UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re	:	Chapter 7
Anthony C. Stylianou,	:	Case No. 01-16121 (AJG)
Debtor.	:	

OPINION AND ORDER

Before the Court is the January 16, 2008 application (the "Application") in support of the motion of Gregory M. Messer, Chapter 7 Trustee (the "Trustee") of the estate (the "Estate") of Anthony C. Stylianou (the "Debtor"), pursuant to Federal Rules of Bankruptcy Procedure ("FRBP") Rule 9019(a), (1) approving the settlement agreement between the Trustee, as successor-in-interest to Debtor, and the New York City Board of Education;[1] Joel I. Klein, as Chancellor of the New York City Public Schools; Susan Erber, Ph.D., individually and as Superintendent of District 75 Citywide; and Marta Rojo, individually and as Principal of P.35 M [sic] (collectively, the "Defendants") in the sum of $140,000.00 (the "Settlement Agreement"); (2) approving counsel fees for special counsel in the sum of $79,200.00 and expenses and disbursements in the sum of $6,656.00; and (3) authorizing the Trustee to pay Debtor his exemption in the personal injury action against the Board of Education and various individuals (the "Lawsuit") in the sum of $7,500.00.

For the reasons stated below, the Application is granted.

[1] Now known as the Department of Education.

I. FACTS

A. Initial Bankruptcy Case

On December 7, 2001 (the "Petition Date"), Debtor filed a petition (the "Petition") under Chapter 7 of the Bankruptcy Code. On December 10, 2001, the Trustee was appointed interim trustee, and on January 11, 2002, he held a § 341(a) meeting, after which he became the trustee pursuant to § 702(d) (2001).[2] Following the § 341(a) meeting, the Trustee filed a report of no distribution (the "Report of No Distribution" or the "No Asset Report"). On January 31, 2002, Debtor filed an amended Petition (the "Amended Petition") and an Amendment to Social Security Number and Statement of Financial Affairs (the "Statement Amendment"). The Statement Amendment, dated January 18, 2002, listed the Lawsuit,[3] which Debtor had omitted from his Petition's schedule of personal property (the "Schedule B") and schedule of property claimed as exempt (the "Schedule C"). The Trustee stated that he had no records showing receipt of the Statement Amendment, but the Statement Amendment's affirmation of service indicates that the Statement Amendment was served on the Trustee, and the Statement

[2] If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case. 11 U.S.C. § 702(d) (2001).

[3] The Statement Amendment stated that the answer to question 4 on Debtor's statement of financial affairs (the "Statement of Financial Affairs") was amended to "show Debtor's lawsuit for [sic] against the Board of Education, et al for Workman's Compensation, the Line of Duty (ILOD) [sic] and related damages." The Statement Amendment listed the Lawsuit as filed in the United States District Court for the Eastern District of New York, with "Index No." #CV016129 and with the then-caption, "Anthony Stylianou v. The Board of Education of the City of New York; Harold O. Levy, as Chancellor of the New York City Public Schools; Susan Erber, PhD, individually and as Superintendent of District 75 Citywide; Marta Rojo, individually and as Principal of P.35 M [sic]." The Statement Amendment listed the "Amount" of the Lawsuit as "Undetermined, uncertain recovery" and the "Status" of the Lawsuit as "Pending." In the Statement Amendment, the Debtor stated that his reason for the Statement Amendment was that "[a]t the time of the filing of my petition, I erroneously omitted information about my lawsuit." The Lawsuit seeks relief under, *inter alia*, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, for violation of Debtor's civil rights and disability discrimination. Debtor was a school psychologist who suffered a serious injury to his spine as a result of two assaults in the school. Debtor alleged that administrators, acting from disability-based and retaliatory animus, failed and refused to process his applications for "injury in the line of duty" ("ILOD") pay, interrupted his health insurance coverage, left him without any source of income, and refused to process his application for an accident disability pension. Debtor further alleged that these acts caused him emotional distress.

Amendment was docketed on January 31, 2002.[4] The Court signed an order on March 20, 2002, amending Debtor's Social Security number. On March 25, 2002, an order of discharge (the "Discharge") and order of final decree (the "Order of Final Decree") was entered, and the Trustee was discharged. Debtor's bankruptcy case was closed on March 29, 2002.

B. Reopened Case

On March 30, 2004, the Trustee filed a motion to reopen (the "Motion to Reopen") Debtor's bankruptcy case pursuant to § 350(b) (2004) and Rules 5010 and 9024 FRBP (2004) because Debtor omitted the Lawsuit from his schedules, preventing the Trustee from fully administering the assets of the Estate. In the Motion to Reopen, the Trustee stated that he had been "recently" contacted by the Defendants' counsel, the City of New York Law Department (the "City"), regarding the Lawsuit. The Trustee also stated that his office had contacted Debtor's counsel in the Lawsuit[5] and had been informed that the Lawsuit may be of considerable value to the Estate. The Motion to Reopen's affidavit of service indicates that the Motion to Reopen was served on Debtor and his bankruptcy counsel, David Caraway ("Caraway"), and the Motion to Reopen was docketed on March 30, 2004.

On May 5, 2004, the Court issued an order (the "Reopening Order") reopening Debtor's bankruptcy case and vacating the Order of Final Decree pursuant to § 350(b) (2004) and Rules 5010 and 9024 FRBP (2004). On May 5, 2004, the Clerk of Court (the "Clerk") gave notice to all creditors and interested parties that Debtor's bankruptcy case had been reopened. On May

[4] The docket's electronic service receipt also indicates that the Statement Amendment was electronically served on the Trustee.

[5] Although the Trustee does not so specify, Jo Anne Simon ("Simon") was Debtor's counsel in various nonbankruptcy matters, including the Lawsuit, since 1996. Simon did not have a written retainer agreement with Debtor, but she billed him on an hourly basis at a discounted rate. As described *infra* fn.25, Debtor made partial payments of outstanding amounts due from time to time.

11, 2004, the United States Trustee (the "UST") reappointed the Trustee as successor trustee in Debtor's reopened bankruptcy case (the "Reopened Case") by Notice of Appointment pursuant to § 703(c) (2004). On May 11, 2004, the Trustee filed a letter with the Clerk requesting that the Clerk mail a notice of possible dividends (the "Notice of Possible Dividends") to creditors. On May 24, 2004, the Clerk mailed the Notice of Possible Dividends, with proof of claims due by August 23, 2004. On August 4, 2004, the Internal Revenue Service filed a proof of claim in the amount of $7,084.89, which was received by the Court on August 6, 2004, but on August 25, 2004, the Internal Revenue Service withdrew its claim. The Court received this withdrawal of the claim on August 27, 2004. Prior to August 23, 2004, American Express also filed a proof of claim in the amount of $10,586.06 (the "American Express Claim").

On August 18, 2004, Debtor amended Schedule B and Schedule C (the "Schedule Amendments") to reflect the Lawsuit. Debtor listed the Lawsuit on Schedule B as personal property with a current market value of $500,000.00, and Debtor listed the Lawsuit on Schedule C as property claimed as exempt in the amount of $500,000.00, pursuant to New York Debtor Creditor Law § 282 (2)(c), (3)(iii),(iv) (the "NYDCL"). On October 14, 2004, the Trustee filed an application for an order authorizing the retention of Gregory Messer, PLLC as counsel to the Trustee (the "Messer PLLC Application"). The Court signed an order on June 29, 2005, granting the Messer PLLC Application. Also on October 14, 2004, the Trustee erroneously filed a letter with the Clerk requesting that the Clerk mail another Notice of Possible Dividends to creditors. The Trustee explained his error in a letter to the Clerk dated October 18, 2004, asking the Clerk to disregard the letter of October 14, 2004. The Clerk disregarded the letter of October 14, 2004, and did not mail another Notice of Possible Dividends to creditors.

C. Retention of Levy Davis as Special Counsel

On April 7, 2005, the Trustee filed an application for an order authorizing the retention of Levy Davis & Mahler, LLP ("Levy Davis") as the special counsel to the Trustee (the "Levy Davis Retention Application"), pursuant to §§ 327(e), 328 and Rule 2014 FRBP. In the Levy Davis Retention Application,[6] the Trustee stated that Levy Davis would be retained under a contingent fee retainer for the purpose of handling a civil suit for employment discrimination and other tortious conduct (*i.e.*, the Lawsuit). Further, the Trustee stated that Levy Davis would charge the Trustee for its legal services on a contingent fee basis of 33-1/3%. The Trustee also stated that Simon's law office would continue as co-counsel and that he would seek an order from the Court authorizing her retention as co-counsel.

Finally, the Trustee stated that Levy Davis agreed (i) to move in the court in which the Lawsuit was pending to substitute the Trustee as the successor-in-interest to the Debtor in the Lawsuit, (ii) that each and every January 31, May 31, and November 30 following the date of the entry of an order sought pursuant to the Levy Davis Retention Application, Levy Davis shall report to the Trustee, to the Trustee's satisfaction, by letter regarding the status of the Lawsuit, (iii) that settlement of the Lawsuit shall be subject to the Trustee's written consent and further approval by the Court upon the Trustee's motion therefor, and (iv) that upon settlement or other liquidation of the claims being prosecuted in the Lawsuit, Levy Davis will turn over the gross proceeds thereof to the Trustee upon Levy Davis's and/or Debtor's receipt of same so that they may be distributed by the Trustee (the "Items of Agreement").

[6] The Trustee refers to Levy Davis as "Levy Davis & Mahler, LLP," "Intended Special Counsel," and "Special Counsel" interchangeably in the Levy Davis Retention Application.

The Trustee appended to the Levy Davis Retention Application the affidavit (the "Levy Davis Retention Affidavit") of Jonathan A. Bernstein ("Bernstein"), an associate at Levy Davis, in support of the Levy Davis Retention Application. In the Levy Davis Retention Affidavit, Bernstein stated that Levy Davis agreed to complete the Lawsuit on a contingent fee basis of 33-1/3% with attorney's fees to be fixed by the Court at the completion of the case. Bernstein further stated that prior to making any application to the Court, Levy Davis would seek statutory attorney's fees in the Lawsuit's trial court payable by the Defendants, and that in the event the application for statutory attorney's fees were denied, Levy Davis would make an application for payment from the Estate. Bernstein further stated that Levy Davis agreed to advance litigation costs associated with the Lawsuit and would make an application to the Court for reimbursement from the Defendants but that Levy Davis would not seek payment from Debtor or the Estate for attorney's fees or expenses in the event there were no recovery. Finally, Bernstein reiterated the Items of Agreement and added a sixty (60) day time limit to (i), *supra*, wherein Levy Davis would move in the court in which the Lawsuit was pending to substitute the Trustee as the successor-in-interest to Debtor in the Lawsuit, so that the Lawsuit's caption would identify the plaintiff as "Gregory Messer, Trustee of the Estate of the Anthony Stylianou."

In an *ex parte* order[7] authorizing the retention of Levy Davis as the special counsel to the Trustee (the "Levy Davis Retention Order") on May 6, 2005, the Court determined that the relief requested was necessary to the administration of the Estate, that it was satisfied that Levy Davis did not hold or represent any interest adverse to the Trustee, Debtor, or the Estate with respect to the matter upon which the special counsel was to be retained and was a disinterested person

[7] This is the usual procedure in this district for authorization of retention of professionals for a Chapter 7 trustee.

within the meaning of §§ 101(14) and 327(a), as represented by the Trustee in the Levy Davis Retention Application and by Bernstein in the Levy Davis Retention Affidavit, and that Levy Davis's employment was necessary and in the best interest of the Estate. The Levy Davis Retention Order ordered that the Trustee was authorized to retain Levy Davis, pursuant to §§ 327(e), 328 (2004) and Rule 2014(a) FRBP, to handle and conclude the Lawsuit and to be compensated therefor under an hourly retainer agreement upon the filing of a proper application, and approval thereof by the Court pursuant to §§ 328, 330, 331, the FRBP, and the Local Rules of this District. The Court also ordered the Items of Agreement, including Bernstein's addition of a sixty (60) day time limit to (i), *supra*.

The discrepancy between the contingent fee basis of compensation represented by the Trustee in the Levy Davis Retention Application and Bernstein in the Levy Davis Retention Affidavit and the hourly fee basis of compensation ordered by the Court in the Levy Davis Retention Order is the main source of controversy in this case, but it has given way to a wider dispute between Debtor and the other parties regarding attorney's fees. This dispute has also revealed that the Trustee never made an application to the Court for Simon's retention.

D. The Motion Before the Court

1. The Application

On January 16, 2008, the Trustee filed the Application. The Trustee stated in the Application that he had been advised by special counsel that the Settlement Agreement was fair and reasonable and should be accepted. The Trustee further stated that the American Express Claim would be paid in full with interest after administrative expenses were paid and that the balance of the funds would be returned to Debtor. The Trustee appended to the Application

Bernstein's affidavit of August 2, 2007, in support of the Application (the "Application Affidavit"). The Application Affidavit briefly described the history of the Lawsuit and its present posture, which is relevant to the matter before the Court and discussed *infra* § I.D.2. The Application Affidavit also set forth the factors bankruptcy courts use to evaluate settlements or compromises and applied them to the Settlement Agreement. The Application Affidavit further stated that Bernstein, on behalf of Levy Davis, sought attorney's fees at $275.00, $295.00, and $325.00 per hour but only at his historic rather than his current true market rate "as part of a voluntary reduction in the interest of settlement."[8] The Application Affidavit stated that Simon's fees were also discounted. Additionally,

> [t]he proposed settlement would pay the creditors at the rate of 100%. However, if the attorneys sought the full amount of their fees, the debtor would receive no distribution from the proposed settlement. Accordingly, we have voluntarily agreed to discount our fees by 60%. That is, the attorneys are willing to accept $79,200.00, rather than the lodestar amount of $198,000.00 (*i.e.*, a reasonable hourly fee multiplied by the number of hours expended) in order that Mr. Stylianou may obtain a recovery beyond that the satisfaction of his creditors' claims.

