Hearing Date: October 2, 2014, at 2:00 p.m. (ET)
Opposition Deadline: September 2, 2014

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,*** **v.** **JOHN J. ALTORELLI,** ***Defendant.***	**Adversary No. 14-01015**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **DAVID R. GREENE,** ***Defendant.***	**Adversary No. 14-01797**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **WILLIAM C. MARCOUX,** ***Defendant.***	**Adversary No. 13-01687**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **L. LONDELL McMILLAN,** ***Defendant.***	**Adversary No. 13-01772**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **STEVEN P. OTILLAR,** ***Defendant.***	**Adversary No. 14-01818**

ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **ANTHONY W. SHAW,** ***Defendant.***	**Adversary No. 13-01771**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **MICHAEL STEELE,** ***Defendant.***	**Adversary No. 14-01795**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **RONALD W. ZDROJESKI,** ***Defendant.***	**Adversary No. 14-01794**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, ***Plaintiff,*** **v.** **TERRENCE MAHONEY,** ***Defendant.***	**Adversary No. 14-01817**

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The above-named defendants ("Defendants") submit this memorandum of law in support of their motion for summary judgment on the second and fourth claims for relief, and partial summary judgment on the first and third causes of action in the above-captioned proceedings.

PRELIMINARY STATEMENT

Defendants formerly practiced law with, and were denominated as "partners" in the law firm of Dewey & LeBoeuf ("Dewey"), a registered limited liability partnership ("LLP"). Each devoted his full-time professional efforts to the firm and its clients.[1] Each conferred great value to the firm, and its creditors, in the form of billable hours, business generation, fees collected, marketing, and client and practice development. In exchange for working for the firm, each received compensation well below the value that their efforts generated for the firm. If the efforts that gave rise to the compensation at issue[2] had not been made by Defendants, the firm, and its creditors, would not have received the fees those efforts generated, and the value of the estate would have been greatly diminished.

Alan Jacobs, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust (the "Trustee"), contends that, under 11 U.S.C. § 548(b) ("Section 548(b)") and Section 277 of the New York Debtor and Creditor Law ("NYDCL"), Defendants have strict liability to repay to Dewey's bankruptcy estate every cent paid to them as compensation during the period of the firm's alleged insolvency. Under the Trustee's theory, each Defendant worked for free, and, for purposes of determining their liability for purported fraudulent transfers, the value of their professional contribution to the firm is irrelevant simply because they were "partners" in the LLP. In doing so, the Trustee seeks to retain the benefit of the fees that Dewey collected as a result of Defendants' hard work while, at the same time, recovering from Defendants every

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[1] Under the Dewey partnership agreement, each was prohibited from taking outside employment or engaging in any other business without the written consent of the firm's Executive Committee.
[2] For several of the Defendants, the compensation received was far less than what Defendants were entitled to.

penny of the compensation paid to Defendants to secure those fees. In sum, the Trustee's theory seeks a windfall that runs directly counter to the core purpose of fraudulent transfer claims – to prevent depletion of an insolvent debtor's estate.

The Trustee's theory ignores a critical distinction in this case – that Dewey was an LLP and that each of the Defendants was no more than a limited liability partner. Neither Section 548(b) nor NYDCL 277 applies to transfers by an LLP. The reach of Section 548(b) is expressly limited to transfers from a "partnership debtor . . . to a general partner in the debtor." Section 101(9) of the Bankruptcy Code defines a "corporation" to include "a partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association." Thus, under the Bankruptcy Code, a limited liability partnership is a "corporation," not a "partnership." Likewise, Section 277 of the NYDCL ("NYDCL 277") applies, at most, to a "partner," not a limited liability partner. Indeed, at the time that Section 548(b) and NYDCL 277 were enacted, limited liability partnerships did not exist under New York law.

Claims for recovery under Section 548(b) and NYDCL 277 are grounded on the fact that a general partner in a partnership is personally liable for the debts of the partnership. Thus, when defining the methodology for determining solvency of a "partnership," both the Bankruptcy Code and the NYDCL require that the fair value of the net assets of each general partner be included as an asset for purposes of solvency, since each general partner is jointly and severally liable for the unpaid debts of the partnership. *See* 11 U.S.C. 101(32)(B)(ii); NYDCL 271. That methodology makes sense only when the general partner's assets can be reached by creditors. By contrast, Dewey's partnership agreement incorporated verbatim the extensive protections of New York's limited liability partnership law; in which individual partner assets are not available to creditors. In the case of an LLP like Dewey, only the firm's assets are considered when

considering solvency because only the firm's assets are available to pay creditors. It is thus wrong as a matter of law to apply to partners in an LLP remedies such as Section 548(b) and NYDCL 277, which relate to partnerships that have a different solvency standard than LLPs.

The Court should not elevate form over substance when considering whether Defendants are entitled to a fair value defense for their financial contributions to the firm. Though Defendants were nominally "partners" of Dewey, the substance of their relationship to the firm was that of a professional service provider to an employer. They were not passive investors in the firm and they had no interest in the firm that they could sell, assign, or otherwise alienate. To the extent they had an "equity" interest in the firm, that interest was adjusted each year, in the sole discretion of the firm's Executive Committee, based on the Defendants' contributions to the firm and its clients. If the Defendants did not work, and did not generate billable hours and fees,[3] they could not be compensated, and could be terminated from their "partner" positions. If the partner left the firm to seek other employment, any interest he or she might have in the firm evaporated with the departure. Whether denominated as draws and distributions, or incentive-based salary[4] and bonuses, the substance of the relationship was the same – Defendants were compensated for their work for the firm and its clients, not for the value of their "equity."

Finally, with respect to partners that had left the firm or were terminated prior to the Debtor's bankruptcy, the Trustee has claimed that payments made to satisfy antecedent debts to departed partners under the DLPA are avoidable as fraudulent conveyances. They are not; rather, these were unavoidable payments of antecedent debt. To accord creditors the benefit of (i) payments on antecedent debt that reduced the claims pool, (ii) fees generated and other

[3] In addition to billable hours and fee generation, Defendants contributed value to the firm in myriad other ways, including, but not limited to, marketing, recruitment, firm administration, and client and practice development.
[4] Certain of the Defendants, including Steven Otillar, were employed by Dewey pursuant to an offer letter that included a fixed monthly draw. That draw was guaranteed, not incentive-based.

partner contributions to the firm, and (iii) the compensation paid to secure such services would remain at Dewey, would result in an enormous windfall that runs directly counter to the equitable principles of the Bankruptcy Code.

