

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Forward Foods LLC,)	Case No. 09-10545 (KJC)
)	
Debtor.)	
)	
)	

**MOTION FOR ORDER (A) AUTHORIZING CONTINUED USE OF THE DEBTOR'S
EXISTING CENTRALIZED CASH MANAGEMENT SYSTEM AND EXISTING BANK
ACCOUNTS; (B) WAIVING CERTAIN OPERATING GUIDELINES; (C)
TERMINATING SENIOR SECURED LENDERS' SWEEP AGREEMENT;
AND (D) GRANTING RELATED RELIEF**

Forward Foods LLC (“Forward Foods” or the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, hereby moves (the “Motion”) this Court for an order (a) authorizing continued use of the Debtor’s existing centralized cash management system and existing bank accounts; (b) waiving certain operating guidelines; (c) terminating Senior Secured Lenders’ Sweep Agreement (defined below); and (d) granting related relief. A proposed order is attached hereto as Exhibit A. In support of this Motion, Debtor, relies upon and incorporates by reference the *Affidavit of J. Patrick Muldoon in Support of First Day Motions* (the “Muldoon Affidavit”), and respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Sections 105, 345, and 363 of Title 11 (the “Bankruptcy Code”) of the United States Code provide the statutory bases for the relief sought herein.

BACKGROUND

2. Simultaneously herewith (the "Petition Date"), Debtor has filed with this Court its voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtor is continuing to operate its business and manage its properties and assets as debtor in possession. No trustee, examiner or committee of creditors has yet been appointed in this chapter 11 proceeding.

3. Debtor is a manufacturer of high protein, snack, energy and meal replacement bars primarily produced under the Detour brand name. Since the introduction of the original Detour bar in October 2002, Detour has grown into a \$25 million business and is a leading high protein brand in health and fitness stores.

4. Debtor is primarily owned by Emigrant Capital Corporation ("Emigrant"), a private equity company.

5. Debtor is headquartered in Minden, Nevada and manufactures product in two leased facilities, both located in Minden. Debtor employs 52 individuals and regularly employs 25 temporary workers. In its business Debtor also contracts with 14 brokers who represent its brand with many regional and local retailers. A material portion of the sales of Debtor is made through these brokers.

6. A majority of the volume of the products produced by Debtor are sold directly to club, mass, convenience and grocery stores, drugstores and health and fitness clubs.

Events Leading To Commencement Of The Debtor's Chapter 11 Case

7. Debtor commenced operations on September 1, 2006. A group of investors led by Emigrant purchased the assets of a protein bar business from Next Proteins, Inc. ("NP"), David A. Jenkins and Bluegrass Bars, LLC ("Sellers").

8. The purchase of the assets was financed through a senior financing agreement with CIT Commercial Finance ("CIT") which provided a working capital line of credit and a senior secured Term A loan of \$8.9 million as a 5-year credit facility (the "Credit Facility"). Comerica Bank ("Comerica," together with CIT, the "Senior Secured Lenders") is a participant in that Credit Facility. The Sellers participated in the financing with a limited, subordinated Term B loan in an original principal balance of \$4 million. Debtor also entered into a subordinated note with NP in the original principal amount of \$2.5 million.

9. CIT and Comerica are parties to a sweep agreement pursuant to which deposits are swept daily and applied to the Credit Facility (the "Senior Secured Lenders' Sweep Agreement").

10. Emigrant invested \$12.72 Million in the company at closing to finance the purchase of the assets. Five other parties, including NP, also made an additional investment of \$755,000.

11. Since the asset purchase, Emigrant has loaned Forward Foods \$6.25 million through a series of senior subordinated promissory notes as well as an additional \$2 million evidenced by a promissory note. Forward Foods currently owes various vendors approximately \$2.5 Million.

12. Since the purchase of the protein bar business, Debtor and its major investor and lender, Emigrant, have been in dispute with the Sellers with regard to various aspects of disclosure and other matters involving the purchase. On November 26, 2007, Debtor and Emigrant commenced a lawsuit in the Supreme Court for the State of New York against the Sellers alleging breach of

contract, breach of the duty of good faith and fair dealing, fraud and rescission. The Sellers filed a motion to dismiss the New York action based upon *forum non conveniens* which was granted on October 15, 2008.

13. On December 15, 2008, Debtor and Emigrant commenced suit in the Superior Court for the State of California, County of San Diego against the Sellers alleging breach of contract, negligent misrepresentation, fraud and deceit and requesting rescission and restitution. On February 3, 2009, the Sellers filed their answer and cross complaint against the plaintiffs and other affiliated parties alleging fraud and deceit, negligent misrepresentation, intentional interference with prospective economic advantage, negligent interference with the prospective economic advantage, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and breach of the various affiliated agreements with regard to the sale transaction.

