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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
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QUEBECOR WORLD (USA), <u>et al.</u> ,	:	Case No. 08-10152 (JMP)
	:	
Debtors.	:	Jointly Administered
	:	
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**REPLY OF ATHENS PAPER COMPANY, INC. TO DEBTORS’ OBJECTION TO  
MOTION OF ATHENS PAPER COMPANY, INC.’S FOR ORDER  
DEEMING 503(b)(9) CLAIMS TIMELY FILED**

Athens Paper Company, Inc. (“Athens”), by and through its counsel, Moses & Singer LLP, hereby submits its reply to the Debtors’ objection (“Objection”) to the motion (the “Motion”)<sup>1</sup> of Athens for entry of an order deeming its 503(b)(9) claims against the above-captioned Debtors timely filed. In reply and in further support of the Motion, Athens respectfully represents as follows:

**Preliminary Statement**

1. The Debtors’ Objection appears focused on showing that Athens received notice of the Bar Date and numerous other events in the Debtors’ chapter 11 cases. Athens does not dispute either of these points. Rather, the crux of the Motion is that the Bar Date Notice alone

<sup>1</sup> Capitalized terms used herein but not defined herein shall have the meaning ascribed to them in the Motion.

did not provide Athens with adequate notice of the requirement to file 503(b)(9) claims at such time on a special 503(b)(9) Claim Form. The Debtors failed to serve either the 503(b)(9) Procedures Motion or 503(b)(9) Order on Athens, as required by the Case Management Order since, as a major supplier of the Debtors, Athens was clearly affected by such motion and order, and without the 503(b)(9) Procedures Motion or 503(b)(9) Order, the Bar Date Notice alone was inadequate notice of such requirement. Nowhere in their Objection do the Debtors address this undeniable fact. As a result, Athens simply filed (timely) the pre-printed, personalized proof of claim forms provided to it by the Debtors with the Bar Date Notice – which contained all outstanding prepetition amounts owed to Athens by the Debtors, including 503(b)(9) amounts – but did not file separate 503(b)(9) claims.

2. The Debtors' attempt to shift the focus away from the inadequacy of the notice provided to Athens and blame Athens' lack of notice on its failure to make a reclamation demand, to demand immediate payment for goods received by the Debtors within twenty days of the Petition Date or review the Debtors' website to clear-up any uncertainty it may have had. However, Athens was not required to do any of these things but rather it was entitled to receive clear notice of the requirement to file a 503(b)(9) Claim Form before the Bar Date. This argument also ignores the fact that because it did not receive the 503(b)(9) Procedures Motion or the 503(b)(9) Order and the Bar Date Notice alone was inadequate to put it on notice of the requirement to file separate 503(b)(9) claims by the Bar Date, Athens was unaware of what to look for.

### **Argument**

3. The Debtors do not dispute (because they cannot) that the Bar Date Notice contained only three vague references to 503(b)(9). The initial reference merely stated that a

503(b)(9) Claim Form was attached to the Bar Date Notice “for use by any holder of a 503(b)(9) claim.” The other two references, located in the “Who is Not Required to File a Proof of Claim” section, add no clarity regarding the 503(b)(9) filing requirements. The Debtors do not and cannot dispute that nowhere does the Bar Date Notice include the 503(b)(9) filing requirements or expressly state that 503(b)(9) claimants are required to separately file (in addition to filing the pre-printed, personalized general unsecured proof of claim forms attached to the Bar Date Notice) their 503(b)(9) claims on the special 503(b)(9) Claim Form by the Bar Date. Nor can they dispute credibly that the Bar Date Notice did not assume that claimants holding 503(b)(9) claims had previously received notice of the 503(b)(9) Procedures Motion. Similarly, the Debtors cannot dispute that they easily could have included a copy of the 503(b)(9) Order in the Bar Date Package.

4. Adding to this lack of clarity is the fact that eight pre-printed, personalized general unsecured proof of claim forms, which included 503(b)(9) amounts, were attached to the Bar Date Notice received by Athens.<sup>2</sup>

5. The Debtors cannot dispute that the 503(b)(9) Procedures Motion is the pleading in these cases that provided notice with respect to the 503(b)(9) filing requirements and that the Bar Date Notice (with respect to filing 503(b)(9) claims) was predicated on the 503(b)(9) Procedures Motion. Had Athens received service of the 503(b)(9) Procedures Motion when it was filed or the Debtors included the 503(b)(9) Order with the Bar Date Package, the requirement to file the special 503(b)(9) Claim Form to assert its 503(b)(9) claims would have been clear.

