefit of the debtor's estate if the transferee "takes for value and in good faith." 11 U.S.C. § 548(c).

Here, the Complaint fails to sufficiently allege that Dewey received less than a reasonably equivalent value for the transfers at issue, or that such transfers were made outside the ordinary course of business. Indeed, the Complaint fails to plead facts sufficient to establish that the Payments were anything more than ordinary course payments of salary and bonuses owed for services rendered under long-standing employment contracts. Messrs. DiCarmine and Sanders were justifiably owed such amounts on account of their services and the Employment Agreements and therefore took such payments and/or obligations in good faith. Accordingly, dismissal of the Third and Fourth Claims for Relief is warranted.

a. Value Was Provided for the Payments and Obligations.

A lack of reasonably equivalent value is a required element of a claim under § 548 and not an affirmative defense. TLC Merch. Bankers, Inc. v. Brauser, No. 01 CIV.3044 GEL, 2003 WL 1090280, at*6 n.3 (S.D.N.Y. Mar. 11, 2003) (rejecting plaintiff's argument that "[i]t is the Defendant's burden to come forward with evidence her wages were fair and

reasonable in light of her experience and performance"); see also In re Sharp Int'l Corp., 403 F.3d 43, 53 (2d Cir. 2005) ("Sharp fails adequately to allege a lack of 'fair consideration.'"). Thus, the Trustee bears the burden of showing that Dewey did not receive reasonably equivalent value in exchange for the compensation it paid to Messrs. DiCarmine and Sanders. There is no serious question as to whether Messrs. DiCarmine and Sanders provided value: they worked at Dewey and performed their jobs for almost five years. The Trustee's allegations fail to specify what he contends reasonable compensation for senior management at an international law firm should be. (See, e.g., Compl. ¶¶ 47-52.) If his claims are not dismissed in their entirety, his claims should be reduced by at least that value.

The value requirement must be pled consistently with Rule 8(a), as interpreted by Iqbal and Twombly. Thus, bald assertions mirroring the language of the relevant statutes are inadequate. In re Caremerica, Inc., 409 B.R. 737, 756 (Bankr. E.D.N.C. 2009). Plaintiff must instead allege "the consideration received by each transferor [and] information as to why the value of such consideration was less than the amount transferred." Id. Adequate pleading therefore requires that Plaintiff provide information not only as to the value of the transfers made and obligations incurred, but details of the *value of the consideration provided to the transferor*. In re Trinsum Grp., Inc., 460 B.R. 379, 393 (Bankr. S.D.N.Y. 2011) ("The notes were executed in exchange for the repurchase of company stock, but there are no facts in the pleadings regarding how much the stock was worth at the time the transfers took place or how many shares of stock were transferred with respect to each promissory note. Without this information, it is impossible for the Court to reasonably infer whether the transfer was for less than reasonably equivalent value.").

Reasonable equivalence does not require exact equality in value, but means "approximately equivalent" or "roughly equivalent." BFP v. Resolution Trust Corp., 511 U.S. 531, 540 n.4 (1994). "For the consideration to be fairly equivalent to the value of the property transferred or obligation assumed, the exchange does not require exact equivalence." In re Old CarCo LLC, 454 B.R. 38, 52 (Bankr. S.D.N.Y. 2011), aff'd, No. 11 CIV. 5039 DLC, 2011 WL 5865193 (S.D.N.Y. Nov. 22, 2011), aff'd, In re Old Carco LLC, 509 F. App'x 77 (2d Cir. 2013) (noting that a "court need not strive for mathematical precision"). "The focus of the inquiry in both is the specific transaction the trustee seeks to avoid" and not "an analysis of the transaction's overall value to a debtor as it relates to the welfare of the debtor's business." In re Churchill Mortgage Inv. Corp., 256 B.R. 664, 678 (Bankr. S.D.N.Y. 2000), aff'd, 264 B.R. 303 (S.D.N.Y. 2001).