The Court notes that, as explained *infra* § II.B.1.a, the Application Affidavit incorrectly states the formula for the "lodestar" calculation under fee-shifting statutes, *see In re Apex Oil Co.*, 960 F.2d 728, 731-32 (8th Cir. 1992) ("lodestar amount . . . is the number of hours *reasonably expended* multiplied by a reasonable hourly rate") (emphasis added). However, as also explained *infra* § II.B.1.a, such formula is also often used for attorney's fees calculation purposes

[8] The Application Affidavit states that "[i]n such fee-shifting cases as the [Lawsuit], attorneys for prevailing plaintiffs typically collect fee awards at their current (as of the time of judgment) rates, rather than historical rates." The applicability of fee-shifting is discussed *infra* § II.B.1.a, but the Court notes that the Trustee is not a prevailing party in the Lawsuit. Therefore, the representation in the Application Affidavit that Bernstein was "most recently (in December 2006) awarded fees at $295 per hour by Judge Cedarbaum of the Southern District of New York in *Torres v. West Side Radiology Assocs., P.C.*, 05 Civ. 4871 [italics added to case name], a similar (albeit less factually and legally complex) employment discrimination case tried to verdict" is not necessarily relevant to the Application for two reasons. First, the Lawsuit was settled and therefore not subject to fee-shifting under the relevant federal fee-shifting statute. Second, fee-shifting was granted in *Torres* subject to a New York City administrative statute, which has a different standard for fee-shifting than the federal statute relevant to the Lawsuit.

in bankruptcy cases. *See id.* The Application Affidavit indicated that Levy Davis's time records were attached, but they were not.[9]

On the same date that he filed the Application, January 16, 2008, the Trustee moved before the Court to disallow Debtor's claim of a $500,000.00 exemption for the Lawsuit's proceeds (the "Motion to Disallow") on the grounds that the claimed exemption had no basis in law and that the Trustee had never received the amended Schedule B and Schedule C listing the Lawsuit as personal property and claimed as exempt, respectively. The Court held a hearing on February 13, 2008 (the "February 2008 Hearing"), at which the Trustee stated that another § 341(a) meeting was never scheduled[10] and therefore the time to object to the claimed exemption had never commenced. Additionally, Debtor did not oppose the Motion to Disallow. No opposition having been interposed, the Court granted the Motion to Disallow at the February 2008 Hearing.

At the same hearing, the Trustee stated that the UST had reviewed the Settlement Agreement. While neither the UST nor Debtor opposed the Settlement Agreement, the UST "expressed some concern over fees for special counsel" and asked the Trustee to adjourn that part of the Application. That part of the Application was adjourned until March 12, 2008. The UST then stated that he was advised by special counsel that the Settlement Agreement was "good, fair, and reasonable" and that, regardless of what attorney's fees were granted, the settlement proceeds would be sufficient to pay off the creditors with interest and return some money to Debtor. The Court therefore approved the Settlement Agreement but adjourned the part of the Application related to attorney's fees, which, in accordance with the Levy Davis

[9] In response to a telephonic request from the Court, Bernstein submitted a set of time sheets on or about March 18, 2009.

[10] It appears that the Trustee was referring to a § 341(a) meeting being scheduled in the Reopened Case.

Retention Order, were calculated on an hourly fee basis.[11]

At or around the time of the February 2008 Hearing, the UST requested that Levy Davis explain the discrepancy between the contingent fee arrangement provided for in the Levy Davis Retention Application and the Levy Davis Retention Affidavit and the hourly fee arrangement provided for in the Levy Davis Retention Order.[12] In response, Bernstein filed a Supplemental Affidavit in Further Support of Motion to Approve Settlement and Application for Payment of Attorneys' Fees and Expenses (the "Bernstein Supplemental Affidavit") on February 29, 2008. The UST then filed a Statement of the United States Trustee with Respect to a Proposed Order Approving Compensation to Special Counsel for the Chapter 7 Trustee (the "UST Statement") on March 5, 2008. In the UST Statement, the UST stated that the UST's office had no objection to the Application.[13]

However, on March 20, 2008, Debtor filed an Affidavit in Opposition of Motion to Approve Settlement and Application for Payment of Attorneys' Fees and Expenses (the "Caraway Affidavit"). Debtor raised two objections: (1) attorney's fees for special counsel should be calculated on a contingent fee basis, and (2) prior payments to Simon by Debtor or another on his behalf should be credited against that contingent fee amount. Thereafter, the parties submitted several affidavits and letters related to the attorney's fees issue, and the Court held four substantive hearings and one scheduling conference on the same.[14]

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[11] It was later revealed at a hearing on September 24, 2008 (the "September 2008 Hearing") that even though the Trustee executed the Settlement Agreement, the City would not remit the settlement funds until the Court resolved the attorney's fees issue.

[12] The parties did not explain the form in which the UST requested an explanation of the discrepancy, and such request was not submitted to the Court.

[13] Although the UST Statement attributed all the attorney's fees requested in the Application to Levy Davis, the Application itself never makes such an attribution. In fact, in the Application Affidavit, Bernstein specifically stated that the attorney's fees included the fees of Levy Davis's subcontractor, Simon's law office.

[14] The submissions and hearings are as follows, in chronological order:

2. The Lawsuit

Bernstein attached to the Bernstein Reply Affidavit a number of exhibits which shed light on the proceedings before the District Court and the settlement negotiations leading up to the execution of the Settlement Agreement. On September 13, 2001, approximately two months prior to filing the Petition, Debtor filed the Lawsuit in the United States District Court for the Eastern District of New York (the "District Court" or "DC"). *See supra* fn.3. Debtor continued

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On March 25, 2008, in response to the Caraway Affidavit, Bernstein filed a Reply Affidavit in Further Support of Motion to Approve Settlement and Application for Payment of Attorneys' Fees and Expenses (the "Bernstein Reply Affidavit").

On April 2, 2008, Simon filed an affidavit (the "Simon Affidavit").

On April 9, 2008, the Court held a hearing (the "April 2008 Hearing").

On July 15, 2008, Debtor faxed the Court a letter dated July 14, 2008 (the "July 2008 Debtor Letter"), requesting that the Court investigate and review Simon for possible misconduct.

In a letter dated August 21, 2008 (the "August 2008 Simon Letter"), Simon submitted to the Court two sets of time sheets, a letter to the Trustee, and what appears to be an unsent letter to the Court.

On September 24, 2008, the Court held a hearing (the "September 2008 Hearing").

On March 18, 2009, the Court held a hearing (the "March 2009 Hearing").

In a letter dated March 26, 2009 (the "March 2009 Simon Letter"), Simon submitted a breakdown of her fees to the Court. At the March 2009 Hearing, the Court requested that Simon submit a certain breakdown of her fees, but this letter was not responsive that request. On June 23, 2009, Simon submitted a breakdown of her fees which was responsive to the Court's request.

Attached to a letter dated March 30, 2009, Bernstein submitted an affidavit (the "March 2009 Bernstein Affidavit") to the Court.

In a letter dated April 26, 2009 (the "April 2009 Simon Letter"), Simon submitted to the Court a breakdown of fees under the Settlement Agreement between her and Bernstein.

On May 8, 2009, the Court issued an order directing the parties to appear at a pre-hearing scheduling conference on May 26, 2009.

On May 26, 2009, the Court held a pre-hearing scheduling conference and scheduled an evidentiary hearing for June 24, 2009.

On June 5, 2009, Caraway sent the Court a letter by email requesting from Simon a "full accounting of any and all payments made to her or her firm by my client or anyone on his behalf."

On June 8, 2009, Simon responded in an email that she took the position that Debtor had no right to discovery or, alternatively, that Caraway waived any such right of Debtor's by failing to make the request at a scheduling conference conducted by the Court on May 29, 2009.

On June 12, 2009, Caraway sent the Court another letter by email requesting that the Court resolve this discovery dispute.

On June 15, 2009, the Court sent an email to all parties in response to the aforementioned correspondence from June 2009 directing Simon to comply with the request of Caraway as set forth in his letter of June 5, 2009. The email directed Simon to "provide a full accounting of any and all payments made to her or her firm by the Debtor or anyone of [sic] his behalf as soon as such information can be provided to all parties."

On June 23, 2009, Simon faxed to the Court a letter dated June 22, 2009 (the "June 2009 Simon Letter"), in which she submitted to the Court and the parties a table of fees and expenses incurred pre- and postpetition and payments made by Debtor and some receipts for disbursements, but she noted that other receipts were in long-term storage.

On June 24, 2009, the Court held a hearing (the "June 2009 Hearing").

his retention of Simon as his counsel on a discounted hourly basis. On January 25, 2002, Debtor filed an amended complaint in the Lawsuit, which added his registered domestic partner, Linda Tieber ("Tieber"), as a co-plaintiff and a number of additional defendants (the "Additional Defendants").[15] Tieber also retained Simon as her counsel. As previously stated, on May 5, 2004, the Court reopened Debtor's bankruptcy case, and on May 6, 2005, the Court issued the Levy Davis Retention Order, authorizing the retention of Levy Davis as special counsel to the Trustee. On May 11, 2005, the Trustee moved, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure ("FRCP"), in the District Court to substitute himself for Debtor in the Lawsuit. In the same motion, the Trustee also moved, pursuant to Rule 25(d) FRCP, to substitute Joel I. Klein, as Chancellor of the New York City Public Schools, for Harold O. Levy. On June 27, 2005, the District Court ordered both of these substitutions and terminated Debtor as plaintiff and Harold O. Levy as a Defendant.

On March 27, 2006, the Clerk sent the Trustee a letter requesting that he file a case status report. On April 3, 2006, the Trustee filed a case status report, which stated the following: "There is a pending employment discrimination suit. Discovery is essentially complete. Depositions of all fact witnesses are complete. Parties have not determined whether expert witnesses will be deposed. The next court conference is scheduled for April 23, 2006." On January 16, 2007, the Honorable Joseph F. Bianco of the District Court dismissed on summary judgment most of the Lawsuit's claims, leaving only Debtor's claim that denial of his first application ILOD benefits was retaliatory and his COBRA claim. The Honorable Cheryl L.

[15] The Additional Defendants are as follows: the Trustees Teachers' Retirement Board; the Teachers' Retirement System of the City of New York; Donald Miller, as Executive Director of the Trustees Teachers' Retirement Board and the Teachers' Retirement System of the City of New York; John Does 1-7, individuals as yet unidentified, in their official capacities as members of the Trustees Teachers' Retirement Board. The City also represented the Additional Defendants.

Pollak, Magistrate Judge of the District Court, held a status conference on January 31, 2007, regarding the Lawsuit's surviving claims, but the settlement discussions proved unsuccessful.

On March 9, 2007, the Clerk sent the Trustee another letter requesting that he file an updated case status report. On April 29, 2007, Debtor sent Magistrate Judge Pollak a letter (the "April 2007 Debtor DC Letter") asking that she review the settlement of his case. Debtor made various allegations and arguments in the April 2007 Debtor DC Letter, but in substance he stated that he sought to "buy [his] way out of Bankruptcy by paying the Bankruptcy Court $30,000" so that he could regain control of the Lawsuit, take the remaining claims to trial, and possibly appeal the dismissed claims. On May 1, 2007, Magistrate Judge Pollak issued an order (the "May 2007 DC Order") stating that Debtor requested settlement negotiations be stayed pending his attempts to satisfy unpaid debts in the Bankruptcy Court and directing the parties to submit a status report to her as well as responses to Debtor's arguments from the April 2007 Debtor DC Letter.

On May 2, 2007, both Bernstein and Simon wrote letters to Magistrate Judge Pollak. Bernstein's letter (the "May 2007 Bernstein DC Letter") stated the terms of Defendants' settlement offer of $140,000.00, which the Trustee considered to be in Debtor's best interest and fair under the circumstances of the litigation (*i.e.*, most of the claims had been dismissed). The proceeds of the proposed settlement would be distributed as follows: (1) approximately $30,000.00 would be distributed to the creditors; (2) $79,200.00 would be designated attorney's fees; (3) $6,656.00 would be designated disbursements; and (4) the remainder (approximately $24,144.00) would be distributed to Debtor. In a footnote, Bernstein indicated that the Trustee authorized him to "improve upon" the Defendants' earlier offer of $100,000.00 (the "Original

City Offer"), which would have paid the creditors but provided no distribution to Debtor. Additionally, Bernstein stated that Defendants required that $15,000.00 of the settlement funds be designated as wages.

Bernstein further stated that the attorney's fees figure represented a discount of more than 60% and that he and Simon had agreed to the discount in view of the "practical realities" of the litigation and the "unlikelihood of a greater recovery at trial." In another footnote, Bernstein indicated that the discounted figure also reflected the possibility that an award of attorney's fees after trial would be reduced for limited success.

Bernstein noted that Debtor received a "significant lump sum retroactive award from SSDI [Social Security Disability Insurance]" in late 2006.[16] Bernstein also stated that he had had frequent conversations with Debtor, including a conversation in January 2007 in which Debtor asked how much it would cost to buy his way out of bankruptcy. Bernstein asked the Trustee for that figure, which the Trustee indicated was $30,000.00, and Bernstein communicated it to Debtor. Bernstein stated that Debtor had expressed his disagreement with Bernstein's litigation strategy and that while Bernstein had told Debtor he could buy himself out of bankruptcy and retain counsel who agreed with Debtor, Debtor took no action in that regard. Bernstein indicated that Debtor phoned the Trustee a week prior to the May 2007 Bernstein DC Letter to confirm the $30,000.00 figure but did not tender that money or inquire as to the mechanics of a tender. Bernstein asked Magistrate Judge Pollak to give Debtor a "reasonably brief time" to tender

[16] The record does not reveal who represented Debtor in that action nor the amount of the award.

