

THE BIEGLER LAW FIRM

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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

CLARKLIFT-WEST, INC. DBA CLARKLIFT TEAMPOWER

Pursuant to Local Rule 7056-1(b) of the Local Bankruptcy Rules for the Southern District
of New York, plaintiff, Eugene I. Davis, as Litigation Trustee for the Quebecor World Litigation
Trust (the “Plaintiff” or “Trustee”), hereby submits this Statement of Undisputed Material Facts
in support of his Motion for Summary Judgment with Respect to Plaintiff’s Claims Against

1 Defendant, Clarklift-West, Inc. dba Clarklift Teampower (the “Motion”).

2 **PROCEDURAL HISTORY**

3 1. The underlying bankruptcy cases were commenced by the filing on January 21, 2008 of
4 petitions under Chapter 11 of Title 11 of the United States Bankruptcy Code (the
5 “Petition Date”). [Bankruptcy Docket Index No. 1].

6 Defendant’s response: undisputed.

7
8 2. On May 18, 2009, the Debtors filed their Third Amended Joint Plan of Reorganization of
9 Quebecor World (USA) Inc. and Certain Affiliated Debtors and Debtors-In-Possession
10 (the “Plan”). [Bankruptcy Docket Index No. 1662].

11 Defendant’s response: undisputed.

12
13 3. The Court entered the Findings of Fact, Conclusions of Law, and Order Confirming
14 Third Amended Joint Plan of Reorganization of Quebecor World (USA) Inc. and Certain
15 Affiliated Debtors and Debtors-In-Possession on July 2, 2009 (the “Confirmation
16 Order”). [Bankruptcy Docket Index No. 1802].

17 Defendant’s response: undisputed.

18
19 4. Pursuant to the Plan, and as governed by a Litigation Trust Agreement attached as
20 Exhibit 6.11(a) to the Plan, a Litigation Trust, administered by Plaintiff, was created for
21 the pursuit of Contributed Claims (as such term is defined the Plan) and the Litigation
22 Trustee was empowered with exclusive jurisdiction to prosecute or settle any Contributed
23 Claims for the benefit of the Litigation Trust Beneficiaries (as such term is defined in the
24 Plan). Declaration of Eugene I. Davis at ¶ 5 (hereinafter “Davis Decl. at ¶__”), which
25 declaration is attached hereto in support of Plaintiff’s Motion.
26
27

1 Defendant's response: undisputed.

2 5. On January 12, 2010, Plaintiff filed the Complaint to Avoid Transfers Pursuant to 11
3 U.S.C. §§ 547, 548, 549 and 502 and to Recover Property Transferred Pursuant to 11
4 U.S.C. § 550 (the "Complaint") against defendant, Clarklift-West, Inc. dba Clarklift
5 Teampower (the "Defendant") initiating this adversary proceeding. [Docket Item No. 1]
6 (hereinafter "D.I. ____").
7

8 Defendant's response: undisputed.

9 6. On January 26, 2010, a Summons was issued. [D.I. 2].
10

11 Defendant's response: undisputed.

12 7. On or about February 5, 2010, Plaintiff served the Summons and Complaint upon
13 Defendant. [D.I. 4].

14 Defendant's response: undisputed.

15 8. On or about March 31, 2010, Plaintiff's counsel caused to be served upon Defendant
16 Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for
17 Admission (the "First Set of Requests"). [D.I. 5]; Davis Decl. at ¶¶ 15, 16.
18

19 Defendant's response: undisputed.

20 9. On May 25, 2010, Defendant filed an answer to the Complaint. [D.I. 10].
21

22 Defendant's response: undisputed.

23 10. On or about August 6, 2010, Plaintiff received Defendant's objections and responses to
24 Plaintiff's Requests for Production and Requests for Admission ("Defendant's
25 Responses"). Davis Decl. at ¶ 17; Ex. A (Excerpts from Defendant's Objections and
26 Responses to Plaintiff's Requests for Admission).
27

1 Defendant's response: undisputed.

2 **FACTUAL BACKGROUND**

3 11. The Debtors and Defendant have a history of prior dealings reaching back to at least
4 2005. Davis Decl. at ¶¶ 18-19; Ex. E (list of historical transactions between the Debtors
5 and Defendant).

6 Defendant's response: undisputed.

7 12. The Defendant was in the business of heavy equipment sales, rental, and service. Davis
8 Decl. at ¶¶ 18-19; Ex. I (excerpts of invoices provided by Defendant in its responses to
9 Plaintiffs First Set of Requests).

10 Defendant's response: undisputed.

11 13. During the 90 days on or before the Petition Date (the "Preference Period"), the Debtors
12 made and Defendant received ten (10) transfers totaling \$69,207.60 (the "Transfers").
13 Davis Decl. ¶ 7; Ex. A (Defendant's Admission Resp. No. 1); Ex. B (list of Transfers
14 during the Preference Period by date, transfer amount, and type of transfer); Ex. C
15 (cancelled check Transfers from the Debtors' bank account ending 2582).