For these reasons, the Court should grant Defendants summary judgment on the Trustee's second and fourth claims for relief pursuant to 11 U.S.C. § 548(b) and NYDCL § 277 because neither 11 U.S.C. § 548(b) nor NYDCL § 277 applies to Defendants as a matter of law; or alternatively, grant partial summary judgment on the fourth claim for relief finding that each Defendant is entitled to a credit for fair consideration provided pursuant to NYDCL § 278. In addition, the Court should grant partial summary judgment on the Trustee's first and third claims for relief finding that, with respect to the Trustee's claims under 11 U.S.C. § 548(a)(1)(B), NYDCL §§ 273-75, ,and NYDCL § 278, Defendants are entitled to a credit against any liability equal to the fair value of their billable hours worked, business generated, fees collected, marketing, and client and practice development, and antecedent debts paid.

FACTUAL BACKGROUND

Dewey & LeBoeuf LLP ("Dewey") was a law firm created on October 1, 2007, through a merger between two prominent firms: Dewey Ballantine LLP and LeBoeuf Lamb Greene & McRae LLP.[5] Dewey & LeBoeuf eventually comprised more than 1,300 lawyers working in twenty-six offices throughout the world.[6]

Dewey was organized as a registered limited liability partnership ("LLP") under the Partnership Law of the State of New York ("Partnership Law").[7] The firm's Partnership

[5] Adversary Complaint and Objection to Proof of Claim No. 1044 ("Altorelli Complaint"), ¶ 10. All the adversary complaints filed against the Defendants contain substantially the same allegations. Unless otherwise noted, each citation to the Altorelli Complaint is meant to represent the analogous allegation in the adversary complaints filed against the other Defendants.
[6] Declaration of Jonathan A. Mitchell Pursuant to Local Bankruptcy Rule 107-2 and In Support of Chapter 11 Petition and First Day Motions, *In re Dewey & LeBoeuf LLP*, No. 12-12321 (Bankr.S.D.N.Y.May 28, 2012) ¶¶ 8,20.
[7] Altorelli Complaint, ¶ 11; DLPA § 1.6.

Agreement ("DLPA") set forth each partner's rights and obligations vis-à-vis one another and the firm. However, the DLPA expressly authorized the Executive Committee to approve unique compensation arrangements for individual partners, which could involve fixed and/or incentive-based salary structures.[8]

Under the DLPA, the top of Dewey's management structure was the Chairman, Stephen H. Davis ("Davis"), whose initial term was to last for five years.[9] As Chairman, Davis was responsible "for the day-to-day management of the business of the Firm."[10] Although there was an Executive Committee over which Davis presided, between meetings Davis had the power to take most actions the Executive Committee could take.[11] The Executive Committee was responsible for "general management and governance," including, among other duties,[12]

- Making all decisions with respect to changes in the scope or nature of the Firm's practice, including, without limitation, (i) acquisition or disposal of premises; (ii) opening or closing of offices; (iii) entering into or withdrawing from practice areas; and (iv) a Merger or affiliation with other law firms
- [M]aking all financial, personnel and operating decisions for the business of the Firm, including without limitation with respect to borrowing of money [and] making capital expenditures.[13]
- Determining how much capital each partner was required to contribute.[14]

Outside the Executive Committee, partners had little say in the management or operation of the firm. Except for a few major decisions like whether to dissolve the firm or merge it with another firm, partners did not have rights to vote on decisions of the firm.[15]

The Executive Committee could (and did) delegate its powers to the firm's Chairman

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[8] DLPA § 6.5(a).
[9] DLPA § 4.6(b). Davis remained Chairman until April 3, 2012. Per an amendment to the DLPA dated April 3, 2012, the Chairman position was replaced by a five member Office of the Chair, consisting of Davis and four other members.
[10] DLPA § 4.6(a).
[11] DLPA § 4.6(a).
[12] DLPA § 4.1.
[13] DLPA §§ 4.3(i), 4.3(j).
[14] DLPA § 5.1.
[15] *See* DLPA § 4.2.

(Davis).[16] Davis was empowered to "designate all of the initial non-legal executive and administrative positions of the Firm, which he did, in part, by appointing Steve DiCarmine ("DiCarmine") as the Debtor's Executive Director and Joel Sanders ("Sanders") as the Debtor's CFO."[17] Davis, DiCarmine and Sanders managed Dewey with little or no oversight.[18]

Despite their title of "partner," the DLPA did not grant Defendants rights typical of an equity partner. Partners under the DLPA were required to devote their full time to the firm and could not take outside employment without written consent of the firm's Executive Committee.[19] Partners could be terminated without cause, as long as the Executive Committee secured the concurrence of the partners whose Participation Targets constituted the majority of the sum of all Participation Targets.[20] And no partner could obligate the firm or transfer firm assets without the written consent of the Executive Committee.[21] When partners left the firm, the DLPA gave them only their capital contribution and a prorated amount of the income they were set to earn during the year they left.[22] They were no longer entitled to share any profits or vote on firm matters.

Similarly, a partner's "interest" in the firm did not have features typical of an "equity interest." No partner could transfer his or her interest in the firm or any distributions or payments from the firm.[23] A partner's percentage interest was not based on their capital contributions to the firm. The reverse was true: partners' capital contributions were calculated as a fraction of their Participation Targets.[24] A partner's Participation Target was based upon his or

[16] *Jacobs v. DiCarmine, et al.*, Case No. 13-ap-01765 (Bankr. S.D.N.Y.), First Amended Complaint [Dkt. 21] ("DiCarmine Cplt."), ¶ 82.
[17] *Id.*, at ¶ 82.
[18] *Id.*, at ¶ 83.
[19] DLPA § 3.1.
[20] DLPA §§ 4.3(d), 7.4(b).
[21] DLPA § 3.4.
[22] DLPA § 7.6(a).
[23] DLPA § 10.3.
[24] DLPA § 5.1.

her "contributions to the Firm and its clients."[25] A partner's percentage interest in the firm was a ratio of that partner's Participation Target relative to the Participation Target of all other partners.[26] Partners' "equity" interest in the firm fluctuated annually: every year, the Executive Committee set a Participation Target for each partner, and that Participation Target determined what the partner would receive of the firm's overall income from that year.[27] Thus, if a partner made a lesser contribution to the firm and its clients relative to the prior year, his "Participation Target" would go down; and, if he or she made a greater contribution, it would go up. A partner's "equity" was merely a reflection of the approximate value of the work that he or she performed on behalf of the firm relative to the work performed by other partners.