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<sup>2</sup> In response to Athens’ assertion that the pre-printed, personalized forms and the single, blank 503(b)(9) Claim Form attached to the Bar Date Notice made any 503(b)(9) filing requirements even less clear, the Debtors merely state that such an argument is “patently absurd.” Objection, ¶ 24. But the Debtors stop there.

6. The 503(b)(9) Procedures Motion itself states that it was filed because of the “present[] uncertainty as to the procedures section 503(b)(9) claimants need to follow” and that its purpose was to establish procedures that would “provide clear guidance to all parties as to how ... 503(b)(9) claims shall be filed in these cases ... .” 503(b)(9) Procedures Motion, ¶¶ 12, 14.

7. Moreover, the 503(b)(9) Procedures Motion provided information regarding the nature of a 503(b)(9) claim (a claim “relating to goods received [by the Debtors] within twenty days prior to the petition date”) and the significance of such a claim (“... 503(b)(9) prioritizes prepetition claims for goods received within the twenty day prefiling period over other prepetition claims ...”). 503(b)(9) Procedures Motion, at 1 & ¶ 11, 12.<sup>3</sup>

8. The 503(b)(9) Procedures Motion sets forth the specific procedures to be followed by creditors when filing their 503(b)(9) claims, including that such claims must be filed by the (not yet established) bar date for prepetition claims *and that the special 503(b)(9) Claim Form must be used to file such claims. Id.* ¶ 13(a) & (b). Further, it explains the genesis of the 503(b)(9) Claim Form and even goes so far as to make the 503(b)(9) Claim Form “available at this time in order to allow section 503(b)(9) claimants to commence filing proofs of claims without having to wait for a bar date to be set.” *Id.* ¶ 16.

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<sup>3</sup> The inclusion of such information in the 503(b)(9) Procedure Motion and its availability therein to those who received such motion is important and should not be overlooked, especially since the Bar Date Notice did not include any such information, at least as clearly as did the 503(b)(9) Procedures Motion. In early 2008, when the Debtors’ filed their chapter 11 cases and the 503(b)(9) Procedures Motion was filed and served, section 503(b)(9) of the Bankruptcy Code was still in its infancy, and many creditors such as Athens had little, if any, experience with what type of claims were covered by the section and with the procedures for filing such claims. Indeed, the necessity (in part) of filing the 503(b)(9) Procedures Motion is evidence of this fact. It is also supported by the corresponding new process of establishing procedures governing 503(b)(9) claims, as recognized by the Debtors. *See* 503(b)(9) Procedures Motion, ¶ 19 (“Section 503(b)(9) was added to the Bankruptcy Code as part of BAPCPA, and, thus, the process of establishing procedures for such claim is relatively new.”).

9. Athens – as a major prepetition supplier of the Debtors – is a creditor with an interest in such procedures which would directly affect Athens’ rights and interests.<sup>4</sup> Indeed, as recognized by the Debtors, the 503(b)(9) motion (if granted) would have at a minimum precluded Athens from seeking immediate payment of its 503(b)(9) claim. As such, Athens should have and was entitled to receive notice of such motion.<sup>5</sup> See Case Management Procedures Order, ¶ 13 (requiring that notice be given “to any other person whose specific rights or interests are directly affected by such proceeding.”).<sup>6</sup>

10. It makes little sense why a major prepetition supplier of the Debtors likely to have sold goods received by the Debtors within twenty days of the Petition Date would not be served with the 503(b)(9) Procedures Motion. Athens was exactly the type of creditor that should have received service of the 503(b)(9) Procedures Motion.

11. In any event, the fact that the Debtors chose not to serve the 503(b)(9) Procedures Motion or 503(b)(9) Order on Athens (and, presumably, others affect by it) at that time should have made it clear to the Debtors when they subsequently drafted the Bar Date Notice that they needed to include sufficient information in the Bar Date Notice regarding the 503(b)(9) filing

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<sup>4</sup> This is so regardless of whether Athens had filed a 503(b)(9) claim at the time the 503(b)(9) Procedures Motion was filed.

<sup>5</sup> Oddly, while Athens argues that it was entitled to receive notice of the 503(b)(9) Procedures Motion pursuant to the Case Management Order, the Debtors appear to draw a distinction between the 503(b)(9) Procedures Motion and 503(b)(9) Order and focus on the order. Objection, ¶ 21. Other than merely stating that the 503(b)(9) Procedures Motion did not need to be served on all parties in interest because it did not seek to establish a deadline for filing claims and setting forth the purpose behind the filing of the 503(b)(9) Procedures Motion, *id.* ¶ 22 n.1, the Debtors do not address Athens argument that it was entitled to receive notice of the 503(b)(9) Procedures Motion pursuant to the Case Management Order.