Here, for the reasons discussed at length above, the allegations of the Complaint fail to establish that reasonably equivalent value was lacking for the payments and obligations at issue. Instead, the Complaint's allegations of insufficient value or consideration are wholly conclusory and, thus, insufficient. (See, e.g., Compl. ¶¶ 102, 103, 110.) Numerous courts have held that regular payments to employees for services rendered, whether pursuant to a contract or to custom and practice, constitute reasonably equivalent value.

First, as stated above, the court in Jones Truck Lines held that (1) transfers are contemporaneous exchanges of new value where they are in exchange for continued labor by employees and (2) there is a presumption that labor and wages are equivalent in value. 130 F.3d at 327, 328 & n.4.

Second, in In re Churchill Mortgage Inv. Corp., the court held that "[t]he Debtors received 'value' in exchange for the commissions paid to the Brokers for performing in good

faith a facially lawful and customary service for which they were retained by the Debtors." 256 B.R. at 308. In Churchill, the defendants were brokers who were essential to the debtor's Ponzi scheme, and the court held that the proper focus of the constructive fraudulent transfer analysis was not on the fact that the brokers' efforts (unwittingly) exacerbated the debtor's insolvency. Instead, the focus was on the fact that "the Brokers in these cases were hired and paid to produce mortgages or investors. They produced and thereby gave value . . . ." In re Churchill Mortgage Inv. Corp., 256 B.R. at 680 ("The fact that all these transactions may be said to 'exacerbate the harm to creditors and diminish the debtor's estate' from an overall perspective does not mean that the debtor received less than reasonably equivalent value in respect of each particular transaction."). The court accordingly dismissed the claims against the brokers.

Third, in Cilco Cement Corp. v. White, 55 A.D.2d 668 (2d Dep't 1976), the court affirmed a judgment denying fraudulent transfer claims against an officer of a debtor. The court held that "no impropriety had been demonstrated" where the "corporate officer merely continued to draw his regular salary of long-standing, while devoting his best efforts to keeping the business 'afloat'." Id. at 669 ("There is, moreover, no evidence that his salary was either excessive or unreasonable, or that the corporation did not receive full value in return."). The court also noted that the defendant's salary had not changed from the previous year. Id. at 668. Here, Exhibit B to the Complaint makes clear that the salary and bonus payments made to Mr. DiCarmine and Mr. Sanders were consistent from year to year. The regular wage payments were identical week to week; the contractual bonus and trust payments were similarly the same year to year; and the discretionary bonuses were similar in amount year to year. Indeed, the pattern reaches back to the period before the merger, when Messrs. DiCarmine and Sanders worked at

the LeBoeuf law firm. Tellingly, the Complaint does not allege that they made significantly more at the combined Dewey firm than they had at LeBoeuf prior to the merger.

Fourth, in In re TC Liquidations LLC, 463 B.R. 257 (Bankr. E.D.N.Y. 2011), the court noted that "[c]ase law has established that payments of salary are presumed to be made for fair consideration, and in order for a trustee to avoid them he must establish that the salary payments were in bad faith or the payments were excessive in light of the Defendants' employment responsibilities." Id. at 268. There, the transfers were to four insiders and represented two years of salary increases. The court held that "Trustee has failed to establish that some or all of the salary increases were not warranted based upon the increased size and function of the Debtors, and Defendants' new roles in the company. In addition Trustee failed to establish that the salary increases were excessive or in bad faith." In re TC Liquidations LLC, 463 B.R. 257, 269 (Bankr. E.D.N.Y. 2011).

