THE BIEGLER LAW FIRM
Robert P. Biegler (CA Bar Assn. No. 88506)
725 University Avenue
Sacramento, CA 95825
Telephone: (916) 927-3971
Facsimile: (916) 927-7869

Attorneys for Defendant
Team Power Forklifts Inc.

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In re Quebecor World (USA), et al., Debtors.	Bk. No. 08-10152-JMP (Jointly Administered) Chapter 11 DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
Eugene I. Davis, as Litigation Trustee for the Quebecor World Litigation Trust, Plaintiff, vs. Clarklift-West, Inc. dba Clarklift Team Power, Defendant,	Adv. No. 10-01568-shl

I. PARTIES

Defendant Clarklift-West Inc. dba Clarklift Team Power (Defendant Clarklift) is represented by Robert P. Biegler of the Biegler Law Firm.

Plaintiff Trustee Eugene I. Davis for Debtor Quebecor World is represented by Kara E. Casteel of ASK LLP.

II. PRELIMINARY OBSERVATIONS

Preliminarily, Defendant Clarklift notes that Clarklift is no longer doing business in

heavy equipment sales, rental and service. (Decl. of Robert P. Biegler ¶ 4) The assets of the business have been sold and this is one of the final matters the seller/former owner, Defendant, is "cleaning up." This claim is a liability (and theoretical asset) retained by seller. (Biegler Decl. ¶ 4) The transactions, giving rise to this claim were a small portion of an extended business relationship between debtor and defendant which took place primarily in northern California.

III. STATEMENT OF FACTS/LAW

A. Legal Standard For Summary Judgment.

Plaintiff correctly notes the legal standard for Summary Judgment. In accordance with Bankruptcy Rule 7056, which incorporates Federal Rule of Civil Procedure 56, summary judgment may only be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see *Celotex Corp. V. Catrett,* 477 U.S. 317, 322 (1986); *Morenz v. Wilson-Coker,* 415 F.3d 230, 234 (2d Cir. 2005). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986); see also *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co., Inc.,* 161 B.R. 87, 89 (S.D.N.Y. 1993). A fact is considered material if it might affect the outcome of the suit under governing law. See *Anderson,* 477 U.S. at 248. Plaintiff has not met its burden as moving party herein.

B. Legal/Factual Argument

This Opposition to Plaintiff's Motion for Summary Judgment delineates Defendant

Clarklift-West Inc. dba Clarklift Team Power's (Defendant Clarklift) position concerning Litigation Trustee Eugene I Davis' adversary action against Defendant Clarklift based on its "preference claim."

Debtor Quebecor World Merced (California) was a long term customer of Defendant Clarklift. Clarklift provided heavy equipment to Quebecor as well as supplying repair services for said equipment. Said transactions took place primarily in northern California.

Defendant Clarklift contends that none of the subject transfers are subject to a preference claim, by the trustee, for two (2) primary reasons.

First, Plaintiff's counsel's, A.S.K.'s, own New Value Analysis (Exh. G to Declaration of Eugene I. Davis, Plaintiff's Undisputed Fact #22) clearly notes/recognizes that of the $69,207.61 transferred during the relevant period, $30,514.18 was for "subsequent new value" and thus not subject to avoidance pursuant to 11 U.S.C. section 547 (c)(4). As the Trustee has already established that said sum constitutes subsequent "new value", said amount is undisputed as not subject to avoidance, and, thus, is not subject to this motion.

Second, 11 U.S.C. section 547(c)(2) provides that said transfers are not subject to a preference claim when made according to ordinary business terms. The "ordinary course of business" (OCB) defense protects ordinary commercial transactions and encourages creditors to deal with financially troubled debtors (see *In re Fulghum Const. Corp.* 872 F 2d 739)(6th Cir. 1989)). All of the remaining transfers, totaling $38,693.43, were made in a manner consistent with the prior course of dealing between the parties and were ordinary in relation to an objective industry standard. Indeed, Quebecor's own letter of January 21, 2008 (Exh. 1 to Decl of Robert P. Biegler) recognized its need/desire to maintain "normal" business relationships, which had

gone on/been experienced before and during the preference period, with its suppliers in general and Defendant in particular.

Whether a transaction, or pattern of transactions, during the preference period, is in the ordinary course of business, pursuant to 11 USC section 547 (c) (2), at least in this context, necessarily raises a question of fact, making Summary Judgment inappropriate. (see *In re Fulghum Const. Corp* 872 F 2d 739, 743 (6th Cir. 1989). The relevant payments must be "ordinary" in relation to past practices between the creditor and debtor. *In re Healthcentral.com* 504 F3rd 775, 790 (9th Cir. 2007). Payment may be in the ordinary course of business even if the creditor knew of the debtor's precarious financial condition when the payment was received. *In re Comark* 145 B.R. 47, 56 (9th Cir BAP 1992). A letter outlining the creditor's machanics lien rights due to late payments did not constitute unusual collection practice or a threat of litigation. Debtor was late in making the subject/relevant preference period payments per the contract and per past practice. Said late preference period payments were found by the Court to be in the "ordinary course of business." *In re Northpoint Communications Group Inc.* 361 B.R. 149 (BC ND CA 2007).

