

Return Date: July 17, 2008
10:00 a.m.

Davidoff Malito & Hutcher, LLP
Counsel for All Points Capital Corp.
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Chapter 11
Quebecor World (USA) Inc., et al., Case No. 08-10152 (JMP)

Debtors.

Jointly Administered

-----X

**NOTICE OF MOTION AND CONSOLIDATED MEMORANDUM OF LAW FOR AN ORDER
(I) QUEBECOR WORLD BUFFALO, INC. DEBTOR, TO COMPLY WITH SECTION
365(D)(5) OF THE BANKRUPTCY CODE, (II) ORDERING THE DEBTOR TO
EITHER ASSUME OR REJECT A CERTAIN EQUIPMENT LEASE DATED OCTOBER
29, 2002 PURSUANT TO SECTION 365(D)(2) OF THE BANKRUPTCY CODE,
(III) GRANTING ALL POINTS CAPITAL CORP. AN ADMINISTRATIVE
EXPENSE CLAIM, (IV) ALTERNATIVELY, MODIFYING THE AUTOMATIC STAY
UNDER SECTION 362(D) WITH RESPECT TO LEASED EQUIPMENT IF THE
SUBJECT LEASE IS REJECTED OR POST-PETITION PAYMENTS ARE NOT MADE**

PLEASE TAKE NOTICE, that, on July 17, 2008 at 10:00 a.m.
(the "Hearing Date"), upon the annexed application dated July 3,
2008 (the "Application"), All Points Capital Corp. ("APCC" or
"Movant"), by its attorneys, Davidoff Malito & Hutcher LLP,
shall move this Court before the Honorable James M. Peck, United
States Bankruptcy Judge, United States Bankruptcy Court,
Southern District of New York, courtroom 601, One Bowling Green,

New York, New York 10004, for an Order (i) directing Quebecor World Buffalo, Inc., debtor and debtor in possession (the "Debtor") to comply with section 365(d)(5) of the bankruptcy code, (ii) ordering the Debtor to either assume or reject a certain equipment lease dated October 29, 2002 pursuant to section 365(d)(2) of the Bankruptcy Code, (iii) granting All Points Capital Corp. an administrative expense claim, (iv) alternatively, modifying the automatic stay under section 362(d) with respect to such leased equipment in the event the subject lease is rejected or post-petition payments are not made

PLEASE TAKE FURTHER NOTICE, that any opposition to the relief requested in the Application shall be made in writing specifically setting forth the legal and/or factual basis for such objection, shall be made in conformity with the applicable Local Bankruptcy Rules, Federal Rules of Bankruptcy Procedure and the United States Bankruptcy Code, and shall be filed with the Clerk of the Court, United States Bankruptcy Court, Southern District of New York, One Bowling Green, New York, New York 10004, (a)(i) through the Bankruptcy Court's electronic filing system (in accordance with General Order M-242), which may be accessed (with a password which is available by contacting the Bankruptcy Court's technical assistance staff at (212) 668-2870, ext. 3522, Monday through Friday, 8:30 a.m. to 5:00 p.m.) through the Internet at the Bankruptcy Court's website.

www.nysb.uscourts.gov, using Netscape Navigator software version 4.7x or higher or Microsoft Internet Explorer version 5.5 or higher, and (ii) in portable document format (.PDF) using Adobe Acrobat or Adobe Exchange software for conversion; or (b) if a party is unable to file electronically, such party shall submit the opposition papers in .PDF format on a diskette in an envelope with the case name, case number, type and title of document, docket number of the document to which the objection refers, and the file name on the outside of the envelope; or (c) if a party is unable to file electronically or use or create documents in .PDF format, such party shall submit the answer on a diskette in either Word, WordPerfect, or DOS text (ASCII) format. An answer filed by a party with no legal representation shall comply with section (b) or (c) as set forth in this paragraph. A hard copy of the opposition papers, whether filed pursuant to section (a), (b) or (c), as set forth in this paragraph, shall be delivered directly to the Chambers of the Honorable James M. Peck, United States Bankruptcy Judge, and served upon:

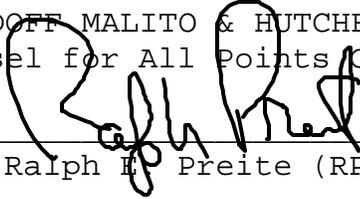
Davidoff Malito & Hutcher LLP
Attn: Ralph E. Preite, Esq.
605 Third Avenue
New York, New York 10005

so as to be received by all on or before three (3) days prior to the Hearing Date.

