

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**DEBTOR’S MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS 105(a)
AND 1107 OF THE BANKRUPTCY CODE AND FEDERAL RULE OF BANKRUPTCY
PROCEDURE 6003, AUTHORIZING, BUT NOT DIRECTING,
DEBTOR TO PAY COMPENSATION TO DEBTOR’S BROKERS,
TEMPORARY EMPLOYEES 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(a) and 1107 of Title 11 (the “Bankruptcy Code”) of the United States Code, and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing, but not directing, the Debtor to pay certain compensation to the Debtor’s Brokers and Temporary Employees. A proposed form of order is attached hereto as Exhibit A. 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”), and 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(a) and 1107 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. By this Motion, Debtor requests entry of an order, pursuant to sections 105(a) and 1107 of the Bankruptcy Code, and Rule 6003 of the Bankruptcy Rules for authorizing, but not directing, Debtor to pay certain compensation to Debtor's brokers and Temporary Employees as these brokers and Temporary Employees are critical to the Debtor's survival.

BASIS FOR SUCH RELIEF REQUESTED

18. In light of the recall of the Affected Product, the preservation of Debtor's work force during the course of this chapter 11 bankruptcy case is critical. In the ordinary course of its business, Debtor, through temporary employment agencies, employs temporary employees (the "Temporary Employees") in addition to its direct hires. Temporary employment agencies providing workers are paid monthly. These Temporary Employees will be heavily relied upon to bolster production during the product recall.

19. Debtor also employs various brokers, who place orders for certain regional customers, (the “Brokers”). Like the Temporary Employees, Debtor’s employment of these Brokers is vital to Debtor’s survival. Specifically, the Brokers control the largest volume of sales of Debtor and thus must be utilized to market Debtor’s product, especially, when Debtor’s customers are concerned about the product recall. These Brokers are traditionally paid on a monthly basis.

20. Debtor’s likelihood of retaining the Temporary Employees and the Brokers during this crisis rests on Debtor’s ability to continue, in the ordinary course, payments to (1) the temporary employee agencies, which supply such Temporary Employees, and (2) the Brokers who provide a significant volume of sales, particularly in this treacherous time of dealing with product recalls. Debtor owes approximately \$152,000 to its Temporary Employees and \$76,000 to its Brokers and respectfully requests that it is permitted to pay these vital employees immediately.¹

21. Payment to these employees is justified under the “doctrine of necessity.” *See, e.g., In re Lehigh & New England Ry. Co.*, 657 F.2d. 570, 581 (3d Cir. 1981) (necessity of payment doctrine “teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during the reorganization, payment may be authorized even if it is made out of corpus.”).

22. Section 105 of the Bankruptcy Code expressly provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Thus, in *In re Ionosphere Clubs, Incorporated*, the court, relying on its equitable powers under Bankruptcy Code section 105(a), permitted Eastern Air

¹ A list that comprises the names of Debtor’s Brokers and Temporary Agencies as well as the respective amounts owed to each entity is attached to this Motion as Exhibit B.

Lines, Inc. ("EAL") to pay its current employees prepetition wages, salaries, medical benefits, and routine business expense claims. *Ionosphere Clubs, Inc.*, 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989) *citing* H.R. REP. NO. 95-595, at 16 (1977)). The *Ionosphere Clubs* court further determined that these payments to or for the benefit of EAL's current employees fell under the "necessity of payment" rule, first enunciated by the United States Supreme Court in *Miltenberger v. Logansport, C. & S.W.R. Company*, under which a bankruptcy court will permit a reorganizing debtor to make postpetition payments on prepetition claims when payment is necessary to effectuate a successful reorganization. *Miltenberger v. Logansport, C. & S.W.R. Co.* 106 U.S. 286, 1 S.Ct. 140 (1882). *See also Pension Benefit Guaranty Corp. v. Sharon Steel Corp. (In re Sharon Steel Corp.)*, 159 B.R. 730, 736 (Bankr. W.D. Pa. 1993) (payment of prepetition wages permissible to prevent serious threat to chapter 11 process); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989) (same).

23. Based on the above-cited decisions, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors.

24. Here, Debtor submits that it must pay (1) the Temporary Employees to ensure that Debtor can maximize production, and (2) the Brokers so that they can market Debtor's product and assuage the concerns of customers, who may opt to purchase similar product from one of Debtor's business competitors.

25. Debtor further submits that granting this Motion is consistent with the policies of the Bankruptcy Code, and is therefore authorized by section 105 of the statute. The Temporary Employees and the Brokers will not continue to work for an entity that has filed a bankruptcy petition and is unable to pay them for timely services rendered. The most critical employees

tend to be those most able to secure new positions. Thus, unless a debtor can provide employees at least with adequate assurances of timely payment, reorganization will be available only to debtors who do not rely on a skilled workforce.

26. Further, the Debtor believes that the amounts requested to be paid to the Temporary Employees and the Brokers pursuant to this Motion, in light of the importance and necessity of retaining these employees' services are reasonable compared with the difficulties and losses Debtor likely will suffer if these amounts are not paid.

27. Such action, if authorized, however, should not be deemed to be an assumption or adoption of any agreement or policy providing such coverage. Debtor is currently reviewing these matters and reserves its rights with respect to cessation or continuation of these programs in the future, and the assumption or rejection of any executory contracts.

28. For all of the reasons previously set forth, Debtor submits that the immediate payment to Temporary Employees and Brokers is necessary to the success of Debtor's bankruptcy proceeding and thus cause exists for granting the relief requested herein.

