

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

IN RE:

**STINSON PETROLEUM COMPANY, INC.,

DEBTOR.**

**CASE NO. 09-51663-NPO

CHAPTER 11**

**MEMORANDUM OPINION AND ORDER GRANTING
REQUEST OF WORLD FUEL SERVICES, INC. FOR ALLOWANCE
AND PAYMENT OF ADMINISTRATIVE EXPENSE**

This day there came on for consideration the Request of World Fuel Services, Inc. for Allowance and Payment of Administrative Expense (“WFS Request”) (Dkt. No. 127) and letter brief in support of WFS Request (Dkt. No. 289) filed by World Fuel Services, Inc. (“WFS”); the Objection of the Official Committee of Unsecured Creditors to the Motion of World Fuel Services, Inc. for Allowance and Payment of Administrative Expense (“Committee Objection”) (Dkt. No. 216) and the Brief in Support of the Objection of the Official Committee of Unsecured Creditors to the Motion of World Fuel Services, Inc. for Allowance and Payment of Administrative Expense (Dkt. No. 288) filed by the Official Committee of Unsecured Creditors (the “Committee”); and the Debtor’s Answer and Response to Request of World Fuel Services, Inc. for Allowance and Payment of Administrative Expense¹ (“Debtor’s Objection”) (Dkt. No. 215) filed by the Debtor, Stinson

¹ The Debtor did not file a brief, and apparently, has allowed the Committee to present its position on the WFS Request.

Petroleum Company, Inc. (the “Debtor”) in the above-styled chapter 11 proceeding. WFS and the Committee submitted the Stipulation of Facts Regarding the Request of World Fuel Services, Inc. for Allowance and Payment of Administrative Expense (“Joint Stipulation”) (Dkt No. 237). Douglas C. Noble represented WFS; Jan M. Hayden represented the Committee; and Craig M. Geno represented the Debtor. The Court, being fully advised in the premises, finds that the Committee Objection and the Debtor Objection should be overruled, and the WFS Request should be granted for the reasons stated herein.²

Jurisdiction

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

Facts

Except for minor stylistic changes, the following facts are taken from the Joint Stipulation:

1. Prior to the petition date,³ from July 15, 2009, through August 4, 2009, the Debtor purchased fuel on credit that was received by the Debtor in the ordinary course of business, such transactions being evidenced by the itemization of purchases attached to the WFS Request as Exhibit 1 and the numerous invoices attached to the WFS Request as Exhibit 2. The amounts evidenced by the Exhibits remain outstanding and unpaid.⁴

² The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rules of Bankruptcy Procedure 9014.

³ The Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code on August 4, 2009.

⁴ According to Exhibit 1, the total amount owed is \$1,280,009.52, which includes a charge of \$43.53 for fuel delivered to the Debtor after the petition date.

2. The invoices in Exhibit 2 reflect, with respect to such purchases by the Debtor, WFS's standard charges for fuel and include information pertaining to certain mandatory federal taxes that are assessed against all fuel sales, including as applicable an underground storage tax ("LUST" tax), federal oil spill tax and excise tax (hereinafter collectively referred to as "Federal Taxes"). No amount included in any invoice or requested in the WFS Request constitutes a "service" provided by WFS to the Debtor.

3. These Federal Taxes are only assessed against and paid to the federal government by the original seller of the product (such as a refiner) and are therefore assessed/passed on by that seller to its customers and become a built-in cost of goods.

4. As the Federal Taxes are paid by the refiner in each instance, WFS does not remit, and has no obligation to remit, payment of such taxes to the Internal Revenue Service or any other federal agency responsible for collection of these taxes.

5. All petroleum bought by WFS for resale, including that sold to the Debtor, is purchased and sold in the ordinary course of business by WFS with all such taxes already included. It is an unavoidable cost to WFS of the goods that is, in turn, passed on to every purchaser of product from WFS.

6. The pricing of fuel sold by WFS to the Debtor as shown on the invoices contained in Exhibit 2 is the pricing used by WFS in ordinary course transactions with its customers for the purchase of fuel products and is consistent with the industry standard for purchase and sale of such products.

7. The invoices contained in Exhibit 2 are identical in all respects to the typical invoice

issued by WFS to its customers. WFS provides the breakout of the Federal Taxes on the invoices to assist customers that purchase products for tax-exempt/non-highway use so that such customers can obtain a refund/rebate. These invoices provide accurate and sufficient supporting evidence of the taxes assessed against the product (which is assessed on a per gallon basis and not on a basis relative to price) so that those customers (or customers of customers) can obtain a refund/rebate if used in a tax-exempt manner.

Discussion

WFS requests that the Court allow its claim for fuel as an administrative expense pursuant to 11 U.S.C. § 503(b)(9).⁵ The Committee concedes that WFS is entitled to an administrative claim for the value of the fuel WFS delivered in the pre-bankruptcy period but objects to the amount of the claim to the extent it includes any charges for Federal Taxes. Accordingly, the sole issue presented to the Court on the parties' Joint Stipulation is whether the definition of "value of any goods" under § 503(b)(9) includes the Federal Taxes reflected in the unpaid invoices.