PLEASE TAKE FURTHER NOTICE, that unless written objections to the Application with proof of service are filed with the Clerk of the Court in accordance herewith and courtesy copies delivered to Bankruptcy Judge James M. Peck's Chambers, the undersigned attorney at least three (3) days before the Hearing Date, the Court may grant the Application and the relief requested therein.

Dated: New York, New York
July 3, 2008

DAVIDOFF MALITO & HUTCHER LLP
Counsel for All Points Capital Corp.

By: 
Ralph E. Preite (RP:6700)

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To:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Chapter 11
Quebecor World (USA) Inc., et al., Case No. 08-10152 (JMP)
Debtors.

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**APPLICATION AND CONSOLIDATED MEMORANDUM OF LAW FOR AN ORDER (I)
DIRECTING QUEBECOR WORLD BUFFALO, INC. DEBTOR, TO COMPLY WITH
SECTION 365(D)(5) OF THE BANKRUPTCY CODE, (II) ORDERING THE
DEBTOR TO EITHER ASSUME OR REJECT A CERTAIN EQUIPMENT LEASE DATED
OCTOBER 29, 2002 PURSUANT TO SECTION 365(D)(2) OF THE BANKRUPTCY
CODE, (III) GRANTING ALL POINTS CAPITAL CORP. AN ADMINISTRATIVE
EXPENSE CLAIM, (IV) ALTERNATIVELY, MODIFYING THE AUTOMATIC STAY
UNDER SECTION 362(D) WITH RESPECT TO LEASED EQUIPMENT IF THE
SUBJECT LEASE IS REJECTED OR POST-PETITION PAYMENTS ARE NOT MADE**

To: The Honorable James M. Peck,
United States Bankruptcy Judge:

All Points Capital Corp. ("APCC" or "Movant"), movant, by
its attorneys, Davidoff Malito & Hutcher, LLP, as and for its
consolidated motion and memorandum of law ("Motion") for an order
(i) directing debtor to comply with section 365(d)(5) of the
bankruptcy code, (ii) ordering the Quebecor World Buffalo, Inc.,
debtor and debtor in possession (the "Debtor") to either assume

or reject a certain equipment lease dated October 29, 2002 pursuant to section 365(d)(2) of the bankruptcy code, (iii) granting all points capital corp. an administrative expense claim, (iv) alternatively, modifying the automatic stay under section 362(d) with respect to such leased equipment in the event the subject lease is rejected or post-petition payments are not made represents to this Court, as follows:

A. BACKGROUND

1. On January 21, 2008 (the "Filing Date"), Debtor Quebecor World Buffalo, Inc., filed a voluntary petition under chapter 11 the Bankruptcy Code. By order of the Court dated January 23, 2008, the Court entered an order jointly administering the Debtor's case with that of Quebecor World USA Inc. under case no. 08-10152.

2. The Debtor has remained as debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. All Points Capital Corp. is a leasing and finance company, and is a wholly-owned subsidiary of Capital One Bank, with offices at 275 Broadhollow Road, Melville, New York 11747.

4. The Court has jurisdiction over this motion pursuant to sections 157(a) and (b) and 1334 of title 28 of the United States Code, 28 U.S.C. §1, et seq. (the "Judiciary Code")

5. This is a core proceeding pursuant to section 157(b)(2)(A) of the Judiciary Code.

6. Venue in this district is proper pursuant to section 1409 of the Judiciary Code.

B. LEASE AGREEMENT

7. By Equipment Lease Number AD-6074 dated October 29, 2002 between the Debtor and RCA Capital Corp. (the "Lease Agreement"), the Debtor leased the following equipment:

- ? one (1) used Bobst Model SP 142-ER s/n 0574 014 12,
- ? two (2) Die Cutting Chases, two (2) cutting plates,
- ? one (1) embossing chase,
- ? one (1) embossing plate,
- ? two (2) upper stripping frames,
- ? two (2) central stripping frames,
- ? two (2) lower stripping frames, stripping bars and pins,
- ? two (2) upper blanking frames, and
- ? one (1) pre-made ready table.