14. Debtor, Emigrant, and the Sellers have entered into a prospective settlement which has been submitted to this Court for approval which would provide, among other things, a cash payment to Debtor of \$975,000, the release of \$500,000 in escrow to the Sellers, assignment of the \$4 million Term B obligation to Emigrant, assignment of the unsecured note of \$2.5 million to Emigrant, assignment of the Seller's equity interest to Emigrant, a grant to Debtor of the alleged defaulted license agreement as to specific trademarks to permit continued use by Debtor through and until December 31, 2009, continuance of the David A. Jenkins non-compete agreement until August 1, 2009 and appropriate releases among the parties with regard to all claims.

15. On January 29, 2009, Debtor was notified by Peanut Corporation of America ("PCA") that all peanut products produced by that company's Blakely facility was involved in a nationwide voluntary recall with regard to a salmonella poisoning risk. Debtor has contracted with PCA for a

proprietary spiced roasted peanut for use in several of Debtor's Detour brand products. The sales of Detour products containing the PCA peanut product (the "Affected Peanuts") make up approximately 75% of all protein bar sales by Debtor.

16. As a matter of policy, Debtor has always employed an independent laboratory to test representative samples of its finished products for quality and safety assurance; however, the fact that the proprietary spiced roasted peanut incorporated by Debtor in its products was purchased from the specific PCA plant subject to the salmonella risk, thereby creating a risk of cross contamination, has created a sufficient risk for Debtor to have initiated a voluntary recall with regard to specific products incorporating the PCA peanuts (the "Affected Product"). Notices with regard to Affected Products were delivered on January 29, 2009, to all known customers purchasing any of the Affected Products.

17. The cost of this recall to the business of the Debtor is material. A significant value of inventory must be condemned, and to the extent customers are appropriately destroying or returning unsold recalled product, the ability to collect outstanding receivables is very much at risk.

RELIEF REQUESTED AND REASONS THEREFOR

18. The United States Trustee for this region (the "UST") has established certain operating guidelines for debtors in possession designed to facilitate the UST's supervision of the administration of chapter 11 cases. These guidelines – the *Operating Guidelines for Chapter 11 Cases* (the "Guidelines") – require chapter 11 debtors to, among other things, (a) close all existing bank accounts and open new debtor in possession bank accounts; (b) establish one debtor in possession account for all estate monies required for the payment of taxes, including payroll taxes; (c) maintain a separate debtor in possession account for cash collateral; and (d) obtain checks for all

debtor in possession accounts which bear the designation “Debtor-in-Possession”, the bankruptcy case number, and the type of account. These requirements are designed to provide a clear line of demarcation between prepetition and postpetition transactions and operations and prevent the inadvertent postpetition payment of prepetition claims.

19. By this Motion, Debtor requests: (a) authority to continue to use Debtor’s existing cash management system and bank accounts; (b) a waiver of (i) the investment and deposit requirements of section 345(b) of the Bankruptcy Code and (ii) certain operating guidelines relating to bank accounts, checks and business forms set forth in the Guidelines; (c) termination of the Senior Secured Lenders’ Sweep Agreement; and (d) for such related relief as the Court deems appropriate.

20. This Court has the authority to grant the relief requested pursuant to section 363(c)(1), which allows a debtor-in-possession to “use property of the estate in the ordinary course of business.” 11 U.S.C. § 363 (c)(1). The purpose of section 363(c)(1) of the Bankruptcy Code is to provide a debtor in possession with the flexibility to engage in the ordinary course transactions required to operate its business without unneeded oversight by its creditors or the court. *See In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992), *see also Med. Malpractice Ins. Ass’n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384 (2d Cir. 1997); *In re Enron Corp.*, No. 01-16034 (ALG), 2003 WL 1562202, at 15 (Bankr. S.D.N.Y. Mar. 21, 2003); *Chaney v. Official Comm. of Unsecured Creditors of Crystal Apparel, Inc. (In re Crystal Apparel, Inc.)*, 207 B.R. 406, 409 (Bankr. S.D.N.Y. 1997).

21. Included within the purview of section 363(c) of the Bankruptcy Code is a debtor’s ability to continue the “routine transactions” necessitated by a debtor’s cash management system. *Amdura Nat’l Distrib. Co. v. Amdura Corp. (In re Amdura Corp.)*, 75 F.3d 1447, 1453 (10th Cir.

