

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

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

**MOTION OF THE DEBTOR FOR ORDER PURSUANT TO SECTIONS
105(a), 363(b), 541, AND 507(a)(8) OF THE BANKRUPTCY CODE AND
FED. R. BANKR. P. 6003 AUTHORIZING PAYMENT OF
CERTAIN PREPETITION TAXES**

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 entry of an order, pursuant to 105(a), 363(b), 541, and 507(a)(8) of the Bankruptcy Code and Rule 6003 of the Federal Rules of Bankruptcy Procedure authorizing, but not requiring, the Debtor to remit and pay sales and use taxes, and such other personal liability and/or trust fund taxes as the Debtor, in its discretion, deems necessary to various country, federal, state, county and city taxing and licensing authorities (collectively, the “Taxing Authorities”). In support of the Motion, the Debtor relies upon and incorporates by reference the *Affidavit of J. Patrick Muldoon in Support of First Day Motions* (the “Muldoon Affidavit”). A proposed form of order is attached hereto as Exhibit A. In further support of the Motion, the Debtor respectfully represents:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of this case and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief

requested herein are sections 105(a), 363(b), 541, and 507(a)(8) of the Bankruptcy Code. Such relief is warranted pursuant to 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 AND BASIS THEREFOR

15. By this Motion, the Debtor requests entry of an order, pursuant to sections 105(a), 363(b), 541, and 507(a)(8) of the Bankruptcy Code and Rule 6003 of the Bankruptcy Rules authorizing, but not directing, Debtor to pay prepetition sales, use and other similar “trust fund” taxes (the “Taxes”) and similar obligations detailed herein to the respective Taxing Authorities in the ordinary course of the Debtor’s business. Such relief will be without prejudice to the Debtor’s rights to contest the amounts of any Taxes on any grounds Debtor deems appropriate.

16. Debtor, in the ordinary course of its business, incurs various Taxes, including state and local use tax liabilities, and import taxes relating to the sales of its goods in Canada.

Debtor does not incur sales taxes for sales of its goods within the United States as Debtor obtains a waiver from such taxes due to the ultimate resale of the product.

17. Sales and use taxes accrue as Debtor consumes goods and the import taxes are paid as the goods cross the border into Canada. Debtor then collects such funds from its Canadian customers. Tax filings are made quarterly with the Canadian authorities.

18. As of the Petition Date, with the exception of various employment related taxes addressed in a separate motion, Forward Foods is behind on various payments to certain Taxing Authorities in the approximate amount of \$19,000, as further detailed in Schedule E filed contemporaneously herewith.

19. Most, if not all, of the Taxes will likely be entitled to priority status under section 507(a)(8) of the Bankruptcy Code and therefore, must be paid in full under any chapter 11 plan before any of the Debtor's general unsecured creditors may be satisfied. Therefore, the payment of the Taxes will likely affect only the *timing* of the payments and not the *amounts* that would ultimately be received by the applicable Taxing Authorities.

20. Certain of the Taxing Authorities, particularly the Canada Revenue Agency, may assert that the Taxes are "trust fund" taxes that the Debtor is required to collect from third parties, such as customers of the Debtor located in Canada, and hold in trust for the benefit of such Taxing Authorities. To the extent that the Debtor collect Taxes for subsequent transfer to the Taxing Authorities, such Taxes may not constitute property of the Debtor's estate. *See Begier v. Internal Revenue Service*, 496 U.S. 53, 57-60 (1990); *City of Ferrell v. Sharon Steel Corp.*, 41 F.3d 92, 97 (3d Cir. 1994); *DeChiaro v. N.Y. State Tax Comm'n*, 760 F.2d 432, 433 (2d Cir. 1985) (sales taxes are "trust fund" taxes); *In re Shank*, 792 F.2d 829, 830(9th Cir. 1986) (sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes).

21. To the extent the Taxes are “trust fund” taxes and the funds representing such Taxes can be adequately identified and traced, the Debtor has no equitable interest in such funds and they would not be property of the Debtor’ estates. *See* 11 U.S.C. § 541(d); *In re Am. Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987). Accordingly, the Debtor should be authorized to pay any Taxes that constitute trust fund taxes as they come due and payment of such taxes would not prejudice the rights of any of the Debtor’ other creditors.

22. Section 105(a) of the Bankruptcy Code 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). Bankruptcy courts have utilized their section 105 equitable powers under the “necessity of doctrine” to authorize payment of a debtor’s prepetition obligations where such payment is necessary to preserve the debtor’s potential for rehabilitation. *See In re Lehigh & New Eng. Rwy. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)).