The aforesaid equipment shall be referred to as the "**Bobst SP 142-ER Equipment.**" A copy of the Lease Agreement is annexed hereto as **Exhibit "A."**

8. The Lease Agreement called for seventy-two (72) monthly payments by the Debtor of \$4,698.00 each, with the payments commencing upon delivery of the subject equipment, and totaling \$333,558.00 over the life of the lease, plus other charges, fees and payments called for there under.

9. The Debtor has made 63 installments, and nine (9) remain to be made in the amount of \$4,698.00 each, plus the purchase option. The most recent payment was received by APCC on December 31, 2007 for the installment due January 04, 2008. The Debtor is

due for the installments due on: February 4, 2008, March 4, 2008, April 4, 2008, May 4, 2008, and June 4, 2008, plus the payments which come due subsequent to the date of this Motion.

10. The Lease Agreement includes a \$160,950.00 Purchase Option.

11. The Bobst SP 142-ER Equipment leased to the Debtor under the Lease Agreement is identified on the Equipment Schedule "A" to the Lease Agreement, a copy of which is annexed as **Exhibit "A"** hereto. Pursuant to the terms of the Lessee's Acknowledgement and Agreement, the equipment ought to be located at the Debtor's premises located at 2475 George Urban Boulevard, Depew, New York 14043. A copy of the Lessee's Acknowledgement and Agreement is annexed as **Exhibit "A"** hereto.

12. The Lease Agreement was assigned to APCC on or about October 31, 2002, and the Debtor received notice thereof by letter of same date. A copy of the assignment and letter notice is annexed as **Exhibit "A"** hereto.

13. The **Bobst SP 142-ER Equipment** was delivered to the Debtor pursuant to the terms of the Lease Agreement, and the Debtor commenced making payments thereunder.

14. Since the Filing Date, the Debtor has been utilizing the **Bobst SP 142-ER Equipment** in the conduct of its business.

C. RELIEF REQUESTED IN THIS MOTION

15. APCC makes this motion to have the Debtor directed to comply with section 365(d)(5) of the Bankruptcy Code.

16. APCC also makes this motion for an Order directing the Debtor to either assume or reject the Lease Agreement. In the event that the Debtor assumes the Lease Agreement, then APCC requests that the Debtor be directed to make monthly payments called for under the Lease Agreement when the payments come due, **and** cure the post-petition arrears under the Lease Agreement.

17. In the event that the Debtor opts to reject the Lease Agreement, or the Debtor fails to make monthly lease payments or fails to cure the post-petition arrears, APCC requests that it be granted relief from the Automatic Stay to recover the subject **Bobst SP 142-ER Equipment**.

18. Additionally, APCC seeks an administrative expense claim for payments which have come due post-petition under the Lease Agreement, and which have not been paid, or are not paid.

**D. APCC REQUESTS THAT THE COURT ISSUE AN
ORDER DIRECTING DEBTOR TO COMPLY WITH
SECTION 365(d)(5) OF THE BANKRUPTCY CODE AND
MAKE PAYMENTS CALLED FOR UNDER THE LEASE**

19. Section 365(d)(5) of the Bankruptcy Code provides, in pertinent part, that:

[t]he [debtor-in-possession] shall timely perform all of the obligations of the debtor first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property . . . ,

until such lease is assumed or rejected.

11 U.S.C. §365(d)(5) (formerly 11 U.S.C. §365(d)(10)). This provision was designed to grant the debtor "limited breathing room" in which to decide whether assume or reject an unexpired lease for personal property. In re Elder-Beerman Stores Corp., 201 B.R. 759, 764 (Bankr. S.D. Ohio 1996).

20. After the 60-day period has passed, the "debtor must perform all obligations under an equipment lease." See In re Elder-Beerman, 201 B.R. at 763 (stating that lessor of personal property is automatically entitled to rental payments after the expiration of the statutory sixty-day period). See also, In re Ernst Home Center, Inc. 209 B.R. 955, 965 n.9 (Bankr. W.D.Wash. 1997) (subject code provision was created to relieve personal property lessors from the burden of petitioning the court to compel the debtor to make lease payments).

21. More than 60 days have elapsed since the order for relief was entered in this case. As a result, Debtor's "breathing room" in which to avoid performing under the Lease Agreement has ended, and the lease payments should commence.

22. Section 365(d)(5) requires that the Debtor perform its obligations under the Lease Agreement, including, but not limited to, providing monthly payments called for thereunder, and procuring appropriate insurance for the equipment and performing other aspects the Lease Agreement.