1996). Accordingly, the Debtor seeks authority under section 363(c)(1) of the Bankruptcy Code to continue the collection, concentration, and disbursement of cash pursuant to its cash management system described below.

22. This Court also has the authority to grant the relief requested pursuant to section 105(a) of the Bankruptcy Code, which provides, in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Debtor submits that the relief requested herein is in the best interests of Debtor’s estate and creditors and is both necessary and appropriate to further the business preservation policies of chapter 11 of the Bankruptcy Code.

Summary of Existing Cash Management System

23. Prior to the commencement of Debtor’s chapter 11 case, in the ordinary course of its business, Debtor utilized a centralized cash management system similar to those utilized by other large corporate enterprises. A schedule identifying Debtor’s prepetition bank accounts (collectively, the “Bank Accounts”) is attached as Exhibit B hereto. Debtor believes that all Bank Accounts are in stable banking institutions with FDIC or FSLIC insurance, where applicable.

24. Under Debtor’s cash management system, deposits are handled as follows: cash collected or received by Debtor is received into Debtor’s lock box account kept with Citibank. Deposited funds are the “swept” by the Senior Secured Lenders with the deposits being applied to the Senior Secured Lenders’ prepetition secured obligations.

25. Debtor also utilizes a centralized payroll account (the “Payroll Account”), which is a zero balance type of account to which funds are transferred from the operating account as payroll

checks, including direct deposits, are presented to the Payroll Account. The Payroll account is held with Citibank.

26. In addition, Debtor maintains one primary operating account and one unused secondary operating account (the "Operating Accounts"), both held with Citibank, for disbursements of the Debtor's accounts payables. Debtor proposes to continue its existing cash management system and bank accounts essentially unchanged.

27. The foregoing practices directly and indirectly help maintain and preserve the value of the Debtor's enterprise. Otherwise, the Debtor might not be able to trace its receipts and disbursements or efficiently manage its liquid assets. As a result (a) the Debtor would not be able to timely meet postpetition obligations; (b) payroll for employees would be disrupted; and (c) the Debtor's ability to service its customers would be impeded. Accordingly, absent the relief requested herein, the Debtor's business could be disrupted and its asset values irreparably harmed. Accordingly, the Debtor respectfully requests that the Court waive the requirements of the United States Trustee's Guidelines.

28. Debtor seeks a waiver of the UST's requirement that the prepetition accounts be closed and that new postpetition accounts be opened. If enforced in this case, such requirements would cause enormous disruption in Debtor's business and would impair severely Debtor's reorganization efforts. Closing existing bank accounts and opening new accounts would be an administrative task of substantial complexity and expense and would inevitably result in delays in payments to administrative creditors, employees, and any other creditors authorized to be paid during this case. It is therefore essential that Debtor be permitted to maintain existing bank accounts and, if necessary, open new accounts.

29. If this relief is granted, Debtor will be able to effectuate the underlying purpose of the UST's requirements, *i.e.*, providing assurance that only those prepetition claims authorized to be paid by the Court are in fact paid. Debtor has the ability to draw clear lines of demarcation between the prepetition and postpetition periods without closing existing accounts and opening new ones. All postpetition transfers of cash can be and will be carefully documented so that all such transactions can be readily ascertained and accounted for. Except as otherwise ordered by the Court, all existing banks will be advised not to honor checks issued prior to the commencement of the case.¹

30. Because strict enforcement of the UST's bank account closing requirements does not serve the rehabilitative purposes of chapter 11, courts in this district have waived such requirements in other cases involving debtors of similar size, sophistication, and complexity. *See In re Tweeter Home Entm't Group, Inc.*, Case No. 07-10789 (PJW) (Bankr. D. Del. June 12, 2007); *see also In re Charter Behavioral Health Systems, LLC*, 292 B.R. 36, 41 (Bankr. D. Del. 2003) (stating court typically enters order permitting debtors to continue using existing bank accounts without need for closing if debtor can establish they are able to track the respective receipts and disbursements).

31. A similar waiver of the account closing requirement is appropriate in this case as Debtor has the ability, while continuing to use its existing cash management system and bank accounts, to draw a clear line of demarcation between prepetition and postpetition transactions and ensure that the inadvertent postpetition payment of prepetition obligations does not occur. Accordingly, Debtor requests that Debtor's existing bank accounts be deemed debtor in possession accounts, and that their maintenance and continued use, in the same manner and with the same

¹ Concurrent herewith, Debtor filed a separate motion for order authorizing Debtor's banks to honor prepetition checks and/or fund transfer requests with respect to certain payroll obligations.

account numbers, styles, and document forms as those employed during the prepetition period, be authorized.