The DLPA gave the Executive Committee (and by delegation, Davis) discretion over how to compensate partners for their work for the firm. In addition to the base level of compensation, each partner was eligible to receive a bonus, the amount of which was determined by the Executive Committee.[28] With the concurrence of a majority of partners, the Executive Committee could cause any "Partner" to become a "Salaried Partner," which designation excluded such partner from any profit or loss sharing.[29] A "Partner" would, ordinarily, share in losses to the extent of his Capital Account or Income Account,[30] and, as discussed above, share in profits to the extent of his job performance relative to other partners. However, the Executive Committee could alter, or entirely eliminate, the right of a "Partner" to share in the profits of the firm.[31] In particular, Section 6.5 of the DLPA allowed the Executive Committee to compensate partners at a fixed rate, and with varying degrees (or no) loss-sharing.

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[25] DLPA § 6.1.
[26] DLPA § 2.1 (definition of "Percentage Share").
[27] DLPA § 6.1. There was a separate transition arrangement for calendar year 2007. *See* DLPA § 6.1; DLPA Appendix 1.7.
[28] DLPA § 6.2. *See* Altorelli Complaint, ¶ 27 (describing the firm's payment of bonuses to partners).
[29] DLPA § 4.10.
[30] DLPA § 6.4(d).
[31] DLPA § 6.5(a).

Although Defendants enjoyed few rights under the DLPA, their obligations were commensurately limited. The DLPA incorporated wholesale the liability protections of New York's law on LLPs – New York Partnership Law § 26. Specifically, the DLPA provided:

> [N]o partner shall be liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the Firm or any Partner, whether arising in tort, contract or otherwise, which are incurred, created or assumed by the Firm while the Firm is a registered limited liability partnership, solely by reason of being such a Partner or acting (or omitting to act) in such capacity or rendering professional services or otherwise participating in the conduct of the other business or activities of the Firm, except out of and to the extent of amounts then available in his Income Account or Capital Account. . . .[32]

The DLPA emphasized that by directly incorporating the protections of New York Partnership Act § 26, those protections applied to the firm's partners "to the fullest extent possible under law and applicable rules of relevant licensing authorities for attorneys."[33]

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[34] Partial summary judgment may be granted for each claim as to which there is no genuine dispute over a material fact.[35]

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED ON THE TRUSTEE'S SECOND CLAIM FOR RELIEF BECAUSE SECTION 548(B) DOES NOT APPLY TO LIMITED LIABILITY PARTNERSHIPS.

The Trustee's second claim for relief depends upon a misapplication of Section 548(b) of the Bankruptcy Code.[36] A transfer by a "partnership debtor" is subject to avoidance if:

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[32] DLPA § 6.4(d).
[33] DLPA § 6.4(d).
[34] Fed. R. Civ. P. 56(c). *See* Fed. R. Bankr. P. 7056 (applying Fed. R. Civ. P. 56 to adversary complaints).
[35] Fed. R. Civ. P. 56(c).
[36] Altorelli Complaint, ¶ 66.

> [the] transfer [is] of an interest of the debtor in property . . . to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.[37]

11 U.S.C. § 548(b). Therefore, to prevail on this claim, the Trustee must establish, among other things, that Dewey is a "partnership" within the meaning of the Bankruptcy Code, and that Defendants were "general partners" of Dewey. The Trustee cannot make either of these showings, and its second claim for relief must be dismissed as a matter of law.

A. The Debtor is Not a "Partnership Debtor" Under 11 U.S.C. § 548(b).

The Bankruptcy Code treats an entity as a corporation rather than as a partnership if the entity is "organized under a law that makes only the capital subscribed responsible for the debts of such association."[38] That is true of LLPs under New York law, which provides that:

> No partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such partner or acting (or committing to act) in such capacity or rendering professional services or otherwise participating (as an employee, consultant, contractor or otherwise) in the conduct of the other business or activities of the registered limited liability partnership.[39]

New York courts have recognized that this provision "eliminated the vicarious liability" of partners for any third-party debts of the partnership.[40] Because partnerships registered under § 26(b) of the Partnership Law limit partners' liability "only [to] the capital subscribed," these partnerships are to be treated as corporations under the Bankruptcy Code.

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[37] 11 U.S.C. § 548(b).
[38] 11 U.S.C. § 101(9)(A)(ii).
[39] N.Y. P'SHIP LAW § 26(b).
[40] *Ederer v. Gursky*, 9 N.Y.3d 514, 523 (2007). *See also Edlinger v. United States*, 3:10-cv-148, 2010 WL 1485951, *3 (N.D.N.Y. Apr. 14, 2010) (invoking New York Partnership Law and granting summary judgment dismissing claim that partner in LLP was vicariously liable).

Moreover, the Bankruptcy Code has a separate test for "partnership" solvency that does not make sense when applied to an LLP. The general solvency test for entities other than partnerships is that the "sum of such entity's debts is greater than all of such entity's property, at a fair valuation."[41] By contrast, the test for partnership solvency adds to the asset side of such test "the sum of the excess of the value of each general partner's nonpartnership property . . . over such partner's nonpartnership debts." Since both solvency tests cannot apply to the same entity, and an LLP partner is not liable for the LLP's debts, an LLP must be a corporation, not a partnership, for purposes of Section 548(b) of the Bankruptcy Code.

Analyzing a limited liability statute substantially similar to New York's, the bankruptcy court in *In re Rambo Imaging LLP* found that an LLP fell within the definition of "corporation" contained in 11 U.S.C. § 101(9)(A)(ii).[42] The court held that "[b]y defining 'corporation' to include such partnerships, Congress apparently intended that such LLPs would be treated as corporations and not as partnerships under the Code."[43] Likewise, the bankruptcy court in *In re Beltway Law Group, LLP* recently dismissed an involuntary petition filed against an LLP, finding that the debtor was a corporation, rather than a partnership, under the Bankruptcy Code.[44] The court explained that a bankruptcy court is not bound by state law labels in determining whether a debtor is a "partnership" or "corporation". Rather, for bankruptcy purposes, an entity is a "corporation" unless at least one of the putative partners is personally liable for the debts of the entity.[45] Similarly, federal courts have held that limited liability companies, which limit members' liability in ways similar to LLPs, are "corporations" under the Bankruptcy Code.[46]

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[41] Contrast 11 U.S.C. §101(32)(A) with11 U.S.C. §101(32)(B)
[42] 07-11190-FRM, 2008 WL 2778846, *6-7 (Bankr. W.D. Tex. July 15, 2008).
[43] *Id.*, at *6.
[44] *In re Beltway Law Group, LLP*, No. 14-00380, 2014 WL 3882424, *3 (Bankr. D.D.C. Aug. 6, 2014).
[45] *Id.* at * 1-2.
[46] *See In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 n.1 (7th Cir. 2011); *Gilliam v. Speier (In re KRSM Props., LLC)*, 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004).