$30,000.00 to the Trustee to satisfy the creditors and if Debtor failed or refused to do so to lift the stay from the May 2007 DC Order and allow the Trustee to conclude the settlement.[17]

While Simon's letter (the "May 2007 Simon DC Letter") deferred to the May 2007 Bernstein DC Letter for a status report on the Trustee's settlement discussions with Debtor and the City, the May 2007 Simon DC Letter provided a status report on Simon's settlement discussions with the City on Tieber's behalf. Although Tieber's claim is not part of this case, the May 2007 Simon DC Letter contained a number of statements relevant to this case. First, Simon stated that "[s]ince Ms. Tieber's joining this litigation as a plaintiff, I have refrained from billing her separately for legal fees incurred." Second, Simon stated she agreed with Bernstein that the proposed settlement was fair and reasonable. Third, Simon reiterated Bernstein's statement, *supra*, with respect to their attorney's fees reduction.[18] Debtor was copied by mail on both the May 2007 Bernstein DC Letter and the May 2007 Simon DC Letter.

On May 3, 2007, an attorney for the City, Jonathan Bardavid ("Bardavid"), also wrote a letter (the "May 2007 City DC Letter") to Magistrate Judge Pollak. The May 2007 City DC Letter covered much of the same ground as the May 2007 Bernstein DC Letter and the May 2007 Simon DC Letter. The May 2007 City DC Letter stated that the City and Bernstein attempted to resolve the Lawsuit in order to avoid further costs to either party and forgo the time and expense of expert discovery and a trial by exploring a settlement in March 2007. The City indicated that

[17] Bernstein stated that if Debtor prosecuted his claim *pro se* or obtained other counsel, Bernstein would assert a charging lien over the file, seek to recover his fees *quantum meruit* and/or apply for fees incident to the settlement or judgment of the Lawsuit. Bernstein further stated that although he represented the Trustee and had no contract with Debtor, he believed that the circumstances were such that a lien would arise either in equity or pursuant to N.Y. Judiciary Law § 485 [sic]. It appears Bernstein was referring to N.Y. Judiciary Law § 475.

[18] Similarly to Bernstein, Simon stated that if Debtor paid the Trustee the amount needed to resolve the creditors' claims, Simon would assert her contractual right to significant attorney's fees and expenses due and owing from Debtor and/or seek to recover these fees *quantum meruit* and/or assert an attorney's lien either in equity or pursuant to N.Y. Judiciary Law § 485 [sic]. It appears Simon was also referring to N.Y. Judiciary Law § 475.

after numerous and lengthy settlement discussions the parties had reached a tentative settlement on April 30, 2007. The City would be settling the claims that had survived summary judgment, *i.e.*, Debtor's claim that denial of his first application for ILOD benefits was retaliatory and his COBRA claim, without admitting liability and specified that the $140,000.00 would be divided with $125,000.00 for emotional damages, the COBRA claim, and attorney's fees, costs, and disbursements, and $15,000.00 in back-pay, less all applicable deductions and withholdings for economic damages, related to Debtor's surviving ILOD claim.

Bardavid stated that he would draft the settlement for Bernstein's review and provide it to him shortly. The May 2007 City DC Letter also explained the Defendants' position that because the Teachers Retirement System was a separate legal entity from the Department of Education and all claims against the Teachers Retirement System[19] were dismissed on January 16, 2007, Debtor was not entitled to an accident disability pension or its present value as Debtor so desired. The May 2007 City DC Letter also strongly objected to Debtor's potential attempt to emerge from bankruptcy as a way of avoiding settlement, and in arguing that Debtor had had years to pay off his creditors and emerge from bankruptcy and that allowing the case to continue would be a waste of judicial resources, urged Magistrate Judge Pollak to deny Debtor's request to further stay settlement negotiations beyond the time period granted in the May 2007 DC Order.

On June 18, 2007, Magistrate Judge Pollak held a status conference (the "June 2007 DC Hearing") with the parties to the Lawsuit and Debtor. Magistrate Judge Pollak granted Debtor's request for thirty (30) days to obtain counsel and consider his options (the "June 2007 DC Stay Order"). She stated that upon the expiration of the thirty (30) day period, the Trustee's counsel

[19] The Teachers Retirement System is among the Additional Defendants, *see supra* fn.15.

may proceed to finalize the settlement unless otherwise directed by the courts. She also set the next status conference for September 5, 2007. On July 9, 2007, the Trustee sent the Clerk a case status report letter, which stated the following: "There is a pending personal injury action vs. the City of New York for the above referenced matter. There has been an offer made and we are currently negotiating it. I don't anticipate this case will be ready to close for at least another six months." The Clerk received and docketed this letter on July 12, 2007.

On July 15, 2007, Debtor sent another letter (the "July 2007 Debtor DC Letter") to Magistrate Judge Pollak requesting that the thirty (30) day stay ordered by Magistrate Judge Pollak at the June 2007 DC Hearing, not be commenced until the proposed settlement was reduced to writing. Debtor also stated that he did not have the benefit of counsel because Caraway had discontinued practicing bankruptcy law.

Bardavid sent a response (the "July 2007 City DC Letter") to Magistrate Judge Pollak opposing Debtor's request and stating that the May 2007 Bernstein DC Letter, May 2007 Simon DC Letter, and May 2007 City DC Letter were all publicly filed and available to Debtor and that the May 2007 Bernstein DC Letter was served on Debtor. Bardavid further stated that not only was Debtor aware of the terms and conditions of the proposed settlement from these letters but that Debtor attended the June 2007 DC Hearing, where the proposed settlement's terms and conditions were discussed in detail and Debtor had an opportunity to express his objections. Bardavid also noted that the June 2007 DC Stay Order did not require the parties to provide Debtor with a copy of the proposed settlement.

Bernstein also sent a response (the "July 2007 Bernstein DC Letter") to Magistrate Judge Pollak opposing Debtor's request and stating that although Debtor had no legal right to review

the settlement documents, Bernstein had sent Debtor a copy of them with the July 2007 Bernstein DC Letter. Bernstein further stated that the June 2007 Stay DC Order was self-executing and that an additional stay would violate its spirit and letter and that because of the June 2007 Stay DC Order's presumed finality, the Trustee was finalizing a motion to the Court to approve the proposed settlement. On July 19, 2007, Magistrate Judge Pollak denied Debtor's request for a further stay (the "July 2007 DC Order").[20]

On September 5, 2007, Magistrate Judge Pollak held a status conference (the "September 2007 DC Hearing"). Debtor appeared telephonically and faxed a letter (the "September 2007 Debtor DC Letter") to Magistrate Judge Pollak asking for another stay so the bankruptcy process could go forward and he could find other counsel. Debtor stated that Caraway had negotiated a stipulation with the Trustee and had enclosed a draft of it with the September 2007 Debtor DC Letter. The proposed stipulation's terms stated that Debtor would pay the Trustee $22,000.00 both to purchase the Trustee's right and title to the Lawsuit and for the Trustee to pay all administrative expenses and timely-filed and late-filed claims. This stipulation was never filed with the Court nor does the record reflect that the stipulation was executed. In the Bernstein Reply Affidavit, Bernstein stated that he admitted at the September 2007 DC Hearing that he once told Debtor that he would be working on the Lawsuit on a contingent fee basis.[21] Bernstein

[20] The July 2007 DC Order provided as follows: "The Court has stayed settlement of the above captioned case for long enough. Mr. Stylianou has not been a plaintiff in this action for more than two years. However, mindful of his pro se status, this Court nonetheless stayed the settlement in order to give Mr. Stylianou the opportunity to buy himself out of bankruptcy, should he choose to do so, and thus the ability to reenter this case. At the hearing held on June 18, 2007, this Court and counsel for the parties fully explained the terms of the settlement to Mr. Stylianou. The Court gave him a final 30-day period to consult with an outside attorney, and to decide his course of action. That time period has now passed. Mr. Stylianou's protest that the terms of settlement were not available to him is inaccurate, and he has had more than sufficient time to secure a lawyer. Accordingly, the Court denies Mr. Stylianou's request to further stay settlement in this matter."

[21] This statement appears to have been made in the April 2006 Bernstein Email, as defined and explained *infra* § I.D.4.

also stated that after making the misstatement he spoke to Debtor at least a half dozen times about the purported contingent fee arrangement and that he "candidly" stated that he had been mistaken the first time. Magistrate Judge Pollak gave Debtor forty-five (45) days to resolve his bankruptcy case (the "September 2007 DC Stay Order") and instructed Bernstein to notify her in writing by October 26, 2007 as to the status of the case and a conference would be set thereafter.

In a letter dated August 7, 2007, but filed with the District Court on September 10, 2007 (the "September 2007 Debtor DC Errata Letter"), Debtor wrote to Magistrate Judge Pollak regarding the Trustee's retainer agreement with Bernstein (the "Retainer Agreement").[22] Debtor stated that he was writing to address an error he made in attributing Bernstein's 33-1/3% contingent fee to Caraway. Debtor does not specify where he made this attribution error, but he stated that Bernstein entered into the Retainer Agreement in a letter to the Trustee in which Bernstein stated that his firm's attorney's fees were a contingent fee of 33-1/3%, which was in turn agreed to by the Trustee. Debtor further stated that Bernstein denied this information at a court conference on "June 15." Neither this Court's record nor the District Court's record indicates that a court conference was held in either court on June 15 of any year, but it appears Debtor was referring to the June 2007 DC Hearing, which was held on June 18, 2007. Debtor also indicated that the Retainer Agreement stated that any statutory attorney's fees awarded to Bernstein would be applied toward the contingent fee (*i.e.*, 33-1/3% of any recovery). No documents related to the Retainer Agreement are in the record.

On September 10, 2007, Bernstein wrote a letter (the "September 2007 Bernstein DC Letter") to Magistrate Judge Pollak, in which he sought to correct the record. Bernstein

[22] In the Bernstein Supplemental Affidavit, Bernstein explained that Levy Davis and the Trustee did not have a written retainer agreement but instead proceeded on the basis of the Levy Davis Retention Order.

reiterated that the Levy Davis Retention Order provided for his retention on an hourly fee basis and stated that this Court noted it was satisfied Bernstein did not hold or represent any interest adverse to the Debtor with respect to the matter on which he was retained and was a disinterested person within the meaning of §§ 101(14) and 327(a).

On October 25, 2007, Bernstein provided Magistrate Judge Pollak with a status report letter (the "October 2007 Bernstein DC Letter") in accordance with her instructions at the September 2007 DC Hearing. Bernstein stated that Debtor had made no move to buy himself out of bankruptcy and that while Debtor had insisted at the June 2007 DC Hearing and the September 2007 DC Hearing that he was seeking counsel to prosecute the Lawsuit but was impeded from doing so because he did not have access to Bernstein's files, neither Debtor nor any attorney had contacted Bernstein despite his offer to make the files available. Bernstein asked Magistrate Judge Pollak for permission for the Trustee to accept the proposed settlement offer.

In a November 20, 2007 order, Magistrate Judge Pollak lifted the stay of the settlement (the "November 2007 DC Lift Stay Order") and allowed the Trustee to finalize the Settlement Agreement subject to any direction from this Court.[23] Since that date, the Lawsuit was reassigned to the Honorable Roslynn R. Mauskopf in the District Court, and Bernstein, on behalf of the Trustee, complied with two status report orders by Magistrate Judge Pollak and two

[23] The November 2007 DC Lift Stay Order provided as follows: "Pursuant to the Order of the Court dated September 5, 2007, Mr. Anthony Stylianou was given a final period of 45 days to resolve his bankruptcy status. Counsel for the trustee was directed to provide a status letter to the Court by October 26, 2007. By letter dated October 25, 2007, counsel wrote to inform the Court that Mr. Stylianou has 'made no move to buy himself out of bankruptcy' and to request that the trustee be granted permission to accept the pending settlement offer in this case. Mr. Stylianou has now been given several chances over a lengthy period of time to move forward, but has failed to do so. Accordingly, the stay of settlement is lifted and the trustee may proceed to finalize settlement subject to any direction from the bankruptcy court."

separate status report orders by Judge Mauskopf by providing to the District Court a total of six status reports between January 11, 2008 and June 15, 2009. In a status report to Magistrate Judge Pollak, dated January 15, 2009, Bernstein explained that the Court approved the Settlement Agreement and held a hearing on September 24, 2008 (*i.e.*, the September 2008 Hearing), to consider Debtor's objection to the distribution of attorney's fees. Bernstein stated that the Trustee executed the Settlement Agreement but that the City indicated that it would not remit the settlement funds until the Court resolved the attorney's fees issue. In a status report to Magistrate Judge Pollak, dated June 15, 2009, Bernstein restated the same information he presented in the status report dated January 15, 2009, and added that after the parties were unable to settle the distribution of attorney's fees, the Court scheduled an evidentiary hearing with all parties for June 24, 2009 (*i.e.*, the June 2009 Hearing). The June 2009 Hearing has been held.

3. Lack of Simon's Retention by the Trustee

From the proceedings before the District Court, it is clear Simon played an important role in prosecuting the Lawsuit, but as previously mentioned, the Trustee never filed an application with the Court seeking authorization for Simon's retention. While, as discussed *infra* § II.B.2.d, the Trustee must seek such authorization if Simon is to be compensated for services performed on his behalf, there is some uncertainty with respect to the third of three periods in which Simon has provided legal services to Debtor or the Trustee throughout the Lawsuit: (1) Debtor's prepetition period, (2) Debtor's postpetition period prior to the Trustee taking over the Lawsuit,[24]

[24] At the June 2009 Hearing, Simon stated that although she had represented Debtor since 1996, she was not aware that he filed for bankruptcy in 2001. She further stated that she knew Debtor had considered filing for bankruptcy but did not know he had actually filed until he told her about the Discharge. Simon recalled that she learned Debtor's case had been reopened in the spring of 2004. In the Simon Affidavit, Simon describes legal action taken by Debtor after the Discharge: "in October 2002 Stylianou filed a Motion for Interim Relief due to the Teachers' Retirement System's failure to timely process his application for retirement which was filed in November 2001.

and (3) Debtor's postpetition period after the Trustee took over the Lawsuit. It is undisputed that Simon represented Debtor during periods (1) and (2), but the nature of Simon's representation is significantly less clear for period (3).

a. Simon's Relationship with Debtor

Although the Trustee stated in the Levy Davis Retention Application that Simon's law office would continue as co-counsel in the Lawsuit and that the Trustee would seek an order from the Court authorizing her retention as co-counsel, the Trustee never did so. Compounding this failure is a letter (the "June 2004 Simon Letter") Simon sent to Debtor at the behest of the Trustee's counsel, Ron Goldstein ("Goldstein"), on June 25, 2004, one of several exhibits Simon attached to the Simon Affidavit. The June 2004 Simon Letter noted that Debtor had made partial payments to Simon from time to time but that he owed her an outstanding balance of $37,048.58,[25] which she had billed at the reduced rate of $150.00 per hour,[26] and included

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That motion was settled by agreement so ordered October 1, 2003 and Mr. Stylianou was paid for past due retirement benefits thereafter." Simon did not indicate whether she represented Debtor in this action, but based on the context, it is reasonable to infer that she did.

