

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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

**DEBTOR'S MOTION FOR INTERIM AND FINAL ORDERS (I) RESTRAINING UTILITIES FROM DISCONTINUING, ALTERING OR REFUSING SERVICE; (II) DETERMINING ADEQUATE ASSURANCE OF PAYMENT TO UTILITIES UNDER 11 U.S.C. § 366; AND (III) ESTABLISHING A PROCEDURE FOR DETERMINING ADEQUATE ASSURANCE OF PAYMENT TO UTILITIES**

Forward Foods LLC (“Forward Foods” or “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, hereby moves this Court, pursuant to section 366 of Title 11 of the United States Code (the “Bankruptcy Code”), for entry of an Order (i) restraining utility companies (individually, a “Utility” and collectively, the “Utilities”) furnishing utility services to Debtor from discontinuing, altering or refusing utility service; (ii) determining that Debtor will provide adequate assurance of payment to the Utilities pursuant to section 366 of the Bankruptcy Code; and (iii) establishing procedures for determining adequate assurance of payment to Utilities (the “Motion”). In support of this Motion, the Debtor relies upon and incorporates by reference the *Affidavit of J. Patrick Muldoon in Support of First Day Motion* (the “Muldoon Affidavit”). In further support of this Motion, the Debtor 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). The venue of this chapter 11

case and this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409 and the Local Bankruptcy Rules. Sections 105 and 366 of the Bankruptcy 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") 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. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

#### **Debtor’s Utilities**

17. In connection with the operation of its business, Debtor is serviced at its Minden, Nevada facility by the Utilities listed on Exhibit A<sup>1</sup> hereto for, among other things, electricity, water and sewer, natural gas, internet, telephone and similar services (collectively, the “utility services”), all of which are critical to Debtor’s ongoing operations and the preservation of Debtor’s properties. The relief requested herein is requested with respect to all Utilities and is not limited to those on Exhibit A.

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<sup>1</sup> Although the Debtor believes that the list attached as Exhibit A is complete, the Debtor reserves its right to supplement the list if it is determined that any Utility has been omitted. Further, the Debtor reserves its right to contest than any Utility listed on Exhibit A is not a utility within the scope of section 366 of the Bankruptcy Code.

## RELIEF REQUESTED AND REASONS THEREFOR

18. By this Motion, the Debtor requests that the Court enter the Interim Order (attached hereto as Exhibit B), and the Final Order (attached hereto as Exhibit C) (i) restraining Utilities furnishing utility services to Debtor from discontinuing, altering or refusing utility service; (ii) determining that Debtor will provide adequate assurance of payment to the Utilities pursuant to section 366 of the Bankruptcy Code; and (iii) establishing procedures for determining adequate assurance of payment to Utilities.

19. Section 366(a) of the Bankruptcy Code prohibits utilities from altering, refusing, or discontinuing service to a debtor for the first twenty (20) days of a bankruptcy case (the "Stay Period"). Upon the expiration of the Stay Period, however, section 366(b) of the Bankruptcy Code provides that a utility company may (but need not) terminate services if a debtor has not furnished "adequate assurance of payment" for postpetition utility services. In a chapter 11 case, section 366(c)(2) provides that the Stay Period is thirty (30) days with adequate protection to be provided within such 30 day period. The statute further expressly grants a court the authority, upon request and after notice and a hearing, to make a reasonable modification of any requirement that a debtor furnish a deposit or other form of adequate assurance of payment to its utility providers.

20. Without an extension from this Court, the twenty (20) day period provided for in section 366(b) of the Bankruptcy Code will expire on or about March 9, 2009 and the thirty (30) day period provided for in section 366(c)(2) will expire on or about March 19, 2009 (the "Deadline").

21. Uninterrupted utility services are critical to the maintenance of the Debtor's ongoing operations. The Utilities provide essential services that are necessary to Debtor's

business operations. An interruption of utility services would, therefore, severely disrupt Debtor's business operations and, potentially, seriously impair Debtor's ability to reorganize.

22. As adequate assurance of payment, the Debtor proposes to deposit an amount equal to two weeks of Utility Services, calculated as a historical average over the past fifty-two (52) weeks (each, a "Deposit," and collectively, the "Deposits").

23. The Debtor further submits adequate assurance of future payment exists based upon its ability to timely pay the Utilities. As part of the DIP Facility, the Debtor prepared an operating budget, which includes amounts allocated for payment of postpetition utility services. Thus, the Debtor expects to have the ability to timely pay the Utilities, in accordance with their normal invoice terms, for all postpetition utility services that they provide to the Debtor.

