

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**DEBTOR’S MOTION FOR ORDER PURSUANT TO SECTIONS 105(a), 363, 507(a)
AND 1107 OF THE BANKRUPTCY CODE AND FEDERAL RULE OF BANKRUPTCY
PROCEDURE 6003, AUTHORIZING DEBTOR TO PAY PREPETITION WAGES,
COMPENSATION, EMPLOYMENT BENEFITS AND RELATED RELIEF**

Forward Foods LLC (“Forward Foods LLC” or the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, hereby moves (the “Motion”) for an order pursuant to sections 105, 363, 507(a)(4) and 507(a)(5) of Title 11 (the “Bankruptcy Code”) of the United States Code, and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for entry of an order (i) authorizing, but not directing, the Debtor in the ordinary course of business, to (a) pay certain prepetition employee salaries, wages, paid time off, and other contractual compensation, as the case may be; (b) make payments for which employee payroll deductions were made; (c) pay benefits under employee benefit plans and all costs incident to the payment of such benefits (including payroll-related taxes and processing costs); (d) pay reimbursable prepetition business expenses; and (ii) directing all banks and other financial institutions to receive, process, honor, and pay any and all checks drawn on the Debtor’s account for payment of such prepetition employee obligations. In support of this Motion, the Debtor relies upon and incorporates by reference the *Affidavit of J. Patrick Muldoon in Support of First Day Motions* (the “Muldoon Affidavit”). In further support, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this District and in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are sections 105, 363, 507(a)(4) and 507(a)(5) of the Bankruptcy Code and Bankruptcy Rule 6003.

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.

RELIEF REQUESTED

17. The maintenance of employee morale and preservation of the Debtor's work force during the course of this chapter 11 bankruptcy case is critical. Moreover, it is critical to minimize the personal hardship of the Debtor's employees if their employee-related obligations are not paid when due. Accordingly, the Debtor has filed this Motion requesting an order of the Court pursuant to sections 105, 363, 507(a)(4) and 507(a)(5) of Title 11 (the "Bankruptcy Code") of the United States Code, and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the

“Bankruptcy Rules”) for entry of an order (i) authorizing, but not directing, the Debtor in the ordinary course of business, to (a) pay certain prepetition employee salaries, wages, paid time off, and other contractual compensation, as the case may be; (b) make payments for which employee payroll deductions were made; (c) pay benefits under employee benefit plans and all costs incident to the payment of such benefits (including payroll-related taxes and processing costs); (d) pay reimbursable prepetition business expenses; and (ii) directing all banks and other financial institutions to receive, process, honor, and pay any and all checks drawn on the Debtor’s account for payment of such prepetition employee obligations.

BASIS FOR RELIEF

A. Wages, Salaries, and Commissions

18. The Debtor employs 52 individuals at its Minden, Nevada facilities (collectively, the “Employees”), comprised of approximately 29 hourly employees (the “Hourly Employees”)¹ and 23 salaried employees (the “Salaried Employees”).

19. As of the Petition Date, the Employees were owed or had accrued entitlements to various sums for, *inter alia*,: (a) wages, (b) salaries, (c) vacation pay, sick leave pay, holiday pay (“Paid Time Off”) and (d) miscellaneous payroll items. Both the Hourly Employees and Salaried Employees are paid every other Friday, one week in arrears, with the next payroll scheduled for February 20, 2009.²

20. The average biweekly payroll for the Employees is approximately \$120,000.00.

¹ As set forth in paragraph five above, an additional group of approximately 25 individuals work for the Debtor through an agency, Hire Dynamics, LLC. These individuals are not subject to this Motion, and their treatment in this bankruptcy case will be subject to a separate motion.

² The February 6, 2009 payroll was not processed for Salaried Employees. Moreover, the Hourly Employees only received a payroll check in connection with the amount of hours worked. No tax amounts were included in the February 6, 2009 payroll for the Hourly Employees.

21. The Debtor estimates that, as of February 10, 2009, approximately \$139,628.70, including payroll taxes, existed in accrued by unpaid payroll for the Employees.