[25] The Court's analysis of the spreadsheets Simon attached to the June 2009 Simon Letter revealed the following as to her attorney's fees for each of the three periods (these figures are the closest approximations possible because although certain events, such as Debtor's filing his Petition and the Trustee taking over the Lawsuit, occurred during the middle of months, Simon's records are broken down by month rather than day or week):

During Debtor's prepetition period (period (1)), from January 1999 through December 2001, Simon billed $14,859.18 and was paid $15,795.00, leaving Debtor with a credit of $935.82. Based on these records, Debtor had no outstanding amounts due to Simon for Debtor's prepetition period (period (1)).

During Debtor's postpetition period prior to the Trustee taking over the Lawsuit (period (2)), from January 2002 through June 2004, Simon billed $58,358.05 and was paid $21,000.00, leaving Debtor with an outstanding balance of $37,358.05. Adding that amount to Debtor's prepetition credit of $935.82, Debtor had an outstanding balance of $36,422.23 for the time period from January 1999 through June 2004. In the June 2004 Simon Letter, Simon stated that Debtor had an outstanding balance of $37.048.58. Although the $626.35 discrepancy between these two amounts is unexplained, it is clear that during this period Simon was working directly for Debtor and not the Trustee because Debtor had received his Discharge and his bankruptcy case was closed. The Court accepts the $37,048.58 amount represented in the June 2004 Simon as the accurate amount due to Simon from Debtor as of that letter's date.

The sum of amounts paid by Debtor for periods (1) and (2), according to the spreadsheets attached to the June 2009 Simon Letter, is $36,795.00. However, in the unsent letter attached to the August 2008 Simon Letter (to which Simon attached her detailed billing records), Simon stated that "[b]etween 1999-2007, I was paid a total of $35,795 in connection with this matter. No fees were paid during the periods of time in which the Bankruptcy case was

disbursements. Simon indicated that Debtor would pay litigation expenses when incurred but that if the plaintiffs were "prevailing parties," as discussed *infra* § II.B.1.a, Simon would apply for attorney's fees from the Defendants at her usual and customary rate. Simon then would reimburse Debtor for attorney's fees already paid, but the amount of attorney's fees due would not be dependent upon the amount of damages claimed or awarded. The Court notes that in the June 2004 Simon Letter, there are further statements that may have caused Debtor confusion as to Simon's role in the Lawsuit after that date. Such discussion is reserved for any hearing regarding Simon's retention by the Trustee and any effort by Simon to be paid attorney's fees for Debtor's postpetition period after the Trustee took over the Lawsuit.

As stated in the November 2007 DC Lift Stay Order, Debtor was "given several chances over a lengthy period of time to move forward, but has failed to so," but in the July 2008 Debtor Letter, Debtor asserted that he did not buy himself out of bankruptcy because Simon advised him against it, which Simon in turn has denied.[27] Debtor has asked the Court to investigate Simon

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open, nor does the enclosed include legal time spent on this matter since settlement discussions with defendants began." The Court notes that the $1,000.00 discrepancy between these amounts is taken into account in the above calculations, leaving only the aforementioned $626.35 discrepancy. As previously stated, the Court accepts the $37,048.58 figure in the June 2004 Simon Letter as the accurate amount due as of that letter's date because there is no indication that Debtor made any payments to Simon subsequent to that date.

During Debtor's postpetition period after the Trustee took over the Lawsuit (period (3)), from July 2004 through July 2007, Simon billed $82,679.06 and was paid nothing by either Debtor or the Trustee. Although Simon is therefore owed $82,679.06 for that time period, she seeks $24,151.42. This amount is arrived at by subtracting the amount referenced in the June 2004 Simon Letter, $37,048.58, from the amount Simon referenced in her April 26, 2009 letter to the Court, $61,200.00, which she stated represented the attorney's fees apportioned to her from the total $85,856.00 in fees and disbursements provided for under the Settlement Agreement.

In response to a question from the Trustee at the June 2009 Hearing, Simon responded Debtor owed her "$191,700 and change" in undiscounted fees as of the date of that hearing. Quite obviously, $61,200.00 represents a significant discount from that amount.

[26] In the Simon Affidavit, Simon stated that her customary rate is $375.00 per hour.

[27] In the Simon Affidavit, Simon stated that "at no time did I urge Debtor Stylianou not to buy himself out of bankruptcy. When the issue of the Trustee's reopening the bankruptcy case arose, I advised Mr. Stylianou consistent with the law. I did so several times over the course of the litigation." Simon further stated that following the District Court's dismissal of most of Debtor's claims on summary judgment, "without violating attorney-client privilege, I advised Mr. Stylianou as to potential consequences of either course of action. It is my belief . . . that Mr. Stylianou has had adequate opportunities to buy his way out of Bankruptcy, and has fully understood the

for misconduct for purportedly giving such advice. As stated, the record indicates that Debtor may have had reason to be confused as to whether Simon represented him or the Trustee, but since such conduct occurs during period (3), which is the subject of any retention application to be filed by the Trustee, the Court will address Debtor's allegations at any such hearing.

Debtor acknowledges that Caraway advised him to pay off his creditors (*i.e.*, "buy himself out of bankruptcy"), but Debtor chose to follow Simon's advice instead of Caraway's in the months the District Court gave him to explore his options regarding the Lawsuit. While Debtor admits he did not have the wherewithal to pay off his creditors without borrowing money from his family,[28] the record indicates that the Trustee and Bernstein, on the Trustee's behalf, not only performed their fiduciary duty by enabling the creditors to be paid in full but also performed whatever fiduciary duty they may have had to Debtor, *see infra* § II.A.3, by increasing the Lawsuit's settlement proceeds by $40,000.00 in negotiations with the City.

The record shows that despite his failure to object to the Settlement Agreement at the February 2008 Hearing at which it was approved, Debtor has seized on the inconsistency between the contingent and hourly fee bases of compensation for special counsel as well as "poor" legal advice Simon purportedly gave him to further delay a settlement with which he disagrees intensely. Specifically, Debtor seeks to impeach Simon's credibility because of a generalized disagreement as to her and Bernstein's litigation strategy. Debtor demonstrated his dissatisfaction with Simon and Bernstein's litigation strategy in the July 2008 Debtor Letter, in

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circumstances and consequences of his actions, but is lacking either in intent or resources." The Court agrees with this assessment of Debtor's purported desire to buy himself out of bankruptcy.

[28] In the Caraway Affidavit, Caraway stated that Debtor refrained from removing such monies from his retirement accounts to buy himself out of bankruptcy. The inconsistency between Debtor and his counsel's accounts of the source of Debtor's funds lends further credence to the inference that Debtor did not have the wherewithal to buy himself out of bankruptcy.

which he asks the Court to have the "Department of Education and the Teacher Retirement System . . . do the right thing and grant me an Accident Disability Pension." However, the claims to which Debtor referred were dismissed by the District Court on summary judgment, *see supra* § I.D.2, and Debtor represented to the District Court that he wanted to take the remaining claims to trial and possibly appeal the dismissed claims. In any event, as the Court has found previously, *see infra* § II.B, the Settlement Agreement meets the applicable standard for settlement.

b. Simon's Relationship with the Trustee

The record, including the June 2004 Simon Letter, demonstrates that Simon was aware that her retention needed to be authorized by the Court. At the June 2009 Hearing, the Court questioned Simon about her retention and noted that she had received an affidavit (the "Proposed Simon Retention Affidavit") from the Trustee's office. Simon explained that Goldstein called her to retain her to work on the Lawsuit and that he wanted her to sign a standard contingent fee retention of the sort commonly used in personal injury actions. Simon stated that she maintained that the Lawsuit was a fee-shifting case, and that under a fee-shifting case, a debtor benefited because the attorney's fees were not part of the estate but rather came from the defendant. *Contra infra* § II.B.1.b. Simon further stated that she refused to sign a contingent fee agreement because it "wasn't that type of case," "under the law [she] had to go along with the fee-shifting provisions of the statutes [they] were suing under," and she "felt that that was a great deal less benefit to the Debtor."

Simon then explained that she went "back and forth a bit" with Goldstein over the Proposed Simon Retention Affidavit, which he had drafted for her. Simon explained that the

Proposed Simon Retention Affidavit was "all wrong" and that Goldstein asked her to edit it, which she did and sent back to him. Thereafter, Simon received a call from Bernstein, who told her that in his discussions with the Trustee, they had determined that it made more sense if Simon was "part of the team" because she knew the case (*i.e.*, the Lawsuit) and Debtor had a relationship with her and trusted her judgment. Simon explained that it was her understanding from Bernstein that he and the Trustee had agreed it was better to proceed in that fashion than by getting Bernstein "up to speed on litigating [the Lawsuit] himself." The Proposed Simon Retention Affidavit was never submitted to the Court nor did the Trustee apply for her retention.[29]

c. Simon's Relationship with Bernstein

Under further questioning from the Court at the June 2009 Hearing, Simon explained that it was her understanding that she was assisting Bernstein, who had been formally retained, and that she was "of counsel" to him. Simon stated that she did not believe she needed a separate retainer and that she had such an understanding with Bernstein. Simon responded affirmatively to a question from the Court as to whether she was "of counsel" to Levy Davis but qualified her answer by stating that she was "of counsel" to Levy Davis for the Lawsuit only and that she was not working with that law firm on anything else. Presumably, this arrangement would have allowed Simon to share in any compensation granted to Levy Davis.

Aside from Simon's representation, there is no evidence in the record to indicate that she had any sort of identifiable legal relationship with Levy Davis such that she was "of counsel" to

[29] Simon attached to the Simon Affidavit several marked-up versions of the Proposed Simon Retention Affidavit as well as correspondence between her and Goldstein. The marked-up versions of the Proposed Simon Retention Affidavit and the correspondence from Simon to Goldstein all indicated that Simon would not sign any affidavit providing for a contingent fee arrangement. Simon signed at least two versions of the Proposed Simon Retention Affidavit, but no version was ever submitted to the Court.

that law firm. In fact, in the Application Affidavit, Bernstein referred to Simon as Levy Davis's "subcontractor," and at the June 2009 Hearing, the Trustee referred to Simon as an "independent contractor." The Court rejects as not credible any argument that Simon was "of counsel" to Levy Davis. *See* 4 COLLIER ON BANKRUPTCY ¶ 504.03[1][a] (15th ed. rev. 2009) (footnote omitted) ("A person who is 'of counsel' to a firm may be entitled to share fees with that firm under section 504(b)(1), but courts should look closely at the facts to determine whether an attorney is of counsel generally or has claimed that moniker solely to avoid the prohibition of section 504.").

4. Contingent Fee v. Hourly Fee

Throughout the course of the proceedings before both this Court and the District Court, it has become clear that Debtor has seized on the discrepancy between the contingent fee basis of compensation provided for in the Levy Davis Retention Application and the Levy Davis Retention Affidavit and the hourly fee basis of compensation provided for in the Levy Davis Retention Order to delay the Settlement Agreement indefinitely. Nevertheless, Debtor supports his argument by asserting in substance that a contingent fee arrangement would have given Bernstein a stake in a positive outcome for Debtor, whereas under an hourly fee arrangement Bernstein would be more interested in a cash settlement from which he could easily collect attorney's fees, leaving little for Debtor. This argument dovetails with another argument of Debtor's, which, as previously mentioned, is best characterized as general disagreement with the litigation strategy of Bernstein and Simon but, namely, that Bernstein and Simon should have more zealously pursued larger pension benefits for Debtor instead of a cash settlement.[30]

[30] Debtor also points to Bernstein's representation in the Levy Davis Retention Affidavit that Levy Davis agreed to

Debtor also points to an email (the "April 2006 Bernstein Email"), dated April 12, 2006 and attached to the Caraway Affidavit, in which Bernstein explained to Debtor that he was working under a contingent fee arrangement. Debtor contended that had Bernstein correctly informed him that the Levy Davis Retention Order provided for an hourly fee arrangement, there would have been a month remaining to amend or correct it.[31] Debtor's argument is not well-taken for two reasons. The Court would not have corrected, amended, or changed the Levy Davis Retention Order because, as explained *infra* § II.B.1.a, the hourly fee basis of compensation provided for therein is proper under the circumstances of this case.[32] The attorney's fees attributable to the Trustee's representation are $48,607.42 (*i.e.*, $24,151.42 apportioned to Simon plus $24,656.00[33] apportioned to Levy Davis), calculated on an hourly basis. The $24,656.00 apportioned to Bernstein, on behalf of Levy Davis, represents a

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advance litigation costs associated with the Lawsuit and would apply to the Court for reimbursement from the Defendants but would not seek payment from Debtor or the Estate for attorney's fees or expenses in the event there were no recovery. This representation is not relevant because there was a $140,000.00 recovery in the Lawsuit.