Dewey was exactly the kind of organization contemplated by 11 U.S.C. § 101(9)(A)(ii). The firm's governing document not only quoted verbatim New York Partnership Law § 26 but also stated expressly that the protections of that statute were to apply to Dewey partners – including Defendants – to the fullest extent possible.[47] Moreover, when filing its voluntary petition for bankruptcy, Dewey classified itself as a "Corporation" rather than a "Partnership."[48]

Thus, under federal bankruptcy jurisprudence, and by Dewey's own reckoning, Dewey falls within the Bankruptcy Code's definition of "corporation" and, accordingly, falls outside the scope of § 548(b).

B. Defendants are not "General Partners" Under 11 U.S.C. § 548(b).

Apart from Dewey's status as a "corporation" under the Bankruptcy Code, Defendants are not "general partners" under 11 U.S.C. § 548(b). General partners are jointly liable for a partnership's debts.[49] By contrast, a limited partner does not have liability for a partnership's debts and does not participate in the management of the partnership.[50] In 1994, the New York legislature amended the state's partnership law to create a third type of partnership – the limited liability partnership.[51] LLPs limit their partners' liabilities for partnership debts and obligations in the same way that limited partners' liabilities traditionally were limited.[52]

As the Court explained in *In re Promedicus Health Group., LLP*,[53] "the universe of types of partner in New York consists of general partners, limited partners, and partners in a registered

[47] DLPA § 6.4(d).
[48] *In re Dewey & LeBoeuf LLP*, No. 12-12321 (Bankr. S.D.N.Y.), [Dkt. 1] (Official Form 1 ("Voluntary Petition")).
[49] *See* N.Y. P'SHIP LAW § 26(a) (providing for partners' joint liability for "debts and obligations of the partnership"); N.Y. P'SHIP LAW § 98(1) (providing that a general partner is "subject to all the restrictions and liabilities of a partner in a partnership without limited partners"). *See also Ederer v. Gursky*, 9 N.Y.3d 514, 521-22 (2007) (recognizing that "general partners are jointly and severally liable to nonpartner creditors for all wrongful acts and breaches of trust committed by their partners in carrying out the partnership's business, and jointly liable for all other debts to third parties").
[50] N.Y. P'SHIP LAW §§ 90, 96.
[51] *See Ederer*, 9 N.Y.3d at 522-24 (describing passage of limited liability legislation in New York).
[52] *See* 1994 Sess. Law News of N.Y. Ch. 576 (S-7511A, A. 11317-A), § 8 (amending New York Partnership Law § 26 to limit partners' liability for partnership debts and obligations of a limited liability partnership).
[53] 416 B.R. 389, 391 (Bankr. W.D.N.Y. 2009).

limited liability partnership."[54] In *Promedicus*, as here, the debtor was a New York limited liability partnership,[55] and so its partners necessarily were not "general partners" under the Bankruptcy Code.[56] Rather, the partners fell into the Court's third category – partners in a registered limited liability partnership.

The undisputed facts of this case lead to the same result. Defendants were not "general partners;" they were, at most, partners of a New York LLP. Thus, the Trustee cannot rely on 11 U.S.C. § 548(b), and his claim for relief under that section must be dismissed as a matter of law.

Recent case law in this district bolsters Defendants' position. *Geron v. Fontana (In re Thelen LLP)*, No. 11-02648, 2014 Bankr. LEXIS 2304 (Bankr. S.D.N.Y. May 23, 2014). In *Thelen*, former partners of a limited liability partnership were sued to avoid and recover fraudulent transfers. *Id.* at *5. Judge Gropper found that former partners of an LLP were entitled to avail themselves of a fair consideration/reasonably equivalent value defense and present evidence of services they performed on behalf of the partnership. *See id.* at *19-20. The Defendants here should be permitted the same opportunity. While Bankruptcy Code § 548(b) was not expressly addressed in the decision, Judge Gropper was clearly aware of it, but nevertheless permitted partners to introduce evidence of reasonably equivalent value/fair consideration outside of the points allocated under the partnership agreement on account of their work contributions to the firm.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON THE TRUSTEE'S FOURTH CLAIM FOR RELIEF BECAUSE NYDCL 277 DOES NOT APPLY TO LIMITED LIABILITY PARTNERSHIPS.

In his fourth claim for relief, the Trustee seeks to recover all compensation Dewey paid to the Defendants between January 1, 2009, the alleged date of Dewey's insolvency, and May 28,

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[54] *Id.* at 391.
[55] *Id.* at 390.
[56] *Id.* at 392.

2012 (the "Petition Date"), regardless of any value Defendants provided the firm during that time. In pursuit of his "strict liability" theory, the Trustee relies on Sections 277 and 278 of the NYDCL (through Section 544 of the Bankruptcy Code). Under the Trustee's theory, a partner who worked long hours, generated fees, or provided other value for the firm well in excess of his compensation has no greater defense than a partner paid despite sitting idle in his office.

Section 277 of the NYDCL was not meant to be applied to payments made to partners of a limited liability partnership. NYDCL 277 was enacted over 65 years before an LLP existed under New York law. At the time, only "limited partnerships" and "partnerships" existed under the New York Partnership Law. While NYDCL 277 authorizes recovery of transfers made by a partnership during a period of insolvency, the definition of insolvency includes the net assets of the partners, which would only be relevant as to general partners, whose individual assets are available to satisfy claims against the partnership. Thus, it is not surprising that there is not a single case under NYDCL 277 providing for recovery of a payment made to a limited partner or limited liability partner. With respect to payments made to partners of an LLP, a claim to recover a purportedly fraudulent transfer lies only under NYDCL 273-275, which govern fraudulent conveyances generally. Thus, the Trustee's claims based on NYDCL 277 must fail.