24. Further, section 503(b)(1)(A) of the Bankruptcy Code provides that all "actual, necessary costs and expenses of preserving the estate" are entitled to administrative expense priority. Thus, if Debtor defaulted on its postpetition utility payments, the Utilities' postpetition claims would be entitled to administrative expense priority. Accordingly, the Utilities will not be prejudiced if they continue to furnish and render to Debtor the utility services.

25. The Debtor submits that providing the Utilities with the Deposits, in conjunction with its ability to pay for postpetition utility services on a current basis provide the Utilities adequate assurance of future payment.

26. The Debtor submits that the Deposits constitute adequate assurance of future payment. However, to address the rights of any Utility under sections 366(b) and (c)(2) of the Bankruptcy Code to seek adequate protection satisfactory to it, the Debtor proposes the following procedures (the "Procedures"):

- a. The Debtor shall cause a copy of this Order to be served on all parties that qualify as a Utility afforded protections under section 366(c)(2) of the Bankruptcy Code.
- b. If any Utility objects to the adequate assurance provide by the Debtor (the "Deposit") such Utility shall have ten (10) days from entry of this Order to file and serve a written objection with this Court. A copy of the Objection must also be served on Debtor's counsel, Bradford J. Sandler, Esquire, Benesch Friedlander Coplan & Aronoff LLP, 222 Delaware Avenue, Suite 801, Wilmington, DE 19801. The objection must contain a statement (i) setting forth the location for which utility services are provided and the relevant account number(s), (ii) describing the deposits, prepayments or other security currently held by the objecting Utility and the amounts owing to such Utility, and (iii) explaining why the Deposit is not sufficient adequate assurance of future payment.
- c. If no objection is filed within such ten-day period, then the adequate protection provided by the Deposit is deemed satisfactory under section 366 of the Bankruptcy Code.
- d. If an objection is timely filed and served, then counsel for the Debtor and counsel for the Utility shall contact the Court to arrange for an expedited hearing on such objection. Notwithstanding the filing of an objection, an objecting Utility must continue to provide services pending entry of a final order with regard to the Utility's objection

27. The Debtor requests a final hearing on this Motion to be held within twenty-five (25) days of the Petition Date to ensure that, if a Utility argues that it can refuse service to the Debtor on the thirty-first (31<sup>st</sup>) day after the Petition Date, the Debtor will have the opportunity to request that the Court modify the Procedures as appropriate to avoid any potential termination of utility service.

28. The relief requested herein is supported by law. Whether utilities are subject to an unreasonable risk of nonpayment must be determined from the facts of each case. See *Hanratty v. Philadelphia Elec. Co.*, 107 B.R. 55, 60 (E.D. Pa. 1989). As noted by one court, "section 366(b) requires the Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require

an 'absolute guarantee of payment.'" *In re Caldor, Inc.* – NY, 199 B.R. 1, 3 (S.D.N.Y. 1996), *aff'd*, *Virginia Elec. & Power Co. v. Caldor, Inc.-N.Y.*, 117 F.3d 646 (2nd Cir. 1997). *See also Hanratty*, 107 B.R. at 60; *In re George C. Frye Co.*, 7 B.R. 856, 858 (Bankr. D. Me. 1980) (adequate assurance of payment does not mean guarantee of payment, but that utility is not subject to an unreasonable risk of future loss).

29. The Debtor's proposed method of furnishing adequate assurance of payment for post-petition utility service is not prejudicial to the rights of any Utility and is in the best interests of the Debtor's estate. *See In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (Bankr. D. Del. April 24, 2007) (Carey, J.) (deeming utilities adequately assured where debtor provided two weeks deposit for utilities). It is the adequacy of the Deposits and the Debtor's ability to pay postpetition bills promptly that is relevant to the issue of adequate assurance for the Utilities. The Debtor believes that granting the relief requested herein will not prejudice the rights of the Utilities under section 366 of the Bankruptcy Code.

30. In addition, the Court has the authority to grant the relief requested herein under section 105(a) of the Bankruptcy Code. Uninterrupted utility services are critical to the maintenance of Debtor's ongoing operations and the preservation of Debtor's properties, and thus, the relief requested is necessary and in the best interests of the Debtor's estate and creditors.