[31] Although Debtor did not elaborate on this point, Debtor's theory appeared to be that the hourly fee arrangement ordered in the Levy Davis Retention Order was a "mistake" under Rule 60(b)(1) FRCP, made applicable through Rule 9024 FRBP, and as such the Court could have relieved the parties of the Levy Davis Retention Order and amended or corrected it to reflect the purported contingent fee arrangement had a motion been made within one year of the Special Counsel Order's entry, pursuant to Rule 60(c)(1) FRCP. Caraway presumably believed that if the April 2006 Bernstein Email had properly identified the hourly fee arrangement specified in the Levy Davis Retention Order, Debtor or another party would still have had approximately one month to move for relief from the Levy Davis Retention Order under Rule 60(c)(1) FRCP. Although Rule 60(b)(6) FRCP contains no such deadline, that subsection is not applicable to this situation.

[32] In the Bernstein Supplemental Affidavit, Bernstein stated that the Trustee initially proposed to retain him on a contingent fee basis but because of the fee-shifting available in the Lawsuit, Bernstein regarded a fee application to the District Court as the more appropriate method of compensation. Bernstein further stated that the Trustee advised him that the Court was reluctant to commit to payment of hourly fees from a bankruptcy estate and customarily ordered special counsel to be compensated on that basis. Bernstein stated that he deferred to the Trustee and executed the Levy Davis Retention Affidavit, which provided for a contingent fee basis of compensation, but Bernstein stated that it was his intention to waive some part of the contingent fee if there was a recovery of pension benefits. Bernstein argued that at the time the Court issued the Levy Davis Retention Order, which provided for an hourly fee basis of compensation, that he "assumed that counsel had persuaded [the Court] that, in light of the fee-shifting available under the law applicable to the [Lawsuit], this Court should depart from its customary practice." This statement is not credible because Bernstein sent Debtor the April 2006 Bernstein Email, in which he told Debtor that he had a contingent fee arrangement, eleven months after the Levy Davis Retention Order, *see infra* fn.36, but it does not impact the Court's determination that an hourly fee arrangement was proper in this case.

[33] Bernstein's share of the fees is calculated by subtracting the fees ($61,200.00) Simon stated in the April 2009 Simon Letter were apportioned to her from the total fees and disbursements ($85,656.00) sought in the Application.

significant discount from Bernstein's usual and customary hourly rate.[34] If the Levy Davis Retention Order had in fact provided for a 33-1/3% contingent fee, as Debtor believes it should have, Levy Davis would have been entitled to $46,666.67 (33-1/3% of the $140,000.00 total settlement amount), representing a difference of less than $2,000.00 from the potential amount due under a contingent fee arrangement.[35]

Debtor's argument is also not well-taken because Debtor was not prejudiced by the April 2006 Bernstein Email, and there is no evidence in the record that Bernstein sent it to deliberately mislead Debtor. In the April 2006 Bernstein Email, Bernstein explained how contingent fees work with respect to statutory attorney's fees. Bernstein's intention all along was to seek statutory attorney's fees, the rough equivalent of which has occurred by virtue of the Settlement Agreement. Further, Bernstein argued in the Bernstein Reply Affidavit that whatever prejudice Debtor may have suffered as a result of his misstatement in that email was cured by the May 2007 Bernstein DC Letter, in which Bernstein detailed in a status report to the District Court both the proposed payment of attorney's fees and the fact that the Levy Davis Retention Order provided for his retention on an hourly fee basis. The Levy Davis Retention Order was also attached to the May 2007 Bernstein DC Letter. Despite some minor inconsistencies in his

[34] In the Bernstein Supplemental Affidavit, Bernstein stated that he "negotiated directly with defense counsel for payment of attorney's fees as part of the settlement. Such negotiations are customary in discrimination litigation in part because the courts strongly encourage compromise rather than litigation of the fee issue" (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933 (1983)). The Court notes that the *Hensley* Court expressed concern about a "fee-shifting" statute causing a second major litigation solely to determine the attorney's fees due to a "prevailing party" thereunder. "Fee-shifting" statues and "prevailing party" are explained *infra* § II.B.1.a.

[35] Assuming the Court accepted Debtor's argument that a contingent fee arrangement should control, one of two outcomes would have occurred with respect to Simon's representation of the Trustee. If the Court accepted Simon's argument that she was "of counsel" to Levy Davis, which it does not, *see supra* § I.D.3.c, Simon would have shared in any contingent fee due to Levy Davis. Thus, the total contingent fee still would have been $46,666.67. If Simon required a separate retention authorization from the Court, which she does, *see infra* § II.B.2.d, the contingent fee arrangement would control, and the contingent fee still would have been $46,666.67, which would have to be shared by Levy Davis and Simon.

account,[36] the Court agrees with Bernstein. Debtor has not pointed to any action he would have taken or refrained from taking had he known Bernstein would be compensated on an hourly basis. Moreover, as described *supra* § I.D.2, Debtor had months in which he could have taken action, such as by "buying himself out of bankruptcy," and failed to act despite the District Court's giving Debtor ample opportunity to do so. *See supra* fn.23. Debtor also did not seek relief from the Court once he became aware of the hourly fee issue, notwithstanding the expiration of the timetable under Rule 60(b)(1),(c)(1) FRCP.[37]

In the Caraway Affidavit, Caraway argued that "[a]lthough Mr. Bernstein in his Supplement Affirmation [sic] in Support found the idea of taking a commission of Mr. Stylianou's pension 'repugnant', my client would have been much better off if Levy Davis & Maher, LLP [sic] had fought more zealously for Debtor's pension benefits which were a major part of the claim in this litigation and been paid a commission." The Court reiterates that the claims related to pension benefits were dismissed by the District Court on summary judgment, so

[36] The primary inconsistency is Bernstein's assertion that even though the Retainer Agreement with the Trustee was an oral agreement, Bernstein proceeded on the basis of the Levy Davis Retention Order, which he assumed displaced his oral agreement with the Trustee, and "relied" on that order. Bernstein's assertion that he "relied" on the Levy Davis Retention Order is not credible because that order was issued on May 6, 2005, but Bernstein sent Debtor the April 2006 Bernstein Email on April 12, 2006, in which he told Debtor that he was working for the Trustee on a contingent fee basis. As described *supra* § I.D.2, Bernstein states in the Bernstein Reply Affidavit, which he submitted to the Court in response to the Caraway Affidavit, that he acknowledged his misstatement at the June 2007 DC Hearing but that in subsequent conversations with Debtor he corrected himself. Bernstein further states that it would have been more prudent to correct his error in writing. The Court agrees. However, it is unnecessary for the Court to resolve a credibility dispute between Bernstein and Debtor inasmuch as the May 2007 Bernstein Letter, which Debtor received, cured any prejudice Debtor may have suffered as a result of the April 2006 Bernstein Email. Moreover, the less than $2,000.00 increase in the hourly fee amount over the contingent fee amount can hardly be seen as an "improper" benefit to Levy Davis and Simon.

The Court notes that Bernstein also stated in the April 2006 Bernstein Email that he did not know what Debtor's fee arrangement was with Simon's firm prior to the Discharge, but "that arrangement was extinguished by the discharge." This statement is not accurate, but Debtor has made no representation that he relied on it.

[37] Debtor's argument is further undercut by the fact that the Levy Davis Retention Order was available on the Court's docket for those eleven months between it being issued by the Court and the April 2006 Bernstein Email. At the September 2008 Hearing, Caraway acknowledged as much when he stated that whether he "should have gone on [the docket] on a regular basis and checked for such action is up to the Court to decide."

there is no way the City would have settled those claims because the City was no longer exposed to liability unless the Trustee appealed the District Court's summary judgment order.[38] Bardavid confirmed that this was the City's position at the June 2009 Hearing when he stated that the parameters of settlement negotiations would only include the claims remaining after summary judgment and "that didn't include an accident disability pension."

Additionally, in the Caraway Affidavit, Caraway argued that "Levy Davis & Mahler, LLP should not be rewarded with attorney's fees that only resulted in a mediocre settlement which was far below damages thought possible upon the undertaking of this matter." Caraway also asserted at the March 2009 Hearing that Debtor was adamant that he "got poor legal services" and "was not part of the negotiation for the stipulation amount." As to the first point, most of Debtor's claims were dismissed by the District Court on summary judgment; only two survived. While Bernstein and Simon's original demand (the "Demand")[39] in the Lawsuit was approximately $5.5 million, at the June 2009 Hearing Bardavid characterized this demand as "pie in the sky" and stated that any negotiation would have to be within the parameters of the claims surviving summary judgment (as compared to the Demand, which included all claims).

As to the second point, the Court emphasizes that Bernstein was not Debtor's attorney following the substitution of the Trustee as plaintiff in the Lawsuit. Accordingly, there is no basis for Bernstein to be found in violation of 22 NYCRR § 1215 for lacking a written retainer agreement with Debtor because Debtor was not and is not his client; the Trustee was and is his

[38] At the April 2008 Hearing, Simon stated that she and Bernstein argued for additional pension benefits for Debtor but that such benefits were "not on the table" for the City in terms of settlement. Moreover, it appears Debtor has received pension benefits of some sort from the Teachers' Retirement System, *see supra* fn.24.
[39] Bernstein attached the Demand, dated April 12, 2006, to the March 2009 Bernstein Affidavit.

client.[40] Despite Debtor not being Bernstein's client, the record shows that Bernstein negotiated with the City for a $40,000.00 increase from the Original City Offer, most of which inured to Debtor's benefit.[41] *See supra* § I.D.2&5. Moreover, Debtor has never formally objected to the Settlement Agreement, only to the allocation of attorney's fees provided for thereunder.[42]

Debtor's other argument against payment of attorney's fees under the Settlement Agreement was that $30,000.00 already paid by Debtor should have been deducted from the attorney's fees available under a contingent fee arrangement, leaving $16,666.67 in attorney's fees to be paid from the Settlement Agreement proceeds. This argument is baseless. Regardless of whether these attorney's fees were for the Lawsuit or a different matter entirely, they were undoubtedly for different *services* than those for which Simon was allocated attorney's fees under the Settlement Agreement. Specifically, the attorney's fees for which Debtor paid $30,000.00 were for services rendered by Simon for Debtor.

Additionally, in the June 2004 Simon Letter, Simon stated that if the plaintiffs were "prevailing parties," she would apply for statutory attorney's fees from the Defendants at her usual and customary rate. Simon then would reimburse Debtor for fees already paid, but the

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[40] Debtor's invocation of 22 NYCRR § 1215 is somewhat ironic given that in the Simon Affidavit, Simon stated that "throughout my representation of him, Mr. Stylianou repeatedly declined to enter into a written retainer agreement." Simon indicated in the June 2004 Simon Letter that she was sending it to Debtor in accordance with 22 NYCRR § 1215.

[41] Had the Trustee accepted the Original City Offer, Debtor would have received a lower distribution from the Settlement Agreement, if any at all.

[42] At the September 2008 Hearing, Caraway calculated that in total, there would be approximately $115,000.00 in legal fees (approximately $85,000.00 in legal fees in the Settlement Agreement plus $30,000.00 that Debtor had already paid Simon), plus $15,000.00 "for the Trustee" (this appears to be back-pay, which ultimately goes to Debtor, not the Trustee), plus $22,000.00 to the creditors, which equals $152,000.00. Subtracting the total settlement amount, $140,000.00, from that amount, $152,000.00, would leave Debtor $12,000.00 purportedly "in the hole on this entire matter, and that's even with the $7,500.00 he's entitled to as an exemption for a disability claim or a personal injury claim." Caraway's argument appears to be that Debtor suffers a net loss as a result of the Settlement Agreement. Assuming all the attorney's fees are paid, Debtor will receive a distribution of approximately $32,000.00. The fact that this amount is equal to or less than the amount Debtor has already paid in attorney's fees has no bearing on the reasonableness of attorney's fees and thus provides no basis for Debtor to object to the payment of attorney's fees. The Court further notes that this calculation is not accurate.

amount of fees due would not be dependent upon the amount of damages claimed or awarded. Simon's statement was meant to indicate that if the plaintiffs were "prevailing parties" and the Defendants paid attorney's fees, *see infra* § II.B.1.a, Simon would reimburse Debtor for partial payments Debtor had made. Thus, Simon would not "double-dip" such that the Defendants and Debtor both paid her for the same services. In the Simon Affidavit, Simon stated that she discussed this with Debtor and that his understanding was consistent with hers. Reimbursement is not relevant here because none of the attorney's fees under the Settlement Agreement are attributable to services for which Debtor had already made partial payment. Simon's statement, which she made prior to most of the claims being dismissed on summary judgment, would only have been relevant if those claims had not been dismissed and the plaintiffs were "prevailing parties" such that Defendants had to pay the plaintiffs' attorney's fees. Had that been the case and the $30,000.00 were attributable to services performed on the Lawsuit, Debtor would have been entitled to reimbursement.