A. NYDCL 277 Applies Only Where Partners Are Jointly Liable for Partnership Debts.

Section 277 of the New York Debtor and Creditor Law was passed in 1925[57] and tracks Section 8 of the Uniform Fraudulent Conveyance Act.[58] Section 277 provides:

> Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

[57] See N.Y. DEBT. & CRED. L. § 277 (MCKINNEY 2014) (noting that the statute was passed in 1925).
[58] *See* N.Y. DEBT. & CRED. L. § 277 (MCKINNEY 2014) (noting that the statute was passed in 1925); 1938 Leg. Doc. No. 65A, 1938 Report, Recommendations and Studies, pp. 458-59 (noting that the wording of NYDCL § 277 was "taken verbatim from the Uniform Fraudulent Conveyance Act"); Unif. Fraudulent Conveyance Act § 8 (1918).

> a. To a partner, whether with or without a promise by him to pay partnership debts, or
>
> b. To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.[59]

At the time this language was adopted, New York recognized two types of partnership: partnerships and limited partnerships.[60] Partners (and general partners in limited partnerships) were jointly liable for partnership debts and obligations,[61] whereas limited partners were not personally liable for partnership obligations.[62]

NYDCL 277(a) and UFCA § 8(a) were not meant to impose on limited liability partners the draconian result urged by the Trustee. Rather, they were meant to address a specific scenario relevant where partners were jointly liable for a firm's debts. In that scenario, a partner in a dissolving partnership would sell his interest in the partnership to a single co-partner, who in return would promise to pay the partnership's debts.[63] In this way, the assigning partner could effectively convert claims on the partnership to individual claims on the remaining partner, so that satisfaction of partnership creditors' claims was limited to the assets of one partner.[64] By prohibiting assignments of partnership interests "with or without a promise by [a partner] to pay partnership debts," UFCA § 8(a) and NYDCL 277(a) were intended to preserve the availability of the general partner's assets to pay partnership creditors.[65]

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[59] N.Y. DEBT. & CRED. L. § 277(a). Under Section 278 of the New York Debtor Creditor Law, which the Trustee also invokes, fraudulent conveyances may be set aside. N.Y. DEBT. & CRED. L. § 278(1).

[60] *See* N.Y. P'SHIP LAW § 90 (noting statute was passed in 1922 and defining limited partnership); *compare* N.Y. P'ship Law § 10 (noting statute was passed in 1919 and defining partnership).

[61] *See* N.Y. P'SHIP LAW § 26(1)-(2) (MCKINNEY 2014) (noting the statute was passed in 1919 and imposed liability for partnership debts and obligations on partners); *id.* § 98(1) (MCKINNEY 2014) (noting the statute was passed in 1922 and providing that general partners were subject to "all the restrictions and liabilities of a partner in a partnership without limited partners").

[62] *See* N.Y. P'SHIP LAW § 90 ("The limited partners as such shall not be bound by the obligations of the partnership.").

[63] *See Remedies in Bankruptcy of Partnership Creditors on Transfer of Firm Assets to One Partner*, 49 YALE LAW J. 686, 694 (1939-40), at 686-87.

[64] *See id.*, at 687, 694.

[65] *See id.*, at 694.

The limitation of NYDCL 277(a) to general partners is consistent with the statutory definition of insolvency, which requires the net assets of partners be included in the partnership's assets for purposes of determining the date of insolvency. The UFCA and NYDCL both provide:

> In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.[66]

General partners' net assets were included as partnership assets when determining solvency because in traditional partnerships, individual partners' assets were ordinarily available to satisfy partnership debt. By contrast, the assets of a limited liability partner are not available to creditors. And although the definition of "insolvency" also refers to "limited partner[s]," LLPs do not include limited partners, by express statutory definition.[67] Thus, the NYDCL's definition of partnership "insolvency" simply does not contemplate an entity like an LLP, and NYDCL 277 cannot apply to payments made to limited liability partners. Rather, in order to recover payments made to limited liability partners, the Trustee must establish that the transfer was fraudulent under NYDCL 273, 274 or 275.

B. LLP Partners Are Not Jointly Liable for The Partnership's Debts.

Long after the NYDCL and UFCA were drafted, the "classic partner joint and several liability rule" that informed those statutes was "altered dramatically" by the establishment of LLPs,[68] an entity that did not exist in 1925. Although LLPs were a kind of partnership, they were characterized, and distinguished from traditional partnerships, by "corporate-styled limited

[66] UFCA § 2(2); N.Y. DEBT. & CRED. L. § 271(2).
[67] N.Y. P'SHIP L. § 2 (McKinney 2014) (defining "Registered Limited Liability Partnership" to mean a "partnership without limited partners" registered as an LLP).
[68] Carter G. Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act (1994)*, 53 BUS. LAW. 101, 101, 112 (1997).

liability."[69] New York's LLP statute, codified in 1994,[70] represented a particularly sharp break with the traditional partnership form.[71] Partners in a New York LLP are not "liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise."[72]

In light of the express liability protections afforded to partners of New York LLPs, the fundamental assumption of NYDCL 277(a) does not apply. Because the net assets of LLP partners are not available to creditors, LLPs cannot fit within the NYDCL's definition of partnership "insolvency." As a result, LLPs fall outside the scope of NYDCL § 277.

C. Even if NYDCL 277 Applied to LLPs, NYDCL 278 Exempts The Transfers At Issue from Recovery to The Extent Defendants Provided Fair Consideration Therefor.

Because New York LLPs do not fall within the ambit of NYDCL 277, the Trustee can proceed against Defendants only pursuant to NYDCL 273-275. As explained in Section III below, NYDCL 273-275 treat conveyances as fraudulent only if they are made without receiving fair consideration in return. The Trustee cannot carve out the fair consideration defense embodied in these sections by attempting to fit LLPs into NYDCL 277, which did not contemplate recoveries except in the context of general partnerships.