31. Accordingly, the Debtor moves this Court for an order: (a) restraining the Utilities from discontinuing, altering or refusing service; (b) determining that (i) Debtor's providing the Utilities with the Deposits and (ii) its ability to pay for postpetition services on a current basis provide the Utilities adequate assurance of payment under section 366(b) and (c) of the Bankruptcy Code.

**NOTICE**

32. Notice of this Motion has been given to: (a) the United States Trustee for the District of Delaware, (b) the Debtor's twenty largest unsecured creditors; (c) counsel to (i) The CIT Group/Commercial Services, Inc., (ii) Emigrant Capital Corporation, and (iii) Next Proteins, Inc. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is required.

33. Within five (5) business days of entry of the Interim Order, the Debtor will serve a copy of the Motion and the Interim Order on the Utilities listed on Exhibit A, and on all other parties required to receive notice under Rule 2002-1(b) of the Local Rules of Bankruptcy Procedure. The Debtor submits that such notice is sufficient for the relief requested.

WHEREFORE, the Debtor requests entry of the Interim Order and the Final Order granting the relief requested herein and such other and further relief as is just and proper.

Dated: February 17, 2009  
Wilmington, DE

Respectfully submitted,

/s/ Bradford J. Sandler

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-and-

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(216) 363-4588

Proposed Counsel for Forward Foods LLC,  
Debtor and Debtor in Possession

**EXHIBIT A**  
**List of Debtor's Utility Providers**

Utility Name	Address	Service	Account No.
ACC Business	P.O. Box 13136 Newark, NJ 07101-5636	Internet Access	1157466
AT&T Mobility	P.O. Box 6463 Carol Stream, IL 60197-6463	Cell Phone	828942661
AT&T Datacomm	P.O. Box 8104 Aurora, IL 60507	Firewall/ Router	602766
AT&T Long Distance	P.O. Box 660688 Dallas, TX 75266-0688	Phone/ Long distance	226900/808561066
Carson City Landfill	3505 Butti Way Carson City, NV 89701	Garbage/ Dump	1000302/1000302
Citrix Online	File 50264 Los Angeles, CA 90074	Web Conferencing	615702
Douglas Disposal Inc.	1653 Lucerne St, Suite A Minden, NV 89423-4306	Garbage Bin	1043793
East Valley Utilities	P.O. Box 3000 Minden, NV 89423	Water/ Sewage usage	2331046B 2331046A 04001017
EDS Canada Inc.	P.O. Box 4582 Postal Station A Toronto, Ontario M5W 4W4 Canada	EDI Provider	2045666
NV Energy	875 E Long St Carson City, NV 89706	Power	920298
Southwest Gas Corporation	P.O. Box 98890 Las Vegas, NV 89150-0101	Gas	241-1267614-003 241-1173748-003
Sprint - 958435628	P.O. Box 4181 Carol Stream, IL 60197-4181	Cell Phone	958435628
SPS Commerce, Inc.	VB Box 3 P.O. Box 9202 Minneapolis, MN 55480-9202	EDI Provider	SPE 27130
Verizon California	P.O. Box 9688 Mission Hills, CA 91346-9688	Phone	45 5837 3956309235 03

**EXHIBIT B**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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In re: ) Chapter 11  
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Forward Foods LLC, ) Case No. 09-\_\_\_\_\_ ( )  
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                          ) Re: Docket No. \_\_\_\_  
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**INTERIM ORDER (I) RESTRAINING UTILITIES FROM DISCONTINUING,  
ALTERING OR REFUSING SERVICE; (II) DETERMINING ADEQUATE  
ASSURANCE OF PAYMENT TO UTILITIES UNDER 11 U.S.C. § 366; AND  
(III) ESTABLISHING A PROCEDURE FOR DETERMINING ADEQUATE  
ASSURANCE OF PAYMENT TO UTILITIES**

Upon the motion of Forward Foods LLC (“Forward Foods” or “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, for entry of an interim and final order: (i) restraining the Utilities<sup>1</sup> from discontinuing, altering or refusing service; (ii) determining adequate assurance of payment to the Utilities furnishing utility services under section 366 of Title 11 of the United States Code (the “Bankruptcy Code”); and (iii) establishing a procedure for determining adequate assurance of payment to the Utilities (the “Motion”); and having heard the statements of Debtor’s counsel and the statements of other parties in interest who appeared; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that the Motion is in the best interests of the Debtor, its estate and its creditors; and adequate notice of the Motion having been given; and it appearing that no other

<sup>1</sup> All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