The tables/check registers/invoices/balance sheets (Plaintiff's Exhibits C, D and E) incorporated herein, clearly quantify that the claimed distributions constitute only a small part of the ongoing "normal" business relationship/dealings between Defendant Clarklift and the Debtor Quebecor.

This Court is required to perform a subjective inquiry into the normal practices between the parties. *In re Enron Creditors Recovery Corp.*, 376 B.R. 442, 459 (Bankr., S.D.N.Y. 2007). In determining whether payments fell within the protection of §547 (c)(2)(A), the Court

considers a plethora of factors including:

1.) Prior course of dealing between the parties;

2.) Amount of the payment(s);

3.) The timing of the payment(s);

4.) Circumstances of the payment(s);

5.) The presence of unusual debt collection practices, and

6.) Changes in the means of payment(s).

The Court, in determining the availability of the defense, must review the "baseline dealings" between the parties to "enable the court to compare the payment practice during the preference period with the prior course of dealings." *Schick v. Herskowitz* (In re Schick), 234 B.R. 357, 348 (Bankr S.D.N.Y 1999).

Here, Plaintiff has established the baseline dealings between the parties. Plaintiff's exhibits, particularly C, D, E and F evidence a long term relationship between the parties. Amounts of invoices, payment periods vary widely throughout the business relationship; the vast majority of which is outside the preference period. Payments were made, in response to Defendant's invoices to Defendant by check, from Debtor's checking account.

Defendant's exhibit 1 to the Biegler Dec. clearly shows Quebecor's desire to continue with the "ordinary course of business", post filing, which had been experienced by the parties prior to and during the preference period. The parties prior and subsequent conduct was consistent with that desire.

The parties' preference period conduct was consistent with (1.) The prior course of dealing between the parties. (Biegler decl. ¶ 7)

Note, there is no evidence that (2) the amount of payments varied to establish them outside the ordinary course, during the preference period. (Biegler decl. ¶ 8)

The (4) "circumstances of the payments" remained exactly the same, constituting the ordinary course of business. (Biegler decl. ¶ 9)

There is absolutely no evidence of (5) "unusual debt collection practices" either inside or outside of the preference period, as there was none. (Biegler decl. ¶ 10)

The (6) "means of payment" remained exactly the same during the preference period as they were before it (Biegler decl. ¶ 11).

Thus, five (5) of the six (6) factors, enumerated in *In re Enron Creditors Recovery Corp.* supra, clearly establish that said transactions, in the preference period, were in the ordinary course of business, satisfying the subjective criteria of 11 USC §547(c)(2)(A).

Plaintiff's argument relies exclusively on one (1) of the six (6) factors, the (3) "timing of the payment(s)." This analysis also fails for at least two (2) reasons. First, given the fact that five (5) of the six (6) *In re Enron Creditors'* factors militate toward said transactions being within the "ordinary course of business," there is absolutely a triable issue of fact regarding this defense.

Second, the Court in *In re Central Valley Processing Inc.* 360 B.R. 376 (BC EDCA 2007) noted that although the payments by the Debtor were 10-15 days beyond the 30 day period, specified in the Creditor's invoices, said payments were in the "ordinary course" of Debtor's and Creditor's business. This was true despite the fact that said payments were also 10-15 days beyond the Debtor's historic payment period. Thus, in *In re Central Valley Processing Inc.* Ibid the Eastern District of California Bankruptcy Court (where Quebecor and Clarklift primarily did their mutual business) found that a 33% to 50% variance in the timeliness of the payment of

invoices did not take said transaction(s) out of the "ordinary course of business."

Not only is Defendant Clarklift not liable for any preferential transfers, it is actually owed for goods and services provided in the normal course of business, consistent with its claims asserted in the underlying Bankruptcy action.

IV. CONCLUSION

For the reasons noted herein, Defendant Clarklift contends that none of the funds transferred are subject to a preference claim. Claimant Clarklift further contends that it is entitled to the full amount of its claim. Triable issues of fact are present. Plaintiff's Motion for Summary Judgment should be denied.

Dated: November 21, 2013

THE BIEGLER LAW FIRM

/s/ Robert P. Biegler
Robert P. Biegler
Attorney for Defendant