<sup>6</sup> The Debtors state that Athens cites to the fact that the Debtors provided notice of the Section 503(b)(9) Procedures Motion to all parties on the Notice List and “to other parties who have asserted that they provided goods to the Debtors within twenty days prior to the petition date, either in pleadings filed with the Court or in connection with reclamation demands submitted to the Debtors” as evidence that the Debtors should have provided Athens notice of the Section 503(b)(9) Procedures Motion. Objection, ¶ 22. This statement is not correct. The Motion includes such information (in a footnote) simply to indicate which parties did receive notice of such motion. Motion, ¶ 13 n.3. The Motion clearly argues that service of the 503(b)(9) Procedures Motion on Athens was required by the Case Management Order. *Id.* ¶¶ 23-25.

procedures or to have at least included a copy of the 503(b)(9) Order.

12. The Bar Date Notice was instead drafted in a way that appears to have assumed creditors who were likely to hold 503(b)(9) claims had received the 503(b)(9) Procedures Motion or 503(b)(9) Order. Without receiving that motion or order, the Bar Date Notice (with respect to the 503(b)(9) filing requirements), as it was subsequently drafted, was totally inadequate.<sup>7</sup> The Debtors remaining arguments do not alter the central fact that the Bar Date Notice alone was insufficient to give Athens notice of the 503(b)(9) filing requirements.

13. Again, instead of addressing the issues raised in the Motion the Debtors discuss the many ways Athens could have educated itself of the Bar Date Notice. However, this is an empty statement given that the Bar Date Notice was lacking and Athens thus had no reason to believe its rights were being affected. It was the Debtors' responsibility to provide adequate notice of matters directly affecting the right and interests of its creditors. It failed to do so in this instance.

14. Finally, the Debtors' reliance on the ballot for voting on the Plan, including the Disclosure Statement (which Athens does not dispute receiving), the Confirmation Order, and the Effective Date Notice (which Athens also does not dispute receiving), again, is irrelevant to the adequacy of the Bar Date Notice alone. Nothing in any of these pleadings (which were each received by Athens well after the Bar Date) provided Athens with clear notice of the 503(b)(9) filing requirements.<sup>8</sup>

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<sup>7</sup> While the Debtors note two times in their Objection that almost 700 creditors filed 503(b)(9) claims, Objection, ¶¶ 12, 20, the Debtors fail to indicate how many of those 700 creditors received either or both of the 503(b)(9) Procedures Motion and 503(b)(9) Order, or how many claimants whose goods were received by the Debtors within twenty days of the Petition Date failed to file 503(b)(9) claims.

<sup>8</sup> Since each of these pleadings was served on Athens well after the Bar Date had passed, even if any of the pleadings did clarify the 503(b)(9) filing requirements (which they did not), it would have been too late for Athens to timely file a 503(b)(9) claim in accordance with such requirements.

### **Excusable Neglect**

15. For the reasons discussed in the Motion, and for many of the same reasons discussed above, if the Court finds that the Bar Date Notice alone was adequate notice of the 503(b)(9) filing requirements (which it should not), the Court should nevertheless deem Athens' 503(b)(9) claims timely filed based upon excusable neglect pursuant to Bankruptcy Rules 3003(c)(3) and 9006(b)(1).

16. As discussed in the Motion, the reason that Athens did not timely file its 503(b)(9) claims was not within Athens' control. Contrary to the Debtors' contention that it was, the Motion clearly sets forth that the opposite is true. Athens did file its claims in a timely fashion, it failed however to file such claims in accordance with the established 503(b)(9) procedures due to the fact that the Debtors failed to serve anything upon Athens that made the 503(b)(9) filing requirements clear. What the Debtors did (or failed to do) was completely outside of Athens' control.

17. Any delay by Athens in seeking to properly assert its 503(b)(9) claims is due to the Debtors' failure to provide adequate notice to Athens of the 503(b)(9) filing requirements. Because the notice received by Athens was inadequate, it was not until Athens retained counsel in connection with the preference action commenced against it by the Quebecor World Litigation Trustee that the 503(b)(9) claim issue came to its attention. Athens sought to remedy the issue in a timely fashion at that time.

18. Finally, deeming Athens' 503(b)(9) claims timely filed will not prejudice the Debtors. The deadline to object to 503(b)(9) claims has yet to pass and therefore, upon information and belief, distributions on many such claims have yet to be made. Moreover, contrary to the Debtors' contention that the Debtors had no basis to assume Athens maintained

