

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**DWAYNE G. DEER,**

**CASE NO. 06-02460-NPO**

**DEBTOR.**

**CHAPTER 7**

**ORDER DENYING MOTION TO CLASSIFY CLAIM  
AS ADMINISTRATIVE EXPENSE UNDER § 503(b)(9)**

There came on for consideration the Motion to Classify Claim as Administrative Expense Under § 503(b)(9) (the “Motion”) (Dk. No. 78) filed by YELLOW BOOK USA (“Yellow Book”)<sup>1</sup>, the objections thereto filed by Shelby Gardner (“Gardner’s Objection”) (Dk. No. 79), and by J. Stephen Smith, Chapter 7 trustee (the “Trustee’s Objection”) (Dk. No. 80). Following the hearing on the Motion held on March 20, 2007 (the “Hearing”), the parties submitted a Stipulation of Facts to the Court (the “Stipulation”) (Dk. No. 117). The Court, having considered the Stipulation and the relevant legal authorities, concludes that the Motion is not well taken and should be denied for the reasons set forth below.

**Jurisdiction**

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Motion was proper under the circumstances.

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<sup>1</sup> In that the signature block of the Motion identifies the creditor as YELLOW BOOK USA while the body of the Motion refers to the creditor simply as Yellow Book, the Court is unable to discern the correct name of the creditor. For the purposes of this Order, the Court will refer to the creditor as Yellow Book.

## **Facts**

The following facts are contained in the Stipulation and the Court file:

1. On July 13, 2006, Dwayne G. Deer (the “Debtor”), an attorney, entered into a contract to purchase advertising in Yellow Book, South Mississippi Region, commencing in 2007 (“Yellow Book 1”).
2. On July 21, 2006, the Debtor entered into a contract to purchase advertising in Yellow Book, Natchez, Mississippi Region, commencing in 2007 (“Yellow Book 2”).
3. On October 24, 2006, Yellow Book 2 was published.
4. On November 2, 2006, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (Dk. No. 1).
5. On December 21, 2006, Yellow Book 1 was published.

## **Discussion**

Yellow Book asserts in the Motion that its claim for the debt created by the Debtor’s purchase of advertising should be allowed as an administrative expense pursuant to 11 U.S.C. § 503(b)(9).<sup>2</sup> Both Gardner’s Objection and the Trustee’s Objection deny that the Yellow Book claim is entitled to be classified as an administrative expense.

Section 503(b)(9) is new to the Bankruptcy Code, added under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which is effective in cases commenced on or after October 17, 2005. Section 503(b)(9) provides as follows:

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<sup>2</sup> Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code, unless otherwise noted.

(b) After notice and a hearing, there shall be allowed administrative expenses, . . . , including - -

. . . .

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9).

Given the recent adoption of § 503(b)(9), no relevant case law exists to guide the Court as to whether advertising constitutes a good which falls within the scope of this new provision.<sup>3</sup>

However, according to Collier on Bankruptcy:

The scope of section 503(b)(9) is limited solely to goods. Claims for services and claims for personal property other than goods are outside the scope of section 503(b)(9). Goods is not defined in the Code and so the definition used in Article 9 of the Uniform Commercial Code is likely to be used.

L. King, 4 Collier on Bankruptcy, ¶ 503.16[1] (Matthew Bender 15<sup>th</sup> Ed. Rev. 2005). To that end, the Uniform Commercial Code § 9-201 defines goods as:

all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that

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<sup>3</sup> In fact, in the few cases addressing § 503(b)(9), the parties agreed that the creditor was entitled to an administrative expense claim under § 503(b)(9), but disagreed as to whether the new provision altered the timing of the payment of such claims. *See, e.g., In re Bookbinders' Restaurant, Inc.*, 2006 WL 3858020 (Bankr. E.D. Pa. 2006); *In re Global Home Products, LLC*, 2006 WL 3791955 (Bankr. D. Del. 2006).

consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

U.C.C. § 9-201. The Court is unaware of any cases interpreting § 503(b)(9) within the context of Article 9. However, applying the plain language of the definition set forth above, the Court is persuaded that the advertising does not constitute a good as defined by Article 9.

Moreover, the advertising purchased under the contract does not constitute a sale of goods under Article 2 of the U.C.C. *See* Southwestern Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572 (Tex. 1991) (yellow page advertisements are services, not goods); Vails v. Southwestern Bell Tel. Co., 504 F. Supp. 740, 743 (W.D. Okla. 1980) (sale of advertising does not fall within the purview of the U.C.C., which controls only the sale of goods); Directory Publishers Inc. v. Lake Country Hearth & Leisure, 193 Misc.2d 799, 801 (N.Y. City Ct. 2002) (contract for yellow page advertising was a contract for a service, not for goods within the meaning of the U.C.C.).

Finally, the Court observes that § 503(b)(9) was adopted to “operate[] in conjunction with 11 U.S.C.A. § 546(c)(2) to provide administrative expense treatment to a creditor with reclamation rights even if the seller fails to make a demand.” 3 Bankruptcy Desk Guide § 24:78.10 (Thompson/West 2007); William Houston Brown & Lawrence R. Ahern, III, 2005 Bankr. Reform Legis. with Analysis 2d § 7:1 (Thompson/West 2006). Yet, Yellow Book has made no assertion that it would be entitled to exercise reclamation rights such that § 503(b)(9) would provide it with an alternative administrative expense claim upon some inability or failure to reclaim its goods. *See* 2 Bankruptcy Desk Guide § 17:83 (Thompson/West 2007) (grant of an administrative expense claim is an alternative to reclamation). Yellow Book, therefore, seemingly has misconstrued the

underlying purpose of § 503(b)(9).<sup>4</sup> As a result, it has misapplied this new code section to the debt at issue.

Based on the foregoing, the Court finds that the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is denied.

SO ORDERED, this the 14<sup>th</sup> day of June, 2007.

/s/ Neil P. Olack \_\_\_\_\_  
NEIL P. OLACK  
UNITED STATES BANKRUPTCY JUDGE

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<sup>4</sup> Presumably, Yellow Book also made the determination that its claim for the debt created by the purchase of advertising does not fall within the purview of § 503(b)(1), which allows an administrative expense claim for “the actual, necessary costs and expenses of preserving the estate . . . .”