16 Defendant's response: undisputed.

17 14. The Transfers were made by check transfer from the Debtors' corporate bank account
18 ending in 2582. Davis Decl. ¶ 8; Ex. B (List of Transfers made during the Preference
19 Period by Check No., Check Date, Clear Date, and Check Amount); Ex. C (Cancelled
20 check Transfers from the Debtors' bank account ending 2582).

21 Defendant's response: undisputed.

22 15. Each Transfer was made for Defendant's benefit or the benefit of a creditor. Davis Decl.

1 ¶ 9; Ex. A (Admission Resp. No. 4); Ex. C (Cancelled check Transfers from the Debtors'
2 bank account ending 2582).

3 Defendant's response: undisputed.

4
5 16. At the time the Transfers were made, Defendant was a creditor of the Debtors. Davis
6 Decl. ¶ 10; Ex. D (List of invoices paid by Transfers, including: Check No., Check Amt.,
7 Check Date, Clear Date, Invoice No., Invoice Amt., and Invoice Date).

8 Defendant's response: undisputed.

9
10 17. The Transfers were payments on antecedent debt, as the payments were made pursuant to
11 an obligation that arose prior to the payments. Davis Decl. ¶ 11; Ex. D (List of invoices
12 paid by Transfers, including: Check No., Check Amt., Check Date, Clear Date, Invoice
13 No., Invoice Amt., and Invoice Date).

14 Defendant's response: undisputed.

15
16 18. The Transfers were made during the Preference Period. Davis Decl. ¶¶ 6, 12; Ex. B (list
17 of Transfers during the Preference Period by date, transfer amount, and type of transfer);
18 Ex. C (cancelled check Transfers from the Debtors' bank account ending 2582).

19 Defendant's response: undisputed.

20
21 19. Pursuant to Plan section 4.3, which Plan was confirmed by the Confirmation Order,
22 distribution to general unsecured creditors will be less than 100%. (Bankruptcy Docket
23 Index Nos. 1662, 1802); Davis Decl. ¶ 13.

24 Defendant's response: undisputed.

25
26 20. Defendant is an unsecured creditor, and did not hold a perfected security interest in the
27 assets of the Debtors with respect to the Transfers. Davis Decl. ¶ 14; Ex. A (Admission

1 Resp. No. 9).

2 Defendant's response: undisputed.

3 **Facts Concerning Potential Affirmative Defenses**

4
5 21. Plaintiff's has completed an analysis of Defendant's purported affirmative defenses,
6 which are attached hereto. Davis Decl. at ¶¶ 18-19; Ex. F (comparison of historical
7 payments to Preference Period Transfers (entitled "Aging Analysis Comparing
8 Preference Period to Historical Period")); Ex. G (Plaintiff's New Value Analysis.); Ex. H
9 (Plaintiff's Combined Analysis of Subsequent New Value and Ordinary Course of
10 Business Defense).
11

12 Defendant's response: undisputed.

13 22. When examining solely the subsequent new value exception, Defendant is at most able to
14 assert a subsequent new value offset (without consideration of any other purported
15 affirmative defenses) of \$30,514.18. Davis Decl. at ¶¶ 18-19; Ex. G (Plaintiff's New
16 Value Analysis.). The net preference remaining when examining solely the new value
17 defense is \$38,693.42. *Id.*
18

19 Defendant's response: undisputed.

20 23. As provided in Exhibits F and H, ordinary course of business ("OCB") credit is allowed
21 for Transfers totaling \$4,122.30, and is denied for Transfers totaling \$65,085.30.
22

23 Defendant's response: disputed. Decl of Robert P. Biegler ¶ 7, 8, 9, 10, 11.

24 24. When combining the OCB defense with the allowed new value, which only allows new
25 value to the extent the invoice was not paid for by an otherwise unavoidable transfer, the
26 net preference is \$35,321.23. *See* Ex. H (Plaintiff's Combined Analysis of Subsequent
27

1 New Value and Ordinary Course of Business Defense).

2 Defendant's response: disputed. Decl of Robert P. Biegler ¶ 7, 8, 9, 10, 11.

3
4 **DEFENDANT'S SEPARATE STATEMENT OF UNDISPUTED FACTS:**

5 A. The parties business dealings during the preference period was consistent with their pre
6 preference period conduct. (Plaintiff's Exhibits C, D and E). Biegler Decl ¶ 7

7 B. While the payments' amounts varied both within and prior to the preference period, said
8 payments' amounts did not vary between the preference period and prior conduct to make them
9 outside the ordinary course of business. (Plaintiff's Exhibits C, D and E). Biegler Decl ¶ 8
10

11 C. The circumstances of payment between the parties remained the same both prior to and
12 during the preference period. (Plaintiff's Exhibits C, D and E). Biegler Decl ¶ 9
13

14 D. There was absolutely no "unusual debt collection practices" by defendant at any time
15 during this business relationship, whether within the preference period or prior to it.
16 Biegler Decl ¶ 10

17 E. The means of payment remained exactly the same during the preference period as they
18 were before it. (Plaintiff's Exhibits C, D and E). Biegler Decl ¶ 11
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23 Dated: November 21, 2013

THE BIEGLER LAW FIRM

24 /s/ Robert P. Biegler

25 Robert P. Biegler

26 Attorney for Defendant
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