5. Negotiations with the City

The Court's inquiry at the March 2009 Hearing into the allocation of attorney's fees between Levy Davis and Simon revealed an inconsistency that arose with respect to negotiations over those attorney's fees with the City. At the April 2008 Hearing, Bernstein represented that the City did not just give an attorney a sum of money under a settlement such that the attorney could divide it with his client in any way he saw fit. Although he had no personal knowledge thereof, he assumed that this was for budgetary reasons. Bernstein stated his belief that the City would therefore "get the money back" if the Court disallowed the attorney's fees, but Caraway argued that he did not believe the City cared where the money went if it was willing to settle for

a certain lump sum. At the September 2008 Hearing, Bardavid's supervisor, Blanche Greenfield ("Greenfield") stated that in the Lawsuit, a large part of the settlement memorandum that the City wrote in such cases involved estimating potential liability for attorney's fees because Debtor was suing under a fee-shifting statute, as discussed *infra* § II.B.1.a. Therefore, the City often asked attorneys to "ballpark" their fees. At the June 2009 Hearing, Bardavid confirmed that this occurred in the Lawsuit and that while he was concerned that attorney's fees would be higher, when Bernstein presented his estimate Bardavid thought an agreement could be reached.[43] Bardavid noted that he did not evaluate attorney's fees separately from the gross amount for which he sought settlement authority from his superiors. Thus, both Greenfield and Bardavid stated that the gross settlement amount was arrived at by taking into account potential attorney's fees liability.[44]

At the September 2008 Hearing, Greenfield represented that the City was interested in seeing the Settlement Agreement go forward at the gross amounts negotiated (*i.e.*, $125,000.00 and $15,000.00) but that the written stipulation could be redrafted to reallocate the attorney's fees and damages within the $125,000.00 amount as long as Debtor did not get more than the fair value of his claim. The Court then directed the parties to attempt to reach a consensual resolution, but the Trustee wrote a letter to the Court two weeks later stating that they could not come to agreement. The Court then called the March 2009 Hearing to determine how the City had allocated attorney's fees between Bernstein and Simon. Greenfield represented that it was not the City's policy to allocate attorney's fees between an attorney and his client. The City,

[43] Greenfield also stated at the September 2008 Hearing that she thought the attorney's fees were "low."
[44] Bernstein was correct that the source of settlement proceeds involves more than one City budget, but he was incorrect in its application. Both Greenfield and Bardavid explained that when a back-pay component is involved, that portion of the settlement came out of the department's budget (in this case, the Department of Education). The damages component, including attorney's fees, came out of the City Comptroller's budget.

therefore, would agree to a reallocation as long as it was not "wildly ridiculous." The Court had been given the impression by Bernstein that the City had in fact dictated the allocation between attorney's fees and damages, and the Trustee stated that Bernstein had given him the same impression. Because the Trustee, as the client, should have been included in any discussions involving the allocation of money under the Settlement Agreement, the Court called the June 2009 Hearing to determine how the allocation had been made.

As previously stated, at the June 2009 Hearing, Bardavid indicated that when Bernstein presented his attorney's fees estimate to him, Bardavid thought an agreement could be reached even though he did not evaluate attorney's fees separately from the gross amount for which he sought settlement authority from his superiors. Based on this representation and the March 2009 Bernstein Affidavit, in which Bernstein stated that the Demand included separate dollar figures for each claim before the District Court, including attorney's fees,[45] it is reasonable to infer that Bernstein did not intend to mislead the Court or the Trustee as to his negotiations with the City. In fact, this inference is supported by Bernstein's statement that the Original City Offer was $100,000.00 but that he negotiated for an increased settlement amount of $140,000.00. The June 2009 Hearing concluded, and the Court took the matter under submission.

II. DISCUSSION

A. Preliminary Matters

1. Debtor Did Not Perform His Duties Under § 521

Debtor did not perform his duties under § 521 (2001). A debtor shall file a schedule of his assets and liabilities and a statement of his financial affairs. *See* § 521(1) (2001). Debtor

[45] The attorney's fees sought in the Demand totaled $210,000.00, which included $175,000.00 for Simon and $35,000.00 for Bernstein. At the June 2009 Hearing, Simon stated that if she had not discounted her fees, they would have been "$191,700.00 and change."

breached his affirmative duty to fully disclose all his assets by failing to list the Lawsuit on the statement of financial affairs he filed with his Petition on the Petition Date, but pursuant to Rule 1009 FRBP (2001), Debtor amended the Statement of Financial Affairs to include the Lawsuit by filing the Statement Amendment on January 31, 2002, which was prior to the case closing on March 25, 2002. Debtor also breached his affirmative duty to fully disclose all assets by not scheduling the Lawsuit as personal property on Schedule B, but pursuant to Rule 1009 FRBP (2004), Debtor amended his Schedule B to include the Lawsuit on August 18, 2004, three months after the case was reopened on May 5, 2004.

In addition to amending his Schedule B to include the Lawsuit as personal property, pursuant to Rule 1009 FRBP (2004), Debtor amended his Schedule C to claim the potential proceeds of the Lawsuit as exempt on August 18, 2004. Debtor claimed the exemption pursuant to § 522(b)(1) (2004) because New York is an "opt-out" state under NYDCL § 284, which means that a New York debtor who files for bankruptcy is limited to the exemptions set forth under New York law. *See In re Corio*, 190 B.R. 498, 500 (E.D.N.Y. 1995). Debtor claimed a $500,000.00 exemption in the Lawsuit's potential proceeds pursuant to three sections of the NYDCL.[46]

A debtor shall file a list of property he claims as exempt under § 522(b), *see* § 522(l) (2004), and unless a party in interest objects, the property claimed as exempt on such list is

[46] NYDCL § 282(2)(c) (2004) ("Bankruptcy exemption for right to receive benefits. The debtor's right to receive or the debtor's interest in: . . . (c) a disability, illness, or unemployment benefit"); NYDCL § 282(3)(iii) (2004) ("Bankruptcy exemption for right to receive certain property. The debtor's right to receive, or property that is traceable to: . . . (iii) a payment, not to exceed seventy-five hundred dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent"); NYDCL § 282(3)(iv) (2004) ("Bankruptcy exemption for right to receive certain property. The debtor's right to receive, or property that is traceable to: . . . (iv) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor").

exempt. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644 (1992). Under Rule 4003(b) FRBP (2004), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the conclusion of the § 341(a) meeting or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The Trustee filed the Motion to Disallow on January 16, 2008, which was approximately three years and five months after Debtor filed the Schedule Amendments listing the Lawsuit. However, the Trustee argued that since a § 341(a) meeting in the Reopened Case was never scheduled, the time to object to the claimed exemption had never commenced. Debtor did not respond to that argument or oppose the relief sought. (The Court notes that it did not reach the substance of the Trustee's argument). Accordingly, the Court granted the Motion to Disallow on February 13, 2008.

2. The Lawsuit Is Property of the Estate

The commencement of a bankruptcy case creates an estate which, subject to certain exceptions not relevant here, is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. *See* § 541(a)(1) (2004). Accordingly, Debtor's entire interest in the Lawsuit became property of the Estate upon the filing of the Petition. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.08 (15th ed. rev. 2009) ("The estate created pursuant to section 541(a) includes causes of action belonging to the debtor at the time the case is commenced.") (footnote omitted).

Rule 6009 FRBP (2004) provides that the trustee may prosecute any pending action or proceeding by or against the debtor with or without court approval pursuant to the trustee's capacity under § 323(b) (2004) to sue and be sued. Therefore, on May 11, 2005, the Trustee moved in the District Court to substitute himself for Debtor in the Lawsuit pursuant to Rule 25(c)

FRCP. On June 27, 2005, pursuant to Rules 17(a) and 25(c) FRCP, the District Court ordered the Trustee substituted and Debtor terminated as plaintiff in the Lawsuit, and the Trustee took over as real party in interest in the Lawsuit. Accordingly, pursuant to Rule 25(c) FRCP, Debtor could not continue to prosecute the Lawsuit after that date because the District Court ordered the Trustee substituted as real party in interest under Rule 17(a) FRCP. *See* 10 COLLIER ON BANKRUPTCY ¶ 6009.03[3] (15th ed. rev. 2009) (footnote omitted) ("Once a trustee has been appointed, the debtor has no further authority or standing to prosecute litigation on behalf of the estate.").

3. Debtor Has Standing to Object to Settlement Agreement

Under Rule 9019 FRBP, the trustee must move for and receive the court's approval for settlement after notice and a hearing. Further, pursuant to Rule 2002(a)(3) FRBP, at least 20 days' notice by mail must be provided to the debtor and all creditors of such hearing on approval of a settlement unless the court for cause shown directs that notice not be sent. *See also* 10 COLLIER ON BANKRUPTCY ¶ 6009.03[3] fn.17 (15th ed. rev. 2009) ("There is no requirement . . . that the trustee seek permission to accept a settlement offer" (citing *Litzler v. American Elk Conservatory, Inc.* (*In re Kelso*), 196 B.R. 363, 370 (Bankr. N.D. Tex. 1996) ("The whole premise behind Rules 6009 and 9019 [FRBP] is that the trustee . . . has the authority to prosecute the action and then comes to the bankruptcy court for final approval if a settlement has been reached."))). The Trustee provided such notice by serving the Application by mail on January 16, 2008, more than 20 days prior to the hearing scheduled for February 13, 2008.

A number of circuits have interpreted a debtor's ability to impact a trustee's settlement authority. In the claim-settlement context, the Third Circuit has held that "[i]t is implicit in the

debtor's being given notice [under Rule 2002 FRBP] that the debtor may object to a proposed settlement." *In re RFE Indus.*, 283 F.3d 159, 164 (3d Cir. 2002). However, also in the claim-settlement context, the Eight Circuit has held that "[a] bankruptcy trustee can settle claims without the debtor's approval." *In re New Concept Housing, Inc.*, 951 F.2d 932, 938 (8th Cir. 1991) (citing, *inter alia*, *In re Bashour*, 124 B.R. 52, 54 (Bankr. N.D. Ohio 1991) ("Trustees do not represent the debtor nor do they owe the debtor any fiduciary obligation.")). Although both of these courts, particularly the Third Circuit, focused on the Bankruptcy Code's notice provisions, the Eighth Circuit held that the trustee's violation of certain notice provisions in *New Concept* was "harmless error" because the failure to give debtor notice of a hearing to approve a settlement did not amount to a deprivation of the debtor's due process rights. *See New Concept*, 951 F.2d at 937-38.

The Eighth Circuit noted that "[f]or a due process violation to have occurred, the [d]ebtor must have been deprived of a protected interest without sufficient process." *New Concept*, 951 F.2d at 938 fn.7 (citation omitted). The Eighth Circuit further noted that allowance of a creditor's settled claim would deprive the debtor of a protected property interest only if the debtor could establish a real possibility that a successful objection to the claim would result in a surplus,[47] for which the debtor failed to offer any evidence. *See id.* (citations omitted). Thus, in the Eighth Circuit's claims-allowance jurisprudence, the establishment of a "real possibility that a successful objection to the claim would result in a surplus" is the relevant test for whether the debtor has a protected property interest, of which he may be deprived only after receiving due process. Moreover, although "the trustee has a duty to maximize the value of the estate . . . the

[47] Under § 726(a)(6) (2004), property of the estate shall be distributed to the debtor after it is distributed to the creditors, *inter alia*.

trustee 'also owes a duty to the debtor to maximize value, particularly where there is a real chance that all creditors may be paid in full and the [d]ebtor may receive funds back.'" *In re Berman*, 352 B.R. 533, 542 (Bankr. D. Mass. 2006) (quoting *In re Kazis*, 2257 B.R. 112, 114 (Bankr. D. Mass. 2001)) (additional citation omitted).[48]

The "real possibility . . . [of a] surplus" test that courts have used to determine standing in the claim-settlement context is also applicable in the litigation settlement context because claim-settlement and litigation settlement are closely analogous. While an argument could be made that claim-settlement at least implicates § 502(a) and thus the "party in interest" referred to therein, § 323(b) and Rules 6009 and 9019 FRBP contain no such reference. The underlying principles are the same, though, because both rely on a traditional standing analysis, such as that used for appellate standing in bankruptcy, where a debtor has standing to appeal an order of the court only if he would be "directly and adversely affected pecuniarily" by such order. *See In re Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983) (citations omitted) (referring to such test as the "person aggrieved" test, wherein a debtor only has standing to appeal if the bankruptcy court's

[48] The analogy to claims-allowance jurisprudence is not perfect because under § 502(a), a claim is deemed allowed unless a "party in interest" objects. The Court notes that the current version of COLLIER states that a debtor is a "party in interest" for purposes of claims objections, *see* 9 COLLIER ON BANKRUPTCY ¶ 3007.01[2], but in a footnote COLLIER recognizes that some courts limit a debtor's right to object to instances "where the debtor has a pecuniary interest that would be affected by the claim and an objection to it." *Id.* at fn.18 (citation omitted). *Compare Silverman v. Leucadia, Inc.* (*In re Silverman*), 37 B.R. 200, 201 (S.D.N.Y. 1982) (stating that a debtor has standing to object to a claim "only if it can be demonstrated that the disallowance of the claim would produce a surplus in the estate which would be available" to the debtor) *with Mulligan v. Sobiech* (*In re Sobiech*), 131 B.R. 917, 920 (S.D.N.Y. 1991) (stating that *Silverman* is "no longer the law" because "a debtor is deemed to be a party in interest" (citing 8 COLLIER ON BANKRUPTCY ¶ 3007.03[2] (15th ed. rev. 1990)). In fact, the court in *In re Choquette* observed that the "majority of courts have held that a Chapter 7 debtor has standing to object to claims where one or more of the following factual requisites obtained: 1) the debtor had a pecuniary interest in the result by way of a demonstrable surplus; 2) the trustee failed or refused to object to the claim or claims in question; and/or 3) the debtor's objection would not undermine the efficient administration of the estate." *In re Choquette*, 290 B.R. 183, 187-88 (Bankr. D. Mass. 2003) (collecting over a dozen cases, including *Silverman*, on debtor standing jurisprudence and providing *Sobiech*, *inter alia*, as contrary authority). However, claim-settlement provides a closer analogy to settlement of litigation that has been taken over by the trustee.

order would "diminish the debtor's property, increase his burdens, or detrimentally affect his rights").

Because there is not even a reference to "party in interest" with respect to a trustee's settlement of what was formerly a debtor's litigation, the Court holds that only a debtor "directly and adversely affected pecuniarily" by a trustee's settlement of litigation may object to such settlement. To hold otherwise would defeat the purpose of having a trustee take over what was formerly the debtor's litigation by enabling a debtor without any possible interest in a settlement to "usurp the trustee's authority" and "require the courts to rule on objections [whose consequence] is meaningless to the administration of the estate." *See In re Woods*, 139 B.R. 876, 878 (Bankr. E.D. Tenn. 1992) (discussing lack of consequence of allowance or disallowance of claim on administration of insolvent debtor's estate).