Finally, in In re Fin. Federated Title & Trust, Inc., 309 F.3d 1325 (11th Cir. 2002), the 11th Circuit reversed a lower court decision which had denied a § 548(c) defense to an employee of a Ponzi scheme. The court held, consistent with Churchill, above, that the relevant question was the value of the services provided by the defendant, regardless of whether the defendant had deepened the debtor's insolvency. See id. at 1333. ("[T]he district court is specially instructed that Orlick is not barred as a matter of law from attempting to demonstrate or prove at trial the value of the amount, if any, rendered by her to the debtor under Section 548(c), and whether or not this amount was rendered in good faith.").

Based upon the foregoing, the Complaint fails to establish that reasonably equivalent value was lacking for any of the payments or obligations at issue.

b. The Payments Were Made and the Obligations were Incurred in the Ordinary Course of Business.

For the reasons stated at Point II (B)(3), the Complaint fails to sufficiently plead that the Employment Agreements were non-ordinary course agreements or that the payments made thereunder were not made in the ordinary course of business for a law firm like Dewey. Accordingly, the payments and obligations were received by DiCarmine and Sanders in good faith on account of the employment services they provided to Dewey.

Accordingly, the Third and Fourth Claims for Relief fail and should be dismissed.

2. NYDCL.

"A transfer may be avoided under Debtor and Creditor Law . . . section 277 if made by a partnership of partnership property when the partnership is or will be thereby rendered insolvent if the transfer is made . . . to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners." In re Luis Elec. Contracting Corp., 149 B.R. 751, 757 (Bankr. E.D.N.Y. 1992)

a. Fair Consideration.

"Fair consideration" under NYDCL § 277 has the same fundamental meaning as "reasonably equivalent value" in § 548, discussed above, although "fair consideration" includes an additional requirement of good faith. In re Churchill Mortgage Inv. Corp., 256 B.R. at 677. As with reasonably equivalent value under § 548, fair consideration is a required element of a claim under NYDCL § 277 and not an affirmative defense. TLC Merch. Bankers, Inc. v. Brauser, 2003 WL 1090280, at*6 n.3.

Value

For the reasons stated at Point II (B)(1)&(2), the Complaint fails to sufficiently plead that the relevant transfers were made and/or obligations incurred for less than reasonably equivalent value, and, thus, fair consideration.

Good Faith

"Good faith is an elusive concept in New York's constructive fraud statute." In re Sharp Int'l Corp., 403 F.3d 43, 54 (2d Cir. 2005). While New York law recognizes an "insider" exception that creates a presumption that transfers to shareholders, officers, or directors on account of antecedent debt are presumed to be in bad faith and thus deemed to not be for fair consideration, see, e.g., id.; In re Trinsum Grp., Inc., 460 B.R. at 391, that presumption is rebutted here for two main reasons. First, the payments and obligations at issue were contemporaneous exchanges for new value, (see Point II (B)(1) above), that were made or incurred pursuant to the terms of the Employment Agreements for actual employment services rendered. Second, the payments were made pursuant to the express terms of the Employment Agreements. While the Complaint alleges that the Employment Agreements were somehow improper, such argument is irrelevant because (i) the Complaint fails to assert a claim to avoid the Employment Agreements, and (ii) the Employment Agreements were ratified by Dewey for the reasons stated at Point II (B)(3). Thus, the facts as alleged demonstrate that the payments were made and the obligations were incurred in good faith.

b. Insolvency.

As stated above, the relevant definition of insolvency for the Complaint's NYDCL cause of action (the Second Claims for Relief), like Plaintiff's First Claim for Relief under § 547, is balance sheet insolvency. See In re Trinsum Grp., Inc., 460 B.R. 379, 392

(Bankr. S.D.N.Y. 2011) (noting insolvency under NYDCL and Bankruptcy Code are "analogous"). Thus, to properly plead insolvency under NYDCL § 271:

> The "present fair salable value of [ ] assets" requires there to be an evaluation of the market value of the assets at the time the transfers took place. Additionally, there should be information as to the level of liquidity of the transferor's assets. Often, there is valuation provided of a company's assets or probable liabilities when trying to prove this element.