22. The Debtor's payroll functions are partially administered internally, and in conjunction with ADP. Funds are transferred from the Debtor's operating account to the Debtor's payroll account. ADP then issues the payroll checks. Employee's voluntary withholdings for the 401(k) Plan (as defined below) are automatically withdrawn from the payroll account by Principal Financial.

23. Pursuant to this Motion, the Debtor seeks to pay the outstanding amounts owed as of the Petition Date for accrued and unpaid wages and salaries (the "Prepetition Compensation"), including amounts that the Debtor is required by law to withhold from Employee payroll checks in connection with federal, state and local income taxes, garnishment contributions, social security and Medicare taxes, up to the amount of \$10,950.³

B. Other Compensation: Paid Time Off and Reimbursable Business Expenses

24. The Debtor offers its Employees other forms of compensation, including Paid Time Off and reimbursement of certain business expenses ("Additional Compensation"). These forms of compensation are usual, customary and necessary if the Debtor is to retain qualified employees during the course of the chapter 11 case.

25. **Paid Time Off.** Employees accrue a certain number of Paid Time Off hours in connection with each payroll. Paid Time Off is capped at 2.5 times the annual amount thereof. Prior to the Petition Date, the Employees collectively accrued approximately \$164,568.73 of

³ The Debtor submits that, as of the Petition Date, certain Employees will be owed in excess of \$10,950 in connection with prepetition wages, salaries, and commissions. By this Motion, the Debtor only seeks authority to make payment to such Employees up to the amount of \$10,950.

Paid Time Off.⁴ The Debtor intends to honor its policies by allowing the Employees to use their Paid Time Off in the ordinary course during the postpetition period. The Debtor anticipates that its Employees will use their Paid Time Off in the ordinary course of business without resulting in material cash flow requirements beyond the Debtor's normal payroll obligations.

26. By this Motion, the Debtor seeks authority to honor in the ordinary course of business those liabilities that arose under the Debtor's paid time off policies or practices, except as otherwise set forth herein.

27. **Reimbursable Business Expenses.** In the ordinary course of its business, certain of the Debtor's Employees incur a variety of business expenses (collectively, the "Reimbursable Business Expenses") which, consistent with ordinary practice, are reimbursable. Such expenses are typically paid on a rolling basis as processed. It would be inequitable, cause an undue hardship, and adversely affect the morale and loyalty of such Employees if they were required to bear such expenses, some of which may be substantial and all of which were incurred on behalf of the Debtor in the expectation that they would be reimbursed promptly. Based upon the expense requests in the Debtor's system, and the Debtor's best estimate of additional outstanding expense requests, the Debtor estimates that approximately \$42,712 is owed as Reimbursable Business Expenses to certain of its Employees. By this Motion, the Debtor seeks authority to pay all prepetition Reimbursable Expenses in the ordinary course of business, including those incurred prior to the Petition Date.⁵

⁴ The Paid Time Off rolls over on a yearly basis up to the cap discussed herein. The Debtor's policies do not permit for the Paid Time Off to be cashed out on a yearly basis, but do provide for cash out upon termination. The Debtor is not seeking permission to honor cash out obligations on termination pursuant to this Motion.

⁵ Certain of the Employees for which the Debtor seeks authority to pay prepetition Reimbursable Expenses are subject to the cap of \$10,950. Notwithstanding that fact, the Debtor seeks authority to pay all prepetition Reimbursable Expenses owed to the Employees.

C. Employee Benefit Plans and 401(k)

28. Prior to the Petition Date, the Debtor provided its Employees with various benefits including, without limitation, (i) health and dental insurance (“Medical Plans”); (ii) long-term disability insurance; (iii) life insurance; and (iv) miscellaneous other benefits, including workers compensation (collectively, the “Employee Benefits”).

