

Sur-Reply

1. Hana Financial, Inc.’s (“Hana”) briefing concedes keys facts that are dispositive and demonstrate the appropriateness of the Debtors’ objection. Specifically, Hana admits that the inventory upon which it bases its 503(b)(9) claim was paid for by the Debtors as part of a “one for one release of inventory for cash.” Hana Resp. ¶ 15. Accordingly, Hana does not hold a valid claim against the Debtors because all goods that were received by the Debtors within 20 days of the petition date were paid for.

I. Hana’s Claim Is Not Entitled to Administrative Priority Because the Debtors Paid for the Goods at Issue.

2. As set forth in the Hana Claim Objection, Hana has no administrative claim because all goods that were received by the Debtors within 20 days of the petition date were paid for. See 11 U.S.C. § 503(b)(9) (“After notice and a hearing, there shall be allowed administrative expenses, . . . [for] the value of any goods received by the debtor within 20 days before the 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.”).

3. Hana incorrectly asserts that the Debtors received goods “on credit terms from Hana.” But Hana has no proof. Hana has not identified any contract or other agreement allowing it to apply the funds paid by the Debtors to antecedent debts. On the contrary, the undisputed record shows that the prepetition payment was extensively negotiated by the parties. And the agreement reached was an explicit exchange of money for specified inventory.

4. Consistent with the Debtors’ practice at the time with other vendors who were also refusing to release inventory without first receiving payment, the Debtors sought to pay only for the goods that were to be released. Brian Fleming confirmed this point on January 25, 2017, when he sent an email to Ms. Etlin, Chief Restructuring Officer of the Debtors, summarizing a

recent meeting: “We agreed to a one for one release of inventory for cash.” *See* Hana Claim Obj. Ex. D. This language could not be clearer, the money transferred to Hana was expressly in exchange for the inventory received by the Debtors within 20 days of the petition date

5. Subsequently, Mega-Link and NYAM sent the Debtors itemized invoices specifying which goods would be released, and how much the Debtors must pay to release them. *See* Hana Claim Obj. Ex. C. These discussions ultimately led to Mega-Link and NYAM agreeing that if the Debtors paid for the \$3,454,360 worth of inventory specified in their invoices, Mega-Link and NYAM would release that specified inventory in exchange for full payment. Brian Fleming, confirmed this agreement on February 14, 2017, when he wrote to Ms. Etlin “we commit to deliver to you \$3,454,000 of inventory in exchange for a wire transfer of the same amount.” Hana Claim Obj. *See* Ex. E. On February 15, 2017, the Debtors wired the funds on account of those invoices (totaling \$3,454,000), and on February 16, 2017, after Hana confirmed receipt of the funds, Mega-Link and NYAM released the goods referenced in the invoices from the port to the Debtors.

6. The Debtors do not have any administrative liability to Hana. All of the inventory specified in Hana’s proof of claim either (i) has already been paid for or (ii) relates to inventory delivered more than 20 days before the petition date. Hana Claim Obj. Ex. B, 6/24/17 Etlin Decl.

7. Hana does not dispute these facts, but instead freely admits that “the invoices comprising Hana’s § 503(b)(9) claim are indeed the same invoices related to the goods that were held and ultimately shipped on the eve of the Petition Date.” Hana Resp. ¶15. This admission alone is sufficient to defeat its administrative claim. The undisputed evidence makes clear that

Hana does not hold any colorable claim against the Debtors' estates for administrative expense priority, and its request for an administrative claim should be disallowed and expunged.

II. The Transaction at Issue Was Outside of the Ordinary Course and Does Not Reflect the Parties Ordinary Course Conduct.

8. As stated above the Debtors did not buy the goods on credit. Hana does not present any evidence to the contrary. Hana makes an unsubstantiated assertion that "the amounts paid were . . . applied to the oldest invoices . . . in the ordinary course of the parties' business. Indeed, this was the practice employed by the parties during the entire duration of the Program." Hana Response ¶ 15. Hana argues that the goods were purchased on credit because previously the Debtors purchased goods on credit.

9. In the weeks leading up to the petition date, however, the Debtors faced a liquidity shortfall resulting in certain of the Debtors' vendors refusing to release inventory without cash in advance. The Debtors were no longer able to purchase goods on credit. As a result the Debtors were forced to negotiate new agreements with certain vendors outside of the ordinary course to mitigate the damage that this interruption to the Debtors' supply chain would cause. The Debtors' management team worked with the Debtors' vendors to facilitate payment for specified goods being held in the Los Angeles port. Brian Fleming confirmed this on January 25, 2017, when he sent an email to Ms. Etlin, Chief Restructuring Officer of the Debtors, summarizing a recent meeting, stating: "We agreed to a one for one release of inventory for cash paid to Hana." *See* Hana Claim Obj. Ex. D.

10. A one for one release of inventory for cash is a sale. Black's Law Dictionary defines a "sale" as a "transfer of the absolute title to property for a certain agreed price." Sale, Black's Law Dictionary (10th ed. 2014). Pursuant to UCC § 2-106(1), a sale has four elements

“(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised.” UCC § 2-106(1).

11. Here each element of a sale is present. **First**, the parties are and were competent to contract. **Second**, as evidenced by the emails cited above, there was mutual assent. **Third**, the merchandise was transferred from the Los Angeles port to the Debtors. **Fourth**, a one for one exchange of money for inventory was made.

12. The record is clear that the goods released to the Debtors by Mega-Link in the 20 days before the petition date were not released on credit, but were instead released only after the Debtors had paid for such goods in advance. Moreover, this is consistent with the Debtors’ practice at the time with other vendors that were also refusing to release inventory without first receiving payment. Accordingly, Hana’s proof of claim should be reclassified as a general unsecured claim.

13. For all of these reasons, the evidence makes clear that Hana does not hold any colorable claim against the Debtors’ estates for administrative expense priority and its request for an administrative claim should be denied and its proofs of claim reclassified as a general unsecured claim.

14. For the foregoing reasons, and those set forth in the Hana Claim Objection, the Debtors submit that Hana’s should be claim disallowed.

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/s/ Joshua A. Sussberg

Joshua A. Sussberg, P.C.

Christopher Marcus, P.C.

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

601 Lexington Avenue

New York, New York 10022

Telephone: (212) 446-4800

Facsimile: (212) 446-4900

- and -

James H.M. Sprayregen, P.C.

Benjamin M. Rhode (admitted *pro hac vice*)

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

300 North LaSalle Street

Chicago, Illinois 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

Counsel to the Debtors and Debtors in Possession