In re Trinsum Grp., Inc., 460 B.R. at 392 (citations omitted).

For the reasons stated at Points I and II (B)(4), Plaintiff fails to allege that Dewey was insolvent during the periods at issue and/or Plaintiff should be estopped from doing so.

D. The Complaint Fails to Plead its Non-Bankruptcy Claims.

The Fifth and Sixth Claims for Relief each seek declaratory judgments but offer no basis whatsoever for such relief. Indeed, the Fifth Claim for Relief seeks a declaratory judgment "by virtue of contract, operation of law, or otherwise." (Compl. ¶ 132.) The Sixth Claim for Relief seeks a declaratory judgment "for various reasons." (Id. ¶ 135.) These allegations fall far short of the pleading requirements of Rule 8, Iqbal and Twombly. Accordingly, they fail to sufficiently apprise Messrs. DiCarmine and Sanders of the basis of the allegations against them and should be dismissed.

III. PLAINTIFF'S CLAIMS MUST BE DISMISSED UNDER THE BUSINESS JUDGMENT RULE.

Plaintiff's claims fail for another reason -- they are barred in their entirety by the business judgment rule.

"The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." In re Perry H. Koplik & Sons, Inc., 476 B.R. 746, 795 (Bankr. S.D.N.Y. 2012) (applying the business judgment rule in a Chapter 11 adversary

proceeding) (internal quotation marks omitted). "To overcome the presumption of legitimacy accorded to business decisions…, the Second Circuit has held that a plaintiff must 'allege that the directors acted fraudulently or in bad faith; allegations of 'waste,' standing alone, will not be enough.'" Lippe v. Bairnco Corp., 230 B.R. 906, 916-17 (S.D.N.Y. 1999) (quoting Stern v. General Elec. Co., 924 F.2d 472, 476 (2d Cir.1991)). "[T]he complaint must set forth specific, well-pleaded facts and cannot rest on generalities," in order to avoid application of the business judgment rule on a motion to dismiss for failure to state a claim. In re Verestar, Inc., 343 B.R. 444, 460 (Bankr. S.D.N.Y. 2006). "Conclusory allegations of bad faith" are insufficient. Id. at 473. Rather, "[a] plaintiff bears the burden of alleging well-pleaded facts to overcome the [business judgment rule] presumption and survive a motion to dismiss" Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Investcorp, No. 97 CIV. 9261 (MGC), 1999 WL 754015, at *3-6 (S.D.N.Y. Sept. 24, 1999) (dismissing claim in adversary proceeding under the business judgment rule). Moreover, the business judgment rule applies to protect management decisions of a partnership. See, e.g., Weinberg v. Lear Fan Corp., 627 F. Supp. 719, 723 (S.D.N.Y. 1986).

The thrust of the Complaint is that the Trustee should be entitled to recover payments to Messrs. DiCarmine and Sanders "made pursuant to employment contracts that provide compensation far above the value of the services [that they] actually rendered to Debtor." (Compl. ¶ 1.) In this vein, the Trustee alleges that Dewey "failed to evaluate the reasonableness of the Employment Contracts in comparison to either the Debtor's financial plan or the prevailing market conditions"; "did not commission any compensation study to determine" a proper amount of compensation; and "did not seek out" other candidates that would work for less than Messrs. DiCarmine and Sanders. (Id. ¶ 48.) Instead, Plaintiff asserts, the amounts were

determined even before Dewey came in to existence, (Id. ¶ 47), when the Compensation Committee was attempting to reconcile the pay scales of Debtor's predecessors, LeBoeuf, Lamb, Greene & MacRae LLP and Dewey Ballantine LLP. (Id. ¶¶ 18-19.)