29. **Medical and Dental Plan.** The Debtor provides medical benefits and dental benefits through Anthem and Reliance Standard, respectively. The Debtor pays one hundred percent of the coverage for its Employees under these Plans. As of the Petition Date, the Debtor estimates that it owed approximately \$33,862.45 for medical benefits, and \$3,053 for dental benefits to its providers for the month of February. These amounts represent the Debtor’s average monthly expenditures in connection with the Plans.⁶ By this Motion, the Debtor requests authority to make payments and remittances related to the Plans in the ordinary course of business.

30. **Life and Long-Term Disability Insurance.** The Debtor provides life insurance, long term disability coverage, and employee assistance through Guardian. This coverage is one hundred percent (100%) funded by the Debtor. February obligations in connection with life and long term coverage were paid prior to the Petition Date. The Debtor’s average monthly obligations in connection with life and long term disability coverage are approximately \$830. Additional employee-paid benefits are provided through AFLAC where the Debtor simply provides the payroll deductions in connection with such coverage. The Debtor is currently holding approximately \$2,410.76 in connection with such benefits. By this Motion, the Debtor

⁶ A small portion of these amounts would reflect monies that are collected by the Debtor on behalf of certain employees in connection with the coverage of such employees’ family members.

seeks authority to continue to make remittances in connection with these plans in the ordinary course of business.

31. **Workers' Compensation.** The Debtor provides workers' compensation benefits to all of its Employees. The Debtor's payment of the workers' compensation premiums is covered in a separately filed First Day Motion with this Court. *See Motion of the Debtor for (I) Interim Relief and (II) Final Authority to Continue Financing Arrangement for Insurance Premiums Necessary to Maintain Insurance Coverage.* By this Motion, the Debtor requests authority to continue to provide such benefits in the ordinary course of business.

32. **401(k).** In addition, as of the Petition Date, the Debtor may have made deductions from the Employees' paychecks to make payments on behalf of the Employees in connection with the 401(k) Plan administered by Principal Financial. The Debtor does not match the Employee contributions to the 401(k) Plan. Certain amounts in connection with the 401(k) Plan may have been collected in connection with the February 6, 2009 payroll (which was not processed), which amounts will need to be processed from the Debtor's next payroll. On average, the Debtor withholds approximately \$1,500.00 every other week for Employees' participation in the 401(k) Plan. By this Motion, the Debtor seeks authority to remit all amounts that are related to the 401(k) Plan and that arose prior to the Petition Date in the ordinary course of business, and to continue to remit Employee contributions to the 401(k) Plan subsequent to the Petition Date.

33. The Employee Benefits are integral and important parts of each Employee's total compensation package. Interruption of such Employee Benefits would seriously undermine the Employees' morale, cause them great personal hardship, jeopardize the Debtor's relationships with its Employees at a time when the dedication and cooperation with the Employees is

absolutely critical. Therefore, the continuation of the Debtor's ordinary course practices in connection with the Employee Benefits is imperative.

D. Social Security, Income Tax and Other Withholdings

34. The Debtor routinely withholds certain amounts from Employee paychecks in connection with amounts that the Debtor is required to transmit to third parties, which may include social security, FICA, federal and state income taxes, and similar obligations. The Debtor believes that any such funds that have been withheld, but remain in the Debtor's possession as of the Petition Date would constitute moneys held in trust. Thus, the Debtor believes that it has the authority to direct such funds to the appropriate parties in the ordinary course of business.

E. Direction to Banks

35. In addition, the Debtor seeks an order authorizing and directing the Debtor's banks to receive, process, honor, and pay all of the Debtor's prepetition checks and fund transfers on account of any of the prepetition employee obligations, and prohibiting Debtor's banks from placing holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for prepetition employee obligations.

BASIS FOR RELIEF

36. By this Motion, the Debtor seeks authority, under sections 105, 363, 507(a)(4), and 507(a)(5) of the Bankruptcy Code, to pay in the ordinary course of business, various employee-related prepetition obligations of the Debtor to, or for the benefit of, the Employees. The Debtor's obligations to its Employees (the "Prepetition Employee Obligations") may include, but are not limited to, the following: (a) unpaid prepetition wages, salaries, and paid time off earned prior to the Petition Date; (b) certain deductions from the Employees' paychecks