But even if NYDCL 277 applied to LLPs, Defendants would still be entitled to a fair consideration credit pursuant to NYDCL 278. NYDCL 273-275 and 277 govern whether a transfer at issue is "fraudulent," but do not determine how much of a fraudulent transfer can be recovered. Rather, if a transfer is fraudulent under NYDCL 277, to be recovered, the

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[69] *See id.*, at 112.
[70] *See* 1994 Sess. Law News of N.Y. Ch. 576 (S-7511A, A. 11317-A)
[71] *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1087-88 (1995) (assimilating New York's LLP legislation to Minnesota's "revolutionary" LLP legislation).
[72] N.Y. P'SHIP LAW § 26(b).

requirements of NYDCL 278 must be met.[73] Thus, in both his third and fourth claims for relief, the Trustee includes a claim for recovery of the transfer under NYDCL 278. NYDCL 278 provides that:

> 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, **as against any person except a purchaser for fair consideration without knowledge of the fraud** at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or b. Disregard the conveyance and attach or levy execution upon the property conveyed.
>
> 2. **A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.**

(Emphasis added). Thus, NYDCL 278 provides that, even if the transfers at issue were fraudulent under NYDCL 277, so long as Defendants did not have actual fraudulent intent, they are entitled to a credit for the value they conferred. NYDCL 278 does not distinguish between payments to partners versus payments to non-partners. Thus, the fair consideration defense applies in the context of both. By including NYDCL 278 in his fourth claim for relief, the Trustee recognizes that, regardless of whether a conveyance is fraudulent under NYDCL 277, it cannot be set aside to the extent fair consideration was provided in exchange.[74]

In light of the foregoing, it is not surprising that not a single New York court has held that a payment to a limited liability partner can be recovered under NYDCL 277(a). Moreover, cases considering claims under the UFCA consistently recognize the availability of a fair consideration defense, as part of the principle that fraudulent conveyance claims are meant to protect against depletion of a debtor's estate.[75]

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[73] In this respect, the relationship between NYDCL 277 and NYDCL 278 is analogous to the relationship between 11 U.S.C. § 548 and 11 U.S.C. § 550.

[74] *See* N.Y. DEBT. & CRED. L. § 278 (providing that fraudulent conveyances may be set aside "except [as to] a purchaser for fair consideration").

[75] *See, e.g., Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp.1260 (S.D.N.Y 1991) (recognizing that

As discussed above, the Bankruptcy Code recognizes that an LLP partner is more akin to a shareholder in a corporation than a general partner of a partnership. Thus, an LLP is included in the definition of a "corporation" for Bankruptcy Code purposes. Bankruptcy courts have declined to hold as fraudulent conveyances transfers by corporations to shareholders who provide value to their corporations in the form of services.[76] Since LLPs are treated as "corporations" under the Bankruptcy Code, the same principle should apply here. The New York Court of Appeals has recognized that the provisions of New York's LLP law treat limited liability partners essentially as corporate shareholders for liability purposes.[77] Accordingly, the Defendants are entitled to the same credit for the value of their services.

D. <u>A Failure to Consider the Value the Defendants Conferred to Dewey Would Confer An Unwarranted Windfall on Creditors.</u>

As the court in *In re Metro Water & Coffee Services* held when analyzing the Bankruptcy Code and the New York Debtor and Creditor Law:

> The fraudulent conveyance statutes are intended to prevent an insolvent or undercapitalized debtor's estate and its creditors from being wrongfully deprived of assets which could be otherwise utilized for the payment of creditors. They are not intended to insure that creditors will never be deprived of a valuable asset.[78]

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elements of fraudulent conveyance under Uniform Fraudulent Conveyance Act, as adopted by New York, include that conveyance was made without fair consideration); *Gasser v. Infanti Intern. Inc.*, 353 F.Supp.2d 342, 354 (E.D.N.Y. 2005) (holding that "hallmarks" of valid conveyance under New York law are exchange made in return for fair equivalent and good faith); *In re Pine Co., LLC* (Bankr. S.D.N.Y. 2004), 317 B.R. 276, 286 (recognizing that lack of fair consideration is element of fraudulent conveyance claim); *In re Tronox, Inc.*, 464 B.R. 606, 612 (Bankr. S.D.N.Y. 2012) (recognizing that fraudulent transfer law generally permits avoidance of transactions that "improperly deplete a debtor's assets"); *In re S.W. Bach & Co.*, 435 B.R. 866, 875 (Bankr. S.D.N.Y. 2010) (recognizing that fraudulent transfer law is targeted at "transactions which unfairly or improperly deplete a debtor's assets") (citation omitted).

[76] *See In re Metropolitan Steel Fabricators, Inc.*, 191 B.R. 150, 154(Bankr. D. Minn. 1996) (rejecting fraudulent conveyance claim against shareholders who had received payments for services pursuant to consulting agreement); *In re North American Dealer Group, Inc.*, 62 B.R. 423, 429-30 (Bankr. E.D.N.Y. 1986) (rejecting fraudulent conveyance claim against shareholder who had received payment in exchange for performed services for leading the debtor's sales team).

[77] *See Ederer v. Gursky*, 9 N.Y.3d 514, 524 (2007) (recognizing that New York's LLP statute "does, in fact, afford limited liability partners the same protection from third-party claims as New York law provides shareholders in professional corporations or professional limited liability companies").

[78] 157 B.R. 742, 747 (Bankr. W.D.N.Y. 1993) (rejecting claim of fraudulent conveyance).

Where, as here, partners provide substantial economic benefits to a debtor and its creditors, it would amount to a windfall to award the estate the entirety of the payments made to partners.

The inequity of that outcome is especially stark in a case like this. First, the value of partner distributions was expressly tied to the value the partners provided to the firm.[79] Under the DLPA, the Defendants were entitled to the value of their services, as their Participation Targets were expressly tied to their "contributions to the firm and its clients." This was the only compensation Defendants could earn. If Defendants are denied a fair consideration defense, then Defendants would receive nothing for the value they gave to the estate and from which the creditors will benefit in any event. This Court should deny the Trustee's bid for a windfall.

Second, despite having the title "partner," Defendants' relationship with Dewey bore little resemblance to the general partnerships that were the target of NYDCL 277 when it was adopted in 1925. Courts have recognized that the mere designation "partner" is not conclusive of legal status.[80] In this case, the relationship between Defendants and Dewey resembled that of a professional employee to an employer more than that of a partner to a partnership. The DLPA required that Defendants devote their full time to the firm and barred them from taking outside

[79] The inequities of such an outcome are compounded for those partners who were fraudulently induced to join the Debtor.