SATISFACTION OF BANKRUPTCY RULE 6003

29. Pursuant to Rule 6003 of the Bankruptcy Rules, the Court may grant a request of a debtor to pay all or a part of a pre-petition claim in the first twenty (20) days of a case only if that relief is necessary to avoid immediate and irreparable injury. For the reasons set forth herein, Debtor submits that it has satisfied the requirements of Rule 6003 with respect to the relief requested in this Motion.

NOTICE

30. 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 the District of Delaware, (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.

31. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests entry of an Order substantially in the form annexed hereto, granting the relief requested in the Motion, and such other relief as may be just and proper.

Dated: February 17, 2009
Wilmington, DE

Respectfully submitted,

/s/ Bradford J. Sandler
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Proposed Counsel for Forward Foods LLC,
Debtor and Debtor in Possession

EXHIBIT A

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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

**ORDER GRANTING DEBTOR'S MOTION FOR ENTRY OF AN ORDER PURSUANT
TO SECTIONS 105(a) AND 1107 OF THE BANKRUPTCY CODE AND FEDERAL
RULE OF BANKRUPTCY PROCEDURE 6003, AUTHORIZING BUT NOT
DIRECTING, DEBTOR TO PAY COMPENSATION TO DEBTOR'S BROKERS,
TEMPORARY EMPLOYEES AND RELATED RELIEF**

Upon consideration of the motion (the "Motion")¹ of Forward Foods LLC ("Forward Foods" or the "Debtor"), the debtor and debtor in possession in the above-captioned chapter 11 case seeking entry of an order, pursuant to sections 105(a) and 1107 of the Bankruptcy Code and Rule 6003 of the Bankruptcy Rules authorizing, but not directing, Debtor to pay the Temporary Employees and the Brokers as more fully described in the Motion; and upon consideration of the Muldoon Affidavit; and the Court having jurisdiction pursuant to sections 157 and 1334 of title 28 of the United States Code to consider the Motion and the relief requested therein; and venue being proper in this Court pursuant to sections 1408 and 1409 of title 28 of the United States Code; and it appearing that no other or further notice need be provided; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtor, its creditors, and all parties in interest; and the Court having heard the evidence and statements of counsel regarding the Motion and having determined that the legal and factual bases set forth in the

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

Motion and attested to in the Muldoon Affidavit establish just cause for the relief granted herein, it is therefor

ORDERED that the Motion is granted; and it is further

ORDERED that Debtor is authorized, but not directed, in its sole discretion, to immediately pay, in the ordinary course of its businesses, certain compensation to Debtor's Brokers and Temporary Employees for previous services rendered to Debtor; and it is further

ORDERED that nothing in the Motion or this Order shall be construed as an assumption or adoption of any agreement to employ these Temporary Employees and/or the Brokers, and Debtor reserves its rights with respect to cessation or continuation of these agreements with the Temporary Employees and the Brokers in the future; and it is further

ORDERED that this Court shall retain jurisdiction over Debtor, the Temporary Employees and the Brokers receiving payment from Debtor pursuant to this Order with respect to any matters, claims, rights or disputes arising from or related to the Motion, or the implementation of this Order; and it is further

ORDERED that the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated: _____, 2009
Wilmington, Delaware

United States Bankruptcy Judge

**Forward Foods LLC
Broker List**

VendID	VendName	Amount due	AddrLine1	AddrLine2	City	CountryID	PostalCode	StateID
AC30384	Acosta, Inc.	3,741.72	PO Box 281996		Atlanta	USA	303841996	GA
CD34683	CDZ SALES	7,741.80	3601 Palm Harbor Blvd.	Suite 1	Palm Harbor	USA	34683	FL
CR75093	Crossmark, Inc.	5,267.01	411 Waverly Oaks Rd	Suite 330	Walham	USA	02452	MA
CM00846	Cascade Marketing	1,549.96	1516 Legacy Circle Ste 100		Naperville	USA	60563	IL
DF075	Fazio Consulting Group, Inc.	4,141.64	412 S.Rios Ave.		Solana Beach	USA	92075	CA
HH45246	Harlow-HRK Sales & Marketing	5,488.56	11502 Century Blvd.		Cincinnati	USA	45246	OH
YMB4526	Luna Bella, Inc. (Yememi Mesa)	2,557.44	2303 Camino Ramon	Suite 131	San Ramon	USA	94583	CA
LO94526	Level One	17,560.59	140 Town & Country Dr.	Ste. A	Danville	USA	94526	CA
MG55364	MARK GONROWSKI	431.58	1165 COVE CIRCLE		MINNETRISTA	USA	55364	MN
MS84107	Mancini Sales & Mktg	73.50	164 E 3900 S		Salt Lake City	USA	84107	UT
OFB80308	Organic Food Brokers	6,000.00	P.O. Box 20493		Boulder	USA	80308	CO
SS92007	Synergy Sales	1,057.47	attn: Mike McCaskey	2212 Edinburg Ave.	Cardiff by the Sea	USA	92007	CA
SS92656	Sunshine Specialties Southern Ca, Inc.	1,600.00	35 Rosy Finch Lane		Aliso Viejo	USA	92656	CA
TNT76011	TNT Marketing	11,774.58	2100 Road to Six Flags East		Arlington	USA	76011	TX
TSM78216	Torcasio Sales & Marketing	750.83	10223 McAllister Freeway Ste #105		San Antonio	USA	78216	TX
WD48075	Wodlika Devine	6,800.30	25625 Southfield Rd		Southfield	USA	48075	MI

Total Brokers

76,536.98

Temporary Agencies

Agency Name	Amount due	AddrLine1	City	CountryID	PostalCode	StateID
Hire Dynamics, LLC	152,171.45	P.O. Box 890858	Charlotte	USA	28289	NC