32. The termination of the Senior Secured Lenders' Sweep Agreement will permit the Debtor to work with the Senior Secured Lenders and Debtor's DIP Lender, Emigrant, to assure proceeds of prepetition collateral are properly applied to the Senior Secured Lenders' obligations.

33. If this Court grants the relief requested herein, Debtor intends to maintain and continue using existing bank accounts in the names and with the account numbers existing immediately prior to the Petition Date. Subject to limitations in Debtor's contemplated DIP Facility, Debtor shall retain the right to: (a) close one or more of the bank accounts and, if necessary, open new debtor in possession accounts; (b) deposit funds in and withdraw funds from such accounts by all usual means; and (c) treat their prepetition bank accounts for all purposes as debtor in possession accounts. Moreover, Debtor requests that this Court authorize all banks with which Debtor maintains bank accounts to continue to maintain, service and administer such bank accounts, except that such banks will not be authorized to honor any check issued or dated prior to the Petition Date absent an order of this Court, not to automatically sweep deposits for application to prepetition obligations.

Waiver of the Investment and Deposit Guidelines of Section 345(b)

34. Section 345(a) of the Bankruptcy Code authorizes deposits or investments of money of a bankruptcy estate, such as cash, in a manner that will "yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment." 11 U.S.C. § 345(a). For deposits or investments that are not "insured or guaranteed by the United States or by a department, agency or instrumentality of the United States or backed by the full faith and credit of

the United States,” section 345(b) generally requires the depository institution to issue a bond in favor of the United States secured by the undertaking of an adequate corporate surety.

35. A court may, however, waive the section 345(b) of the Bankruptcy Code requirements for cause. The Debtor believes that such cause exists in the instant case. The Payroll Account is maintained as a zero balance account and does not maintain balances over time. The Banking Accounts that do maintain balances, maintain minimal balances and are kept at Citibank. The Debtor believes that Citibank is financially stable and is otherwise FDIC or FSLIC insured.

36. For this reason, the Debtor believes that the funds held in deposit are safe, and that any risks associated with such accounts are so *de minimus* that it would be a waste of estate resources to incur the cost requires to close such accounts and establish entirely new ones. This is especially the case where, as here, the manner of the proposed investments is safe and prudent. The Debtor submits that its prepetition cash management practices generally conform with the intent of section 345(b) of the Bankruptcy Code to protect and maximize the value of its estate.

Waiver of Certain Operating Guidelines

37. Debtor, in the ordinary course of its business, uses a multitude of checks and business forms. To minimize expenses to its estate and avoid a disruption in its business, Debtor also requests that it be authorized to continue using its existing checks, correspondence, and business forms (including, but not limited to, letterhead, purchase orders, and invoices) in the same form as existing immediately prior to the Petition Date, without reference to Debtor’s status as a debtor in possession. Parties doing business with Debtor will undoubtedly have knowledge of Debtor’s status as a chapter 11 debtor in possession as a result of the size of this case and broad coverage in the industry, trade and financial media. Further, Debtor’s employees will be otherwise notified of this chapter 11 case.

38. Courts have routinely waived the requirements set forth in the Guidelines that debtors in possession immediately cease use of their existing checks and business forms and issue new checks and business forms bearing the designation "Debtor in Possession." See e.g., *In re Tweeter Home Entm't Group, Inc.*, Case No. 07-10789 (PJW) (Bankr. D. Del. June 12, 2007).

NOTICE

39. No trustee, examiner, or creditors' committee has been appointed in this chapter 11 case. Notice of this Motion has been given to: (a) the United States Trustee for this region, (b) the Debtor's twenty largest unsecured creditors; and (c) counsel to the CIT Group/Commercial Services, Inc., Emigrant Capital Corporation, Next Proteins, Inc., and Comerica Bank. In light of the nature of the relief requested herein, Debtor submits that no other or further notice is required.

WHEREFORE, Forward Foods respectfully requests that the Court enter an order: (i) authorizing Debtor to continue using its existing cash management system and the existing bank accounts, subject to the requirement of keeping accurate records of all cash receipts and disbursements; (ii) waiving certain operating guidelines; (iii) terminating the Senior Secured Lenders' Sweep Agreement; and (iv) granting such other and further relief as the Court deems just and proper.

Dated: February 17, 2009
Wilmington, DE

Respectfully submitted,

/s/ Bradford J. Sandler

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