[80] *See Clackamas Gastroenterology Associates P.C. v. Wells*, 538 U.S. 440, 446 (2003) ("Today there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners."); *Smith v. Castaways Family Diner*, 453 F.3d 971, 978 (7th Cir. 2006) ("Someone can be called a 'partner,' for example, yet in fact lack any authority to make decisions for the firm; he might be just as much at the mercy of those who really run the firm as a clerk would be."); *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701 (7th Cir. 2002) (recognizing that "[a]n individual who was classified as a partner-employer under state partnership law might be classified as an employee for other purposes"). In *Sidley Austin*, the Seventh Circuit considered whether equity partners could be considered employees in a firm of more than 500 partners, where decision making was concentrated in a relatively small executive committee. *See Sidley Austin*, 315 F.3d at 702-03. The Court found that "the most partneresque feature" of Sidley's partners was "their personal liability for the firm's debts . . . because it is the most salient practical difference between the standard partnership and a corporation." *Id.*, at 703. The Court found that in spite of that feature, Sidley's partners were distinguishable from "a traditional law partnership, involving 'the common conduct of a shared enterprise' and a relationship among the partners that contemplates that decisions will be made by common agreement or consent among the partners.'" *Id.*, at 706 (internal citation omitted). Here, defendants were not personally liable for Dewey's debts and did not occupy positions of major decision-making power.

employment without written consent of the firm's Executive Committee.[81] Defendants could be terminated without cause, demoted from partner, and, if they stopped working for the firm, had no right to share in profits in any respect. Under the DLPA, Defendants' "equity" interest was not tied to their capital contribution, but was tied to their job performance. They could not transfer, pledge or otherwise generate any value from their equity interest. Indeed, their equity interest fluctuated year to year based on their job performance relative to other partners. In sum, despite their title as "partners" of the firm, Defendants' relationship with Dewey was a far cry from the type of partner/partnership relationship that was meant to be addressed when NYDCL 277 was enacted in 1925, more than 65 years before LLPs existed. For all of these reasons, summary judgment on the fourth claim for relief should be entered in favor of Defendants.

III. PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED ON THE TRUSTEE'S FIRST AND THIRD CLAIMS FOR RELIEF

Because 11 U.S.C. § 548(a)(1)(B) and NYDCL §§ 273-75 each contemplate either a reasonable value or fair consideration defense, Defendants are entitled to partial summary judgment on the Trustee's first and third claims for relief finding that Defendants are entitled to a credit against any liability for the fair value of their billable hours worked, business generated, fees collected, marketing, and client and practice development.

The Trustee's first claim for relief is predicated on Section 548(a)(1)(B) of the Bankruptcy Code, which provides, in relevant part:

> [T]he trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) 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*** . . . .[82]

[81] DLPA § 3.1.
[82] 11 U.S.C. § 548(a)(1)(B)(i) (emphasis added).

Thus, under 11 U.S.C. § 548(a)(1)(B), the Trustee cannot avoid any transfer from Dewey to the Defendants for which Defendants provided reasonably equivalent value in return.

Moreover, under 11 U.S.C. § 548(c), a transferee or obligee "that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or oblige gave value to the debtor in exchange for such transfer or obligation." Thus, even if Defendants provided less than reasonably equivalent value for the payments they received, they are entitled to a credit against any liability under Section 548 for whatever value they gave to the debtor.

The Trustee's third claim for relief invokes Sections 273-275 and 278 of the NYDCL. Sections 273-275 define different types of fraudulent conveyances. However, as with Section 548(a)(1)(B), each of those sections provides for recovery of a transfer only if the transferee did not provide fair consideration. Section 273 provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent ***if the conveyance is made or the obligation is incurred without a fair consideration***.[83]

Section 274 provides:

> Every conveyance ***made without fair consideration*** when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

Section 275 provides,

> Every conveyance made and every obligation incurred ***without fair consideration*** when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond

[83] N.Y. DEBT. & CRED. L. § 273 (emphasis added).

> his ability to pay as they mature is fraudulent as to both present and future creditors.[84]

Thus, Dewey's distributions to Defendants were not fraudulent conveyances under Sections 273-275 of the NYDCL to the extent Defendants provided fair consideration in exchange for them.[85]

There can be no doubt that Dewey, and its creditors, received value from the work that Defendants performed on behalf of Dewey and its clients. Defendants' billable hours worked, and fees collected, directly increased the cash received by the firm, which cash was available to pay debts to creditors. Moreover, Defendants' efforts in the areas of marketing, firm administration, and client and practice development also provided value to Dewey, and its creditors, insofar as those efforts supported Dewey's ability to obtain, and retain, clients and generate fees for work performed on their behalf. Thus, Defendants are entitled, as a matter of law, to a credit for the value of such efforts against any liability they might otherwise have under the Trustee's first and third claims for relief.

IV. THE TRUSTEE IS NOT ENTITLED TO AVOID PAYMENTS MADE TO DEFENDANTS FOR ANTECEDENT DEBT OWED TO THEM UNDER PREEXISTING CONTRACTS.

The fact that a debtor's pre-petition transfers were made to satisfy debts owed under a preexisting contract is sufficient to defeat a fraudulent transfer claim—whether brought under Bankruptcy Code § 548 or New York Debtor Creditor Law—because performance of a contract is satisfaction of an antecedent debt, and satisfaction of a debt provides reasonably equivalent value and/or fair consideration for the amount transferred.[86] This Court has held that

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[84] N.Y. DEBT. & CRED. L. § 275 (emphasis added).

[85] *See In re TC Liquidations LLC*, 463 B.R. 257, 275 (Bankr. E.D.N.Y. 2011) (dismissing Trustee's causes of action under N.Y. Debt. and Cred. L. §§ 273-75 and 11 U.S.C. § 548(a)(1)(B) because Debtors "received fair consideration" for the transfers alleged to be fraudulent).

[86] *See Pereira v. Dow Chem. Co. (In re Trace Int'l Holdings, Inc.),* 301 B.R. 801, 805 (Bankr. S.D.N.Y. 2003); *Callahan v. Osteen (In re Osteen)*, No. 12-cv-00023, 2012 U.S. Dist. LEXIS 150484, at *13 (W.D. Va. Oct. 19, 2012) ("[A] transfer that satisfied an antecedent debt could not be deemed to be a fraudulent conveyance because the existence of the antecedent debt satisfied the requirement of reasonably equivalent value or fair consideration ."); *see also Kass v. Doyle*, 275 F.2d 258, 262 (2d Cir. 1960) ("Under the Uniform Fraudulent Conveyance Act

> Past consideration is good consideration. An antecedent debt satisfies the requirement of fair consideration [under the NYDCL] and reasonably equivalent value [under Bankruptcy Code § 548], and putting aside transfers to insiders, the payment of an existing liability is not fraudulent.[87]

Furthermore, a debt is antecedent to the transfer sought to be avoided if it is pre-existing or incurred before the transfer.[88] A debtor generally incurs a debt when a "claim" arises against the debtor.[89] That is, Dewey owed a debt to the Defendants when they incurred any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[90]

A. Payments under The DLPA after The Applicable Departure Date Are Not Avoidable.

Under the DLPA, Dewey and its former partners had a debtor/creditor relationship. The DLPA provided that, upon the partner's departure, the former partner would be entitled to, among other things, the "credit balance … in his Capital Account," the "credit balance … in his Income Account," and/or other sums certain set forth in the DLPA.[91]