In this case, Debtor undoubtedly has a pecuniary interest that will be affected by the Settlement Agreement. Even if the attorney's fees are paid in full (*i.e.*, approximately $86,000.00) and the creditors are paid in full (*i.e.*, approximately $22,000.00), Debtor stands to receive an approximately $32,000.00 distribution from the Settlement Agreement, including the $15,000.00 in back-pay. Based on the City's representations at the March 2009 Hearing and the June 2009 Hearing, Debtor would stand to benefit from any reduction in the attorney's fees, so long as the reduction did not result in the City deeming such reallocation "wildly ridiculous."[49] Therefore, Debtor has standing to object to the Settlement Agreement.

[49] The Court has interpreted the City's representation to mean that the City would not accept a revised Settlement Agreement under which all (or close to all) of the attorney's fees were reallocated to Debtor or vice versa.

B. Settlement Agreement

The Court's task, then, is to "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied sub nom. Benson v. Newman*, 409 U.S. 1039, 93 S. Ct. 521 (1972)). As previously mentioned, the relief sought in the Application consists of three parts: (1) approval of the Settlement Agreement in the sum of $140,000.00; (2) approval of payment of attorney's fees in the sum of $79,200.00 and expenses and disbursements in the sum of $6,656.00; and (3) authorization to pay Debtor his personal injury exemption in the sum of $7,500.00. All of these funds flow from the Settlement Agreement, so even though the Settlement Agreement in the gross sum of $140,000.00 was approved at the February 2008 Hearing and the Trustee has executed it, the City has represented that it will not remit the settlement funds until the Court has resolved the attorney's fees issue.

The Court does not disturb its approval of the Settlement Agreement at the February 2008 Hearing. Both the UST and the Trustee have stated that special counsel advised them the Settlement Agreement is reasonable, and neither the UST nor the Trustee disagreed with that conclusion. In fact, in the Application the Trustee "whole heartedly recommends" that the Court approve the Settlement Agreement, and the Court may give weight to a trustee's judgment regarding the reasonableness of settlements, *see In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991) (citation omitted), as well as to the competency and experience of counsel who support the settlement, *id.* (citation omitted); *see also In re Int'l Distrib. Ctrs., Inc.*, 103 B.R. 420, 422-423 (S.D.N.Y. 1989) (citation omitted) (same).[50]

[50] Bernstein and Simon are both experienced practitioners in the field of labor and employment law. In the

Moreover, notwithstanding later complaints by Debtor regarding his desire for Bernstein and Simon to have "tried harder" to get pension benefits,[51] Debtor has never formally objected to the Settlement Agreement itself. The Settlement Agreement clearly falls within the range of reasonableness.

As discussed in further detail hereafter, the Court also finds that the gross amount of attorney's fees is within the range of reasonableness. Nevertheless, because payment of these attorney's fees has been disputatious and plagued by confusion, payment of them naturally requires a more extensive discussion.

1. Calculation of Attorney's Fees

a. Fee-Shifting Statutes

Throughout the various disputes over attorney's fees in this case, reference has been made to "fee-shifting" statutes. Under the fee-shifting statute applicable to the Lawsuit, 42 U.S.C. § 12205, the court, in its discretion, may allow the "prevailing party" in any action commenced pursuant to 42 U.S.C. §§ 12101 *et seq.* a "reasonable attorney's fee, including litigation expenses, and costs," thus providing "explicit statutory authority" for a departure from the "American rule" under which parties are "ordinarily required to bear their own attorney's fees – the prevailing party is not entitled to collect from the loser." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 602, 121 S. Ct.

Application Affidavit, Bernstein correctly indicated that had the Lawsuit resulted in a judgment in excess of the settlement amount, the City could challenge it as excessive, subjecting the Lawsuit to appeal and delay. He also correctly observed that the City has "as a practical matter, unlimited resources with which to appeal. Therefore, an agreed resolution with the understanding of prompt, reliable payment is preferable to further litigation."

[51] As previously stated, Bardavid represented at the June 2009 Hearing that the City would not be offering additional pension benefits in the Settlement Agreement. Moreover, given that most of Debtor's claims were dismissed on summary judgment and that Debtor will see a recovery due to the Trustee's authorizing Bernstein to negotiate for such recovery despite an earlier offer from the City that would have paid the creditors, the Settlement Agreement clearly falls in the range of reasonableness.

1835 (2001) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S. Ct. 1612 (1975); *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S. Ct. 1960 (1994)). However, in *Buckhannon* the Supreme Court held that in order to be a "prevailing party" under such "fee-shifting" statutes, only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486 (1989) (citations omitted)).

Specifically, with respect to private settlements, only "settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (citing *Maher v. Gagne*, 448 U.S. 122, 100 S. Ct. 2570 (1980)). The Second Circuit has "further held that an order retaining jurisdiction to enforce the settlement is sufficient to create such a judicially sanctioned alteration in the parties' relationship, even if the terms of the settlement are not incorporated in the dismissal order." 10 MOORE'S FEDERAL PRACTICE – CIVIL § 54.171[3][iii][C] fn.111.3 (citing *Robertson v. Giuliani*, 346 F.3d 75, 82-84 (2d Cir. 2003); *Torres v. Walker*, 356 F.3d 238, 242-45 (2d Cir. 2004)). Because the Settlement Agreement is not being enforced by a court-ordered consent decree, the Trustee is not a "prevailing party" under 42 U.S.C. § 12205 and, accordingly, not statutorily entitled to attorney's fees.

Nonetheless, the methodology behind federal fee-shifting statutes affords the Court a framework within which to evaluate the reasonableness of the gross attorney's fees provided for in the Settlement Agreement and requested in the Application. More importantly, at the March

2009 Hearing, Greenfield represented that the City evaluated the attorney's fees under a settlement in terms of what a plaintiff could recover under the applicable fee-shifting statute if the case went to trial. Thus, a settlement settles not only the underlying damage claim but the defendant's potential attorney's fees liability as well. As stated previously, at the June 2009 Hearing, Bardavid represented that he considered the total amount of attorney's fees reasonable and that he had expected the fee request to be larger.

The record before the Court shows that Bernstein and Simon computed their attorney's fees in much the way a court would have calculated them had fee-shifting been applicable. In determining a "reasonable attorney's fee," the "lodestar method of fee computation is required under any federal fee-shifting statutes that provide for fees to the 'prevailing party.'" 10 MOORE'S FEDERAL PRACTICE – CIVIL § 54.190[1] (citing *City of Burlington v. Dague*, 505 U.S. 557, 565, 112 S. Ct. 2638 (1992); *Blum v. Stenson*, 465 U.S. 886, 900, 104 S. Ct. 1541 (1984)) ("use of the percentage of the recovery method . . . is not permitted under federal fee-shifting statutes," 10 MOORE'S FEDERAL PRACTICE – CIVIL § 54.191[1] (citing *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1459 (5th Cir. 1995))). The lodestar method is a time-based calculation, under which "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rated claimed. Where the documentation is inadequate, the district court may reduce the award accordingly." *Hensley*, 461 U.S. at 433.

The *Hensley* Court also held that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained' . . . the most critical factor is the degree of success obtained." *Id.* at 434, 436 (footnote omitted noting that although district court may consider other reasonable-fee factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate (citing *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 400, 641 F.2d 880, 890 (1980) (*en banc*))).

Specifically, the Supreme Court has stated that where a "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. While there is no precise rule or formula for making a reduction in such situations, the court in its discretion may attempt to identify specific hours to eliminate or simply reduce the award to account for limited success but must not apply a purely mathematical division between prevailing and losing claims. *See id.*; 10 MOORE'S FEDERAL PRACTICE – CIVIL § 54.190[2][a][iii]. The *Hensley* Court instructed fee applicants to "exercise 'billing judgment' with respect to hours worked . . . and . . . maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437 (internal citation and footnote omitted).

Finally, the Court notes that the Second Circuit has suggested abandoning the term "lodestar" in favor of "presumptively reasonable fee" because the meaning of the term "lodestar"

has shifted from a figure based on the attorney's actual or customary hourly rate to a figure based on a reasonable hourly rate. *See* 10 MOORE'S FEDERAL PRACTICE – CIVIL § 54.190[1] fn.8.1 (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 190 & fn.4 (2d Cir. 2007) and observing that "*Hensley* instructs district courts to use reasonable hourly rate to calculate 'lodestar,' but original lodestar method – as formulated by Third Circuit in [*Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973)] – contemplated use of attorney's customary rate to calculate lodestar, with subsequent adjustment for case-specific factors"). The Court employs the definition of "lodestar" which provides for a reasonable hourly rate rather than an attorney's customary rate.

The Court notes that the methodology for determining reasonable compensation in bankruptcy cases often mirrors the methodology used to make such a determination in fee-shifting cases: "In determining what constitutes 'reasonable compensation' under [§ 330(a)], most courts have adopted the formula used to calculate fees under various federal fee-shifting statutes. Compensation under these statutes is based on the lodestar amount which . . . is the number of hours reasonably expended multiplied by a reasonable hourly rate." *Apex Oil*, 960 at 731-32 (finding that the lodestar approach is an "appropriate method to use in calculating reasonable compensation under § 330") (citations omitted).

In this case, the attorney's fees calculation was made by multiplying the number of hours reasonably spent on the Lawsuit by a reasonable hourly rate. Bernstein and Simon each reduced their customary hourly rate significantly both to reflect the limited success of the Lawsuit and to allow Debtor to collect a monetary recovery. The Court finds that the discounted hourly rates used by Bernstein and Simon were each a reasonable hourly rate, and, having reviewed Bernstein

and Simon's billing records, the Court further finds that Bernstein and Simon expended a reasonable number of hours on the Lawsuit. Accordingly, the methodology employed in calculating attorney's fees in the Lawsuit tracks the methodology employed under the case law interpreting fee-shifting statutes, including the prohibition against basing attorney's fees on a percentage of recovery in actions commenced pursuant to such statutes, as well as the methodology often employed in bankruptcy cases. The Court finds that this methodology was proper in this case and that the total amount of attorney's fees, $85,656.00, is reasonable.

b. Settlement Proceeds, Including Any Amount Attributable to Attorney's Fees, Are Property of the Estate

As previously discussed, the Lawsuit is property of the Estate pursuant to § 541(a) (2004). Additionally, "[t]he right to receive the proceeds of a legal proceeding pending at the time a bankruptcy petition is filed becomes property of the estate under the authority of 11 U.S.C. § 541(a)." *In re Terry*, 56 B.R. 713, 715 (Bankr. W.D.N.Y. 1986) (citations omitted); *see also In re Corbi*, 149 B.R. 325, 329 (Bankr. E.D.N.Y. 1993) (stating that proceeds of, *e.g.*, personal injury action are "clearly property of the estate"); *In re De Berry*, 59 B.R. 891, 895 (Bankr. E.D.N.Y. 1986) (stating that any proceeds realizable from, *e.g.*, personal injury action constitute interest in property held by debtor at commencement of case and is "accordingly property of the estate"). Thus, the proceeds of the Settlement Agreement will be property of the Estate when they are tendered by the City to the Trustee pursuant to the Settlement Agreement.

The attorney's fees constitute a part of the Settlement Agreement's proceeds and are thus property of the estate. First, the Settlement Agreement by its own terms directs that the proceeds be paid to the Estate. The Settlement Agreement's stipulation (the "Stipulation") states as follows:

> 3. The New York City Department of Education shall pay Gregory Messer as Trustee for the Bankruptcy Estate of Anthony Stylianou the gross sum of fifteen thousand dollars and no cents ($15,000.00) which represents back pay, less all applicable payroll deductions and withholdings.
> 4. The City of New York shall pay Gregory Messer as Trustee for the Bankruptcy Estate of Anthony Stylianou to [sic] gross sum of $125,000.000 [sic] which represent eighty five thousand eight hundred and fifty six dollars and no cents ($85,856.00) for attorney's fees, costs and disbursements, and thirty nine thousand one hundred forty four dollars and no cents ($39,144.00) in full satisfaction of any claims for damages.

Additionally, the general release (the "Release") accompanying the Settlement Agreement states that the Trustee releases the Defendants in the Lawsuit "in consideration of payment to the Bankruptcy Estate of Anthony Stylianou by the New York City Department of Education the gross sum of fifteen thousand dollars and no cents ($15,000.00) in back pay, less all applicable deductions and withholdings, and payment by the City of New York to the Bankruptcy Estate of Anthony Stylainou [sic] of one hundred twenty five thousand dollars and no cents ($125,000.00) . . . ." Accordingly, both the Stipulation and the Release direct payment to the Trustee as trustee of the Estate. Lastly, the Levy Davis Retention Order directs that "upon settlement . . . the gross proceeds from said settlement . . . shall be turned over to the Trustee by Special Counsel and/or the Debtor for appropriate distribution by the Trustee in accordance with orders of this Court and/or the Bankruptcy Code."

Second, under fee-shifting statutes like 42 U.S.C. § 12205, the prevailing party, rather than the party's attorney, is eligible for any attorney's fees the court may allow. *See Venegas v. Mitchell*, 495 U.S. 82, 87, 1111 S. Ct. 1679 (1990) (citation omitted) (holding that under 42 U.S.C. § 1988 the prevailing *party* is eligible for a discretionary award of attorney's fees rather than the party's attorney) (emphasis in original). Although the *Venegas* Court addressed fee-shifting under another civil rights statute, 42 U.S.C. § 1988, its holding is applicable to the fee-shifting statute relevant in this case, 42 U.S.C. § 12205. *See*, *e.g.*, *Buckhannon*, 532 U.S. at 603-

04 (comparing § 12205 to § 1988 and using § 1988 jurisprudence in aid of § 12205 "prevailing party" analysis); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 123 (2d Cir. 2002) (quoting *Hensley* for the Supreme Court's holding that "the standards used to interpret the term 'prevailing party' under any given fee-shifting statute 'are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party,"'" *Hensley*, 461 U.S. at 433 fn.7).