These allegations are insufficient to overcome the business judgment rule presumption accorded to Steven Davis and the Compensation Committee that set Mr. DiCarmine's and Mr. Sanders's pay scale. Significantly, the Complaint fails to allege that any director or officer of Debtor, or its predecessors, committed fraud or acted in "bad faith" in making these compensation decisions. The business judgment rule does not require, as Plaintiff alleges, professional studies on compensation before Mr. DiCarmine's and Mr. Sanders's pay was set. Nor does it require Dewey to reconsider its hiring decisions – a determination which unquestionably falls within Dewey's sound business judgment. The fact that Dewey set compensation in an effort to reconcile the existing pay scales of its predecessors also does not constitute fraud or bad faith. And, Plaintiff's bald assertions that the Employment Contracts were "one-sided," (Id. ¶ 49), or "not customary," (Id. ¶ 51), are insufficient to overcome the presumption.

Plaintiff has failed to allege any non-conclusory facts supporting a claim of bad faith or fraud to overcome the business judgment presumption. Accordingly, Plaintiff's claims must be dismissed in their entirety.

IV. THE PROOF OF CLAIM OBJECTIONS ARE MERITLESS.

The Complaint's objections to the Proofs of Claim fail for the reasons stated in the Claim Objection Responses, which are incorporated herein. Such objections also fail to satisfy the pleading requirements of Rule 8, Iqbal and Twombly for the additional reasons discussed below.

First, the Employment Agreements are not avoidable. The Complaint alleges only that the Employment Agreements are avoidable and/or cannot be enforced "for the reasons stated above." (Compl. ¶ 141.) However, there are no reasons "stated above" for such relief. The Trustee has not brought a claim to avoid the Employment Agreements or offered any basis to do so. To the extent the Trustee contends he has done so, the Employment Agreements themselves are not avoidable because they were provided in exchange for value – the provision of future employment services to Dewey – and in good faith for the reasons discussed above. In addition, the Complaint fails to even allege that Dewey was insolvent in 2007 when the Employment Agreements were executed, contending only that Dewey was insolvent "by at least January 1, 2009." (Compl. ¶ 33.) Thus, any claim under NYDCL § 277 would fail since, as stated above at Point II (B), insolvency is a required element of such a claim.

Second, the Complaint fails to plead how or why the Proofs of Claims' indemnification claims are on account of a securities claim against Dewey or an affiliate of Dewey, as is required to warrant subordination under § 510(b).

Third, for the reasons discussed at length above, the Complaint fails to allege a lack of reasonably equivalent value.

Finally, there is no basis to disallow the Proofs of Claim under § 502(d) because Messrs. DiCarmine and Sanders are not liable for the return of any property sought to be avoided by the Complaint for the reasons discussed above.

RESERVATION OF RIGHTS

Messrs. DiCarmine and Sanders reserve all of their rights and defenses at law, equity or otherwise, including the right to supplement the Motion or assert additional claims and defenses in this or any other matter.

CONCLUSION

For the foregoing reasons, Messrs. DiCarmine and Sanders respectfully submit that the Complaint should be dismissed in its entirety with prejudice.

Dated: May 1, 2014
New York, New York

HUGHES HUBBARD & REED LLP

By: */s/ Ned H. Bassen*
Ned H. Bassen
Kathryn A. Coleman
Christopher Gartman

One Battery Park Plaza
New York, New York 10004-1482
Telephone: 212-837-6000
Fax: 212-422-4726
bassen@hugheshubbard.com
kcoleman@hugheshubbard.com
gartman@hugheshubbard.com

Attorneys for Defendant Joel I. Sanders

BRYAN CAVE LLP

By: */s/ Kathryn E. Gebert*
Austin V. Campriello
Mary Beth Buchanan (Pro Hac Vice Papers to Be Filed)
Kathryn E. Gebert

1290 Avenue of the Americas
New York, New York 10104
Telephone: 212-541-2000
Fax: 212-541-4630
AVCampriello@bryancave.com
marybeth.buchanan@bryancave.com
kate.gebert@bryancave.com

Attorneys for Defendant Stephen DiCarmine