Under DLPA § 7.1(a), the partnership owed a debt to former partners ("Former Partners" under the DLPA") when a "Departure" occurred.[92] Specifically, DLPA § 7.6(a) provides that

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liquidation of an antecedent debt—one arising prior to the date of insolvency—is fair consideration for a payment by the debtor subsequent to his insolvency."); *Collins v. Kohlberg & Co. (In re Sw. Supermarkets, LLC)*, 325 B.R. 417, 430 (Bankr. D. Ariz. 2005) ("[T]hat the transfers were made pursuant to a preexisting contract is often sufficient to defeat a claim for fraudulent transfer. This is because performance of a contract is, in essence, satisfaction of a debt, and satisfaction of a debt generally provides reasonably equivalent value for the amount transferred. Consequently although performance of a contract or payment of a debt may be avoidable as a preference, it is usually not avoidable as a fraudulent transfer.").

[87] *Trace*, 301 B.R. at 801.

[88] *Crumpton v. McGarrity*, No. 11-cv-2649, 2012 U.S. Dist. LEXIS 139128, at *11 (Sept. 27, 2012).

[89] *Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295, 302 (2d Cir. 1997) ("[T]he term debt is sufficiently broad to cover any possible obligation to make payment").

[90] Bankruptcy Code § 101(4)(A) (defining the term "claim"); *see also In re Chase & Sanborn Corp.*, 904 F.2d 588, 595 (11th Cir. 1990) ("It is established that 'debt' is to be given a broad and expansive reading for the purposes of the Bankruptcy Code.")

[91] *See generally* DLPA §§ 7.6(a)-(f).

[92] DLPA § 7.1(a)-(d) provides

> A Partner's membership in the Partnership shall cease upon the earliest to occur of any of the following events (each, a "Departure"), effective as of the date for such event set forth below (the "Departure Date"): (a) In the event of the retirement of a Partner …[;] (b) In the event of a

> A Partner whose membership in the Partnership ceases as a result of his Departure … *shall be entitled to receive the following*, without interest: (i) The credit balance, if any, in his Capital Account at the Departure Date …[, which] shall be made in three (3) equal annual installments (each in the amount of 1/3 of the total) by December 31 of each year commencing with the first year that ends at least six months after the Departure Date; provided, however, that the Chairman, at his discretion, shall have the right to alter the foregoing payment schedule to accelerate any payments due thereunder; and (ii) The credit balance, if any, in his Income Account at the Departure Date.

Hence, upon the applicable Departure Date, Former Partners had a "right to payment" against Dewey, and Dewey was then obligated to pay the balance on each Former Partner's Capital Account or Income Account (and make certain other payments) as provided for in DLPA § 7.6. Any payments by Dewey in satisfaction of those obligations payments also satisfied (in whole or in part) such claims against the firm; if such claims were not paid, Former Partners would have grounds to sue Dewey for the unpaid balance. Accordingly, any payments to Defendants who were Former Partners when Dewey made payments to them or on their behalf under DLPA § 7.6 are unavoidable because they were for fair consideration/reasonably equivalent value as payments in satisfaction of antecedent debt.

B. Payments to Former Partners under the DLPA Were Not Distributions on Equity.

Dewey's payments to Former Partners in satisfaction of obligations to them that arose after the Departure Date are not distributions on equity. After a Departure Date, Former Partners ceased to have any equity interest in Dewey; they did not share in the profits or losses to the firm; and they had no voting rights or any other control with respect to the firm.[93] Indeed, Former Partners who were owed fixed amounts certain under DLPA § 7.1 faced payment risks incidental to creditors—not equity holders—in that the satisfaction of their claims was dependent

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> Partner's voluntary withdrawal from the Partnership …[;] (c) In the event of such Partner's becoming a Salaried Partner …[;] (d) In the event of the involuntary removal of a Partner …..

See DLPA § 2.1 (defining terms, including the term "Former Partner").

[93] DLPA §§ 4.2(a), 6.3, and 6.4.

entirely upon Dewey's ability to pay, not on the firm's profits and losses.[94] Here, the instant a Departure Date occurred, Former Partners were stripped of their equity interests and became creditors owed amounts certain under DLPA § 7.6. Any subsequent transfer to them under the DLPA was a payment to a creditor, not a distribution to an equity holder.[95]

CONCLUSION

For each of these reasons, the Court should grant Defendants summary judgment on the Trustee's second and fourth claims for relief pursuant to 11 U.S.C. § 548(b) and NYDCL § 277 because neither 11 U.S.C. § 548(b) nor NYDCL § 277 applies to Defendants as a matter of law; or alternatively, grant partial summary judgment on the fourth claim for relief finding that each Defendant is entitled to a credit for fair consideration provided pursuant to NYDCL § 278. In addition, the Court should grant partial summary judgment on the Trustee's first and third claims for relief finding that, with respect to the Trustee's claims under 11 U.S.C. § 548(a)(1)(B), NYDCL §§ 273-75,and NYDCL § 278, Defendants are entitled to a credit against any liability equal to the fair value of their billable hours worked, business generated, fees collected, marketing, and client and practice development, and antecedent debts paid.

Finally, the Court should enter partial summary judgment under the first, second, third and fourth claims for relief, finding that all payments made to Former Partners under the DLPA after a Departure were payments made on account of antecedent debt, rather than on account of equity, and, thus, cannot be recovered as a matter of law.

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[94] Further, even though DLPA § 7.6(c) provides that any payments under section 7.6 are "subordinated in priority to all other Partnership indebtedness," subordination does not affect the characterization of these amounts as debt.

[95] Cases in other contexts have recognized that a former equity holder converts to a creditor at the point where he or she has a claim for the recovery of an unpaid debt (as opposed to claims directly related to a stock transaction). *See, e.g., Official Comm. of Unsecured Creditors v/ Am. Capital Fin. Servs., Inc. (In re Mobile Tool Int'l, Inc.)*, 306 B.R. 778, 781 ("When the stock is exchanged and a separate debt instrument is issued by the debtor, however, the claimant is converted from an owner of stock to a creditor."); *In re Montgomery Ward Holding Corp.*, 272 B.R. 836, 842 (Bankr. D. Del. 2001) (claim based on a contractual obligation to pay a sum certain is not subject to subordination under section 510(b) because such claims are only for the recovery of an unpaid debt).

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