23. The Debtor has not commenced making post-petition payments called for under the Lease Agreement. APCC respectfully requests that the Court issue an order directing the Debtor to commence such payments forthwith.

24. In the event that the Debtor fails to commence making payments in compliance with section 365(d)(5) within five (5) days of the date of such Order, as is more fully set forth below, APCC further requests that the Lease Agreement be deemed rejected, and that APCC be granted relief from the automatic stay so that it may repossess the subject **Bobst SP 142-ER Equipment**.

E. APCC REQUESTS THAT THE COURT ORDER THE DEBTOR TO EITHER ASSUME OR REJECT A THE EQUIPMENT LEASE DATED PURSUANT TO SECTION 365(d)(2) OF THE BANKRUPTCY CODE

25. Pursuant to section 365(a) of the Bankruptcy Code, the Debtor may assume or reject an unexpired lease. Said section provides in pertinent part, as follows:

[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. §365(a). Pursuant to this section, the Debtor may decide that the subject lease is burdensome, or against its best interests to keep, and therefore may seek authorization to reject the lease. Alternatively, the Debtor may assume the subject lease, and therefore make payments called for thereunder, and keep the **Bobst SP 142-ER Equipment** pursuant to the terms of the

lease.

26. The Bankruptcy Code places no duty on the Debtor to make such an election under section 365(a). The language of the subject statute is worded in the permissive as it uses the word "may." Instead, the Bankruptcy Code permits a creditor to seek a directive from the Court compelling such action by the Debtor.

27. In In re CIS Corp., 142 B.R. 640, 644 (S.D.N.Y., 1992), the District Court for the Southern District of New York held that the:

The Code places no such duty on the debtor-in-possession but instead provides the creditor with the vehicle for compelling such action [to assume or reject a lease].

Id. at 644. Accordingly, APCC seeks a ruling from this Court compelling the Debtor to assume or reject the Lease Agreement.

28. APCC requests that the Debtor be provided with a period of five (5) business days from the return date of this Motion to obtain authorization from the Court to assume the Lease Agreement, and to indeed assume it. If not, APCC respectfully requests that the Lease Agreement be deemed rejected by the Debtor at the conclusion of such 5-day period.

**F. APCC REQUESTS THAT THE COURT GRANT
APCC AN ADMINISTRATIVE EXPENSE CLAIM**

29. Section 503(b)(1)(A) of the Bankruptcy Code allows a party to recover "the actual, necessary costs and expenses of preserving the estate" as administrative expenses. Pursuant to this

provision,

. . . a debtor must pay the lessor a reasonable administrative expense for actual use of property which benefits the bankruptcy estate during the pendency of that decision to assume or reject the lease.

In re Cardinal Indus. Inc., 151 B.R. 838, 841 (Bankr. S.D. Ohio 1992) (citing N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 531 (1986); Philadelphia Co. v. Dipple, 312 U.S. 168, 174-75 (1941)).

30. APCC believes that Debtor has continuously used the **Bobst SP 142-ER Equipment** during the post-petition period.

31. It is safe to assume that, since the Debtor is in the printing services business, it must rely heavily on the **Bobst SP 142-ER Equipment** in the operation of its business. Clearly, such use has benefited Debtor's estate.

32. Accordingly, APCC is entitled to receive an allowed administrative expense under section 503(b)(1)(A) of the Bankruptcy Code for all payments due and owing under the Lease Agreement, or otherwise, for the post-petition period. See Burlington N.R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.), 853 F.2d 700, 707 (9th Cir. 1988) (recognizing a presumption that the payment terms of the lease are a reasonable measure of the administrative expenses to be allowed); Farber v. Wards Co., 825 F.2d 684, 689-90 (2d Cir. 1987) (same). See also In re Cardinal Indus., 151 B.R. at 842-43 (noting that the debtor is not entitled to a "bargain basement" rate for compensating the

lessor for actual use of the leased property).

33. The Court should note that even if the Debtor has not been utilizing the **Bobst SP 142-ER Equipment** during the its Chapter 11 case, the Debtor is nevertheless indebted to APCC for an administrative expense claim. See *In re Eastern Agri-Systems, Inc.*, 258 B.R. 352 (ED. N.C. 2000).