Section 503 provides for the allowance of nine separate categories of administrative expenses in bankruptcy. The importance of holding an administrative expense claim is made clear by § 507(a)(2), which grants such expenses priority status in the distribution of the estate's assets. Section 503(b)(9), added to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, created a new administrative claim for pre-petition creditors who deliver goods to the debtor within twenty days of the date of the petition. That section provides:

⁵ Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code.

(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) (emphasis added). Thus, the statute grants an unpaid seller of goods an administrative priority for the “value of any goods” received by the debtor within twenty days of the bankruptcy filing.

The Bankruptcy Code does not define the terms “goods,” as used in connection with § 503(b)(9) claims. 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 2 of the Uniform Commercial Code is likely to be used.

4 Collier on Bankruptcy ¶ 503.16[1] (15th ed. rev. 2009). Previously, this Court has adopted the definition of “goods” found in the Uniform Commercial Code (“UCC”) for purposes of interpreting § 503(b)(9). In re Deer, No. 06-2460, 2007 WL 6887241 (Bankr. S.D. Miss. June 14, 2007) (rejecting § 503(b)(9) claim because advertising was not “good” as defined in UCC). This ruling is consistent with the approach taken by other bankruptcy courts that likewise have embraced the definition of “goods” used in the UCC in the context of § 503(b)(9). *See In re Plastech Engineered Products, Inc.*, 397 B.R. 828, 836 (Bankr. E.D. Mich.2008) (“Absent a definition in the Bankruptcy Code or in controlling case law, the Court is persuaded that the best definition for ‘goods’ is the definition provided by the Uniform Commercial Code”); In re Samaritan Alliance LLC, No. 07-

50735, 2008 WL 2520107, at *4 (Bankr. E.D. Ky. June 20, 2008) (electricity does not constitute “goods” under UCC or for purposes of § 503(b)(9)); *see also* Rudolph J. Di Massa, Jr. & Matthew E. Hoffman, UCC. Definition of “Goods” Applies to § 503(b)(9), 28 Am. Bankr. Inst. J. 26 (Sept. 2009).

The Committee contends that taxes are not “goods” within the meaning of § 503(b)(9). In support of its contention, the Committee cites cases in which courts confronted with a claim for mixed goods and services have excluded the value of the services in the § 503(b)(9) claim, without regard to whether the goods were saleable apart from the services provided. *See, e.g., In re Goody’s Family Clothing*, 401 B.R. 131 (Bankr. D. Del. 2009). The Committee insists that taxes should be treated in the same way.

WFS views the issue presented here differently. WFS contends, and the Court agrees, that the issue here is whether the Federal Taxes should be included in the “value” of goods for purposes of § 503(b)(9). Like the term “goods,” the term “value” is undefined in the statute. The meaning of “value” is best determined by looking to the UCC’s definition of a contract as including the “total legal obligation which results from the parties’ agreement.” *See* U.C.C. § 1-201(b)(12). Because a § 503(b)(9) claim arises only under a contract for the sale of “goods”—a contract governed by the UCC—it follows that the value of those goods should be measured by the parties’ underlying agreement. *See* Adam L. Rosen & Anthony Michael Sabino, Section 503(b)(9) Four Years Later, 26 Bankr. Strategist 3 (Aug. 2009) (“[T]here is ample statutory authority and precedent to conclude that ‘value’ means the full contract price for purposes of § 503(b)(9).”). In other words, the value of goods should be measured by the full contract price—the value of the goods that the parties agreed

upon in their transaction. *See* 4 Collier on Bankruptcy ¶ 503.16[1] (15th ed. 2009) (“In most situations [‘value’ and ‘purchase price’] ought to be synonymous under § 503(b)(9)”).

In applying the relevant law to the stipulated facts, the Court finds that Federal Taxes are included in the “value” of the fuel within the meaning of § 503(b)(9). Here, the parties in the chain of distribution, from the original seller of the product (such as the “refiner”) to the retailer, track the amount of the Federal Taxes paid merely for accounting purposes. (Joint Stipulation ¶¶ 3-6). Those Federal Taxes are paid by the refiner and are not collected by WFS from the Debtor and remitted to anyone. (Joint Stipulation ¶¶ 3-4). These Federal Taxes are reflected on the WFS invoices as a convenience to show this cost component of the goods so that “customers (or customers of the customers) can obtain a refund/rebate if used in a tax-exempt manner.” (Joint Stipulation ¶ 7). Notably, the Committee does not contend that the Debtor used the fuel in a manner that would entitle it to a tax refund. Thus, the “value of any goods” is accurately measured by the full contract price, as reflected in the fuel invoices, an amount that includes the Federal Taxes. The Committee’s contention that the WFS Request is for the “value of any goods,” plus payment by the Debtor of the Federal Taxes, misconstrues the nature of the underlying transaction between WFS and the Debtor.

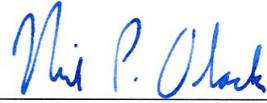
Conclusion

In conclusion, the Court overrules the Committee Objection and the Debtor Objection. Clearly, the present set of stipulated facts creates a rather unique set of circumstances, and this Memorandum Opinion and Order should be viewed in this light.

IT IS THEREFORE ORDERED that the Committee Objection and the Debtor Objection hereby are overruled, and the WFS Request hereby is granted to the extent set forth herein.

A separate final judgment consistent with this Memorandum Opinion and Order will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge

Dated: November 6, 2009