Thus, the "entitlement of an attorney to fees depends upon the contractual arrangement between the attorney and the client. The parties to these arrangements may well take into account the possibility of a court award of fees where statutory authority *such as* Section 1988 exists but a claim for such an award must itself be made by the party rather than the attorney." *Brown v. General Motors Corp., Chevrolet Div.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (emphasis added). With respect to the Lawsuit, the Trustee and Bernstein did not have a contractual arrangement but rather a court-ordered retention (*i.e.*, the Levy Davis Retention Order) under which the Trustee was required to apply to the Court for compensation (*i.e.*, the Application). Although the Levy Davis Retention Order did not so specify, Bernstein stated in the Levy Davis Retention Affidavit that prior to making an application to the Court for payment of attorney's fees, his firm would seek statutory attorney's fees in the District Court payable by the Defendants.

Because the Trustee was not a "prevailing party" under § 12205, the Trustee could not make such an application to the District Court. Moreover, Bernstein argued in the Bernstein Supplemental Affidavit that once the Defendants "indicated willingness to settle, for fair value, the claims surviving summary dismissal, and to pay attorney's fees (albeit reduced to reflect the plaintiff's partial success in the Action [*i.e.*, the Lawsuit]), it would have been pointless, dilatory

and improper for me to continue to litigate the action in the hope that the plaintiff might be deemed a prevailing party for fee purposes." Bernstein requested that for the foregoing reasons, he be relieved of any obligation he may have had to make a statutory attorney's fees application to the District Court. In the UST Statement, the UST agreed that the Court should so relieve Bernstein. The Court concurs with Bernstein and the UST, and Bernstein is relieved of any obligation he may have had to make a statutory attorney's fees application to the District Court.

Therefore, both in process (*i.e.*, the method of calculation) and in substance (*i.e.*, the attorney's fees were paid to the Estate not Bernstein or Simon directly), the Settlement Agreement closely tracks applicable federal fee-shifting statute jurisprudence. One of the reasons the court in *Brown* gave for the entitlement to attorney's fees belonging to the client is that "[w]here an attorney and client have independent entitlements in the same action a conflict of interest is created. Defense counsel will agree only to settlements which satisfy the attorney as well as the client. A client willing to settle for $5,000 will be thwarted if his or her attorney asserts a further right to $30,000 from the defendant. There is simply no reason to believe that Congress intended to diminish substantially the attorney's duty of undivided loyalty to his or her client." *Brown*, 722 F.2d at 1011. In this case, there is no evidence that Bernstein negotiated against the Trustee's interest. In fact, the record reflects that he worked at the Trustee's behest as the Trustee sought to remain faithful to the fiduciary duty he had to the creditors, and in this case, to Debtor by virtue of Debtor's having a "real possibility" of a distribution upon further negotiations. Thus, when Bernstein continued negotiating with the City for a larger recovery it was to benefit Debtor, not himself (aside from any additional attorney's fees incurred through such further negotiations).

2. Payment and Retention

a. Payment of Attorney's Fees from Estate

As previously discussed, in the Application the Trustee moved pursuant to Rule 9019 FRBP for approval of the Settlement Agreement, which included payment of attorney's fees. Those attorney's fees have been found by the Court to be property of the Estate. Thus, payment of them is governed by § 330(a), and the Court treats the Application as an application for compensation pursuant to § 330(a). "The only procedural requirement established by section 330 is that an award of compensation be preceded by notice to any parties in interest and to the United States trustee and by a hearing." 3 COLLIER ON BANKRUPTCY ¶ 330.02 (15th ed. rev. 2009). The Trustee has met this procedural requirement by providing notice of the Application to all parties in interest, including Debtor and the UST, and the multiple hearings held since the February 2008 Hearing have met the hearing requirement. Additionally, both Debtor and the UST have availed themselves of their opportunity to be heard, such that no party in interest is prejudiced by the Court's treating the Application as an application for compensation pursuant to § 330(a).

Under § 330(a)(1), the court may allow "(A) reasonable compensation for actual, necessary services rendered by . . . [an] attorney" and "(B) reimbursement for actual, necessary expenses." A court determines reasonable compensation by considering "the nature, the extent, and the value of such services, taking into account all relevant factors," including time spent on the services, rates charged for the services, whether the services were necessary or beneficial toward completion of the bankruptcy case, whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the

problem, issue, or task addressed, and whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in nonbankruptcy cases. *See* § 330(a)(3). As previously mentioned, the "lodestar amount" or "number of hours reasonably expended multiplied by a reasonably hourly rate" is often used in bankruptcy cases. *See Apex Oil*, 960 F.2d at 731-32.

Rule 2016(a) FRBP sets forth additional guidelines for an application for compensation, including the requirement that "a detailed statement of services rendered and necessary expenses incurred accompany the application for compensation or reimbursement" and "a statement detailing any agreement for the sharing or compensation or a statement that there is no such agreement." 3 COLLIER ON BANKRUPTCY ¶ 330.02[1],[2] (15th ed. rev. 2009). The Trustee and Bernstein complied with such requirements.

b. Simon's Charging Lien

According to the June 2004 Simon Letter, Debtor owed Simon $37,048.58 in attorney's fees and expenses for postpetition services prior to the Trustee taking over the Lawsuit. Such attorney's fees and expenses constitute a direct claim by Simon against Debtor because they were incurred postpetition. However, according to the April 2009 Simon Letter, $37,048.58 represents 59.65% of the $61,200.00 allocated to Simon out of the attorney's fees in the Settlement Agreement. Such sum is an amount billed by Simon pursuant to her representation of Debtor at the discounted hourly rate of $150.00 per hour. In negotiations with the City, this amount was included in the estimate of attorney's fees. As previously stated, the Court finds that the discounted hourly rate used by Simon was a reasonable hourly rate, and, having reviewed Simon's billing records, the Court further finds that Simon expended a reasonable number of

hours on the Lawsuit during Debtor's postpetition period prior to the Trustee taking over the Lawsuit. Accordingly, the Court finds that Simon's total attorney's fees for this period are reasonable.

It is beneficial to Debtor that these attorney's fees are included in the gross attorney's fees because whether they are or not, Simon has a charging lien against Debtor pursuant to N.Y. Judiciary Law § 475. "An attorney's charging lien is recognized under common law equitable principles as an attorney's right to have the fees and costs due the attorney for services in a suit secured out of the judgment or recovery in that suit." *In re Tarricone, Inc.*, 76 B.R. 53, 55-56 (Bankr. S.D.N.Y. 1987) (citing *In re Ashley*, 41 B.R. 67 (Bankr. E.D. Mich. 1984) and pointing to N.Y. Judiciary Law § 475 for New York's statutory authority for charging liens). "The fact that bankruptcy may have intervened between the time when the attorney commenced the action and when the assets were received in satisfaction of the cause of action is not significant because the charging lien relates back to the initiation of the actions." *Tarricone*, 76 B.R. at 56 (citations omitted).[52] Because the June 2009 Simon Letter and accompanying documentation indicates that Simon was paid all amounts due for the prepetition period,[53] her only claim against Debtor, and thus, the only work subject to a charging lien by Simon, is the $37,048.58 she is owed for the postpetition period before the Trustee took over the Lawsuit. Accordingly, $37,048.58 of the total amount of attorney's fees allocated under the Settlement Agreement satisfies Simon's charging lien and may be paid to her from the Estate to effect such satisfaction.

[52] "The attorney need not file or record a charging lien in order to perfect it; the lien takes effect from the time the services were commenced, and a trustee in a subsequent bankruptcy case involving the client takes the property of the estate subject to such lien." Tarricone 76 B.R. at 56 (citing In re PDQ Copy Center, Inc., 27 B.R. 123, 125 (Bankr. S.D.N.Y. 1983). Because Simon had a charging lien against Debtor for $37,048.58 when the Court issued the Reopening Order, the Trustee took over the Lawsuit with its proceeds subject to such charging lien.

[53] The March 2009 Simon Letter indicates the same.

c. Bernstein's Retention

"To be compensated pursuant to [§] 330, a professional's employment must be approved under [§] 327." 3 COLLIER ON BANKRUPTCY ¶ 327.03[3] (15th ed. rev. 2009) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023 (2004)). Under § 327(e) (2004), the trustee, with the court's approval, may employ an attorney, including one who has represented the debtor, if it is in the best interest of the estate and the attorney does not hold any interest adverse to the debtor or the estate, for a specified special purpose. Pursuant to § 327(e) (2004) and Rule 2014(a) FRBP (2004), the Trustee applied to the Court for Bernstein's retention on April 8, 2005. As previously stated, the Levy Davis Retention Application filed by the Trustee on that date provided for a contingent fee basis of compensation. Also pursuant to Rule 2014(a) FRBP (2004), Bernstein swore the Levy Davis Retention Affidavit on March 25, 2005 providing for a contingent fee basis of compensation. However, on May 6, 2005, the Court issued the Levy Davis Retention Order authorizing Bernstein's retention with an hourly basis of compensation pursuant to §§ 327(e), 328 (2004) and Rule 2014(a) FRBP (2004). The Court has already found that the hourly fee basis was proper under the circumstances, *see supra* § II.B.1.a.

As previously mentioned, the Trustee filed the Application on January 16, 2008 in which he sought approval of the Settlement Agreement. As part of the Settlement Agreement and the Application itself, the Trustee requested that attorney's fees be paid to special counsel pursuant to § 330(a) and Rule 2016(a) FRBP. Also pursuant to Rule 2016(a) FRBP, Bernstein swore the Application Affidavit on August 2, 2007 for approval of attorney's fees. While Bernstein does not so specify in the Application Affidavit, the April 2009 Simon Letter shows that Bernstein's attorney's fees under the Settlement Agreement are $24,656.00. Likewise, Simon's attorney's

fees for her work after the Trustee took over the Lawsuit are nearly the same amount (*i.e.*, $24,151.42). The difference (*i.e.*, $37,048.58) between the sum of those amounts (*i.e.*, $48,607.42) and the total amount allocated to attorney's fees (*i.e.*, $85,656.00) represents a direct claim of Simon's against Debtor, as discussed *supra* § II.B.2.b. Accordingly, the attorney's fees allocated to Levy Davis, $24,656.00, are reasonable and may be paid to Levy Davis by the Trustee from the Estate based on the Trustee's and Bernstein's compliance with §§ 327, 328, 330 and Rules 2014(a) and 2016(a) FRBP.

d. The Trustee Must Apply to the Court for Simon's Retention

Under the circumstances, §§ 328, 330(a) are not applicable to Simon because the Trustee did not apply to Court for Simon's retention pursuant to § 327. Moreover, "[t]o be compensated pursuant to [§] 330, a professional's employment must be approved under [§] 327." 3 COLLIER ON BANKRUPTCY ¶ 327.03[3] (15th ed. rev. 2009) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023 (2004)). Under the present circumstances, Simon may not be compensated for her work on the Trustee's behalf pursuant to §§ 328, 330(a) because her employment was not approved by the Court under § 327. As previously stated, Simon's allocation of attorney's fees for services performed during Debtor's postpetition period after the Trustee took over the Lawsuit is $24,151.42, but the Trustee must apply to the Court for Simon's retention before a determination is made as to whether she is entitled to such compensation. Having already found that these attorney's fees, as part of the total attorney's fees of $85,656.00, *see supra* § II.B.1.a, are reasonable, the Court notes that other issues have been raised by Debtor which may impact any effort by the Trustee to seek Simon's retention and any attorney's fees Simon may seek for this period. Debtor's arguments regarding his confusion as to the nature of

Simon's representation and any related arguments are preserved for a hearing on any such application.

CONCLUSION

For the foregoing reasons, the Court finds (i) that the Settlement Agreement is reasonable and approved in full, (ii) the attorney's fees provided for thereunder are reasonable and approved in full, (iii) the City must execute the Settlement Agreement and remit its proceeds in full to the Trustee for distribution, (iv) the Trustee must remit $24,656.00 to Levy Davis pursuant to § 330(a) and no application to any other court for attorney's fees is required, (v) the Trustee must remit $37,048.58 to Simon in satisfaction of her charging lien pursuant to N.Y. Judiciary Law § 475, (vi) the Trustee must apply to the Court for Simon's retention pursuant to § 327 before the Court will consider any payment to Simon as the Trustee's counsel, and (vii) the Trustee must remit $7,500.00 to Debtor for his personal injury exemption. Further, to the extent any portion of the remaining attorney's fees are not paid to Simon, such attorney's fees shall remain in the Estate and be distributed in accordance with the applicable distribution scheme.[54]

[54] With the exception of the Defendants and their attorneys, this matter has been marked by carelessness on the part of the parties and attorneys involved throughout the proceedings before this Court. Such carelessness has resulted in the numerous delays that have occasioned this matter. However, notwithstanding such carelessness, the attorney's fees are reasonable considering the significant reduction in rates by both Bernstein and Simon. To the extent the Trustee seeks a commission or any other compensation, the Court will take the circumstances described herein into account in determining any such commission or compensation.

Accordingly, for the foregoing reasons, it is hereby

ORDERED, the City execute the Settlement Agreement and remit its proceeds in full to the Trustee for distribution; and it is hereby further

ORDERED, the Trustee remit $24,656.00 to Levy Davis pursuant to § 330(a) and no application to any other court for attorney's fees is required; and it is hereby further

ORDERED, the Trustee remit $37,048.58 to Simon in satisfaction of her charging lien pursuant to N.Y. Judiciary Law § 475; and it is hereby further

ORDERED, the Trustee apply to the Court for Simon's retention pursuant to § 327 before the Court will consider any payment to Simon as the Trustee's counsel; and it is hereby further

ORDERED, the Trustee remit $7,500.00 to Debtor for his personal injury exemption.

Dated: New York, New York
August 21, 2009

/s/ Arthur J. Gonzalez
ARTHUR J. GONZALEZ
UNITED STATES BANKRUPTCY JUDGE