G. ALTERNATIVELY, APCC REQUESTS THAT THE AUTOMATIC STAY BE MODIFIED WITH RESPECT TO SUCH LEASED BOBST SP 142-ER EQUIPMENT IN THE EVENT THE SUBJECT LEASE IS REJECTED OR POST-PETITION PAYMENTS ARE NOT MADE OR POST-PETITION ARREARS ARE NOT CURED

34. In the event that the Debtor fails to cure the post-petition arrears, or commence making post-petition payments, or rejects the Equipment Lease, APCC requests as alternative relief that the automatic stay be modified so that it may repossess the **Bobst SP 142-ER Equipment**.

35. Section 362(d)(1) and (2) of the Bankruptcy Code provides that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

11 U.S.C. § 362(d)(1), (2).

36. APCC respectfully requests that, in the event that the Debtor rejects the subject Lease Agreement, it is entitled to relief from the stay pursuant to Section 362(d)(1) of the Bankruptcy Code because at such time, it will be clear that the Debtor does not intend to pay for the use of the equipment provided by APCC.

37. Further, if Debtor is no longer operating APCC's equipment, it may deteriorate from lack of use and proper maintenance and may be subject to further damage if not properly secured. See In re Powell, No. 98-01885-TOM-13, 1998 Bankr. LEXIS 956, at 21 (Bankr. N.D. Ala. 1998) (stating that the party with an interest in the property need only establish a prima facie case of lack of adequate protection under Section 362(d)(1) in order to seek relief from the stay) (citations omitted).

38. Additionally, if the Debtor rejects the Lease Agreement, relief from the stay is available to APCC under section 362(d)(2) of the Bankruptcy Code because the Debtor's estate has no equity in the subject equipment as the **Bobst SP 142-ER Equipment** is owned by APCC, and the subject the **Bobst SP 142-ER Equipment** is not necessary for an effective reorganization (even if a

successful reorganization is in prospect) because the Debtor will have deemed the equipment unnecessary by rejecting the Lease Agreement.

39. Further, if the Debtor is not making post-petition payments for the subject equipment, or fails to cure the post-petition arrears on the monthly post-petition payments due under the Equipment Lease, then APCC is entitled to relief from the automatic stay as such is sufficient cause under section 362(d)(1) of the Bankruptcy Code.

40. Since both subsections 362(d)(1) and (2) are satisfied, APCC must be granted relief from the Bankruptcy Code's automatic stay to proceed with its repossession of the subject **Bobst SP 142-ER Equipment** if the underlying Lease Agreement is rejected or not paid post-petition.

41. Under Section 362(d)(1) of the Bankruptcy Code, the moving party bears the initial burden of showing its entitlement to relief from the automatic stay. Once this burden has been met, the burden of proving the absence of cause, including demonstrating that the movant is adequately protected, shifts to the debtor. See In re Elmira Litho, Inc., 174 B.R. 892 (Bankr. S.D.N.Y. 1994).

42. The **Bobst SP 142-ER Equipment** is subject to depreciation. So long as the **Bobst SP 142-ER Equipment** remains in use by the Debtor, the value of the **Bobst SP 142-ER Equipment** continues to

depreciate.

43. Further, as long as the Debtor fails to make monthly post-petition lease payments, and fails to cure the post-petition arrears thereunder, and deprive APCC of such payment, relief from the automatic stay is warranted.

44. Accordingly, APCC seeks an Order granting it relief from the automatic stay, pursuant to section 362(a)(1) and (2) of the Bankruptcy Code, so that it may take those steps necessary to mitigate its damages, including taking possession of the **Bobst SP 142-ER Equipment** and remarketing same.

45. The relief requested herein has not been previously requested of this or any other Court.

WHEREFORE, for all of the foregoing reasons, APCC respectfully requests that the Court issue an Order (i) directing the Debtor to comply with section 365(d)(5) of the Bankruptcy Code, (ii) compelling the Debtor to assume or reject the Lease Agreement pursuant to section 365(a) of the Bankruptcy Code, (iii) granting All Points Capital Corp. an administrative expense claim, (iv) granting All Points Capital Corp. relief from the automatic stay under section 362(d) of the Bankruptcy Code with respect to the **Bobst SP 142-ER Equipment** in the event the subject lease is rejected or post-petition payments are not made, and post-petition arrears are not cured, and grant such other and further relief as the Court deems just, equitable and proper,

none of which has been requested of this or any other Court.

Dated: New York, New York
July 3, 2008

DAVIDOFF MALITO & HUTCHER, LLP
Counsel for All Points Capital
Corp., creditor

By: 
Ralph E. Preite (RP:6700)

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