23. Moreover, this Court has frequently exercised its equitable powers under section 105(a) of the Bankruptcy Code to authorize Debtor to pay prepetition tax obligations in light of the foregoing considerations. *See, e.g., In re Hilex Poly Co. LLC*, Case No. 08-10890 (Bankr. D. Del. May 6, 2008) (KJC) (order authorizing but not directing Debtor to pay certain pre-petition tax obligations); *In re Buffets Holdings, Inc.*, Case No. 08-10 141 (Bankr. D. Del. Jan. 22, 2008) (MFW); *In re Am. Home Mortgage Holdings, Inc.*, Case No. 07-11047 (CSS) (Bankr. D. Del. Aug. 7, 2007); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (Bankr. D. Del. April 3, 2007) (KJC); *In re Premium Papers Holdco, LLC*, Case No. 06-10269 (Bankr. D. Del. Mar. 22, 2006) (CSS).

24. For these reasons, the Debtor submits that the relief requested herein is in the best interests of the Debtor, its estate and creditors, and therefore should be granted.

25. Nothing in this Motion should be construed as impairing the Debtor's right to contest the amount of any Taxes that the Debtor may owe to any Authority, and the Debtor expressly reserves all of the rights with respect thereto.

26. Any delay in paying the obligations relating to the Taxes would be detrimental to the Debtor, its creditors, and its estate. Accordingly, the Debtor seeks a waiver of the stay of the order authorizing the use, sale, or lease of property under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to the extent such provision may be applicable.

27. The Debtor submits that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for reasons set forth above, Bankruptcy Rule 6003, to the extent applicable, has been satisfied.

28. Based on the foregoing, the relief requested herein is necessary and appropriate, is in the best interests of the Debtor's estate and creditors and should be granted in all respects.

NOTICE

29. 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.

CONCLUSION

WHEREFORE, the Debtor respectfully request that the Court enter an order authorizing, but not requiring, the Debtor to remit and pay sales and use taxes, and such other personal liability and/or trust fund taxes as the Debtor, in its discretion, deems necessary to various country, federal, state, county and city taxing and licensing authorities and such further 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.)	
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**ORDER GRANTING MOTION OF THE DEBTOR FOR ORDER PURSUANT
TO SECTIONS 105(a), 363(b), 541, AND 507(a)(8) OF THE BANKRUPTCY CODE
AND FED. R. BANKR. P. 6003 AUTHORIZING PAYMENT OF
CERTAIN PREPETITION TAXES**

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), 363, 507(a) and 541 of the Bankruptcy Code authorizing, but not directing, the Debtor to pay the Taxes to the Taxing Authorities 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 Motion and attested to in the Muldoon Affidavit establish just cause for the relief granted herein, it is therefor

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

ORDERED that the Motion is granted; and it is further

ORDERED that the Debtor is authorized, but not directed, in its sole discretion, to pay, in the ordinary course of its businesses, all prepetition Taxes relating to the period prior to the Petition Date, including all those Taxes subsequently determined to be owed for periods prior to the Petition Date, to the Taxing Authorities; and it is further

ORDERED that nothing in the Motion or this Order shall be construed as impairing the Debtor's right to contest the validity, priority, or amount of any Taxes allegedly due or owing to any Taxing Authorities, and all of the Debtor's rights with respect thereto are hereby reserved; and it is further

ORDERED that this Court shall retain jurisdiction over the Debtor and the Taxing Authorities receiving payment from the Debtor pursuant to this Order with respect to any matters, claims, rights or disputes arising from or related to the Motion, the implementation of this Order or the validity of any of the Taxes; 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

File a First Day Motion:09-10545-KJC Forward Foods LLC

Type: bk

Chapter: 11 v

Office: 1 (Delaware)

Assets: y

Judge: KJC

Case Flag: PlnDue, DsclsDue,
LEAD**U.S. Bankruptcy Court****District of Delaware**

Notice of Electronic Filing

The following transaction was received from Bradford J. Sandler entered on 2/17/2009 at 10:32 AM EST and filed on 2/17/2009

Case Name: Forward Foods LLC**Case Number:** 09-10545-KJC**Document Number:** 14**Docket Text:**Motion to Pay Sales and Use Taxes (*Prepetition*) Pursuant to Sections 105(a), 363(b), 541 and 507(a)(8) of the Bankruptcy Code and Fed. R. Bankr. P. 6003 Filed By Forward Foods LLC (Attachments: # (1) Proposed Form of Order)(Sandler, Bradford)

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**E:\32199\Prepetition Taxes Motion\Motion to Pay Prepetition Taxes.pdf**Electronic document Stamp:**[STAMP bkecfStamp_ID=983460418 [Date=2/17/2009] [FileNumber=6965762-0]
[974f241167217e40e114205f834d2e4bf520987db11088585451587de8c1eaf60aef
11fcb94977e97df966a72db30ebe4343675f623982b8470a0ec08f1f3d31]]**Document description:**Proposed Form of Order**Original filename:**E:\32199\Prepetition Taxes Motion\Exhibit A to Prepetition Taxes Motion.pdf**Electronic document Stamp:**[STAMP bkecfStamp_ID=983460418 [Date=2/17/2009] [FileNumber=6965762-1]
[7775bc0058d72e0bde1255e90ae516eca1c7ce2beb16fbc0aeec223b2dc8fd567e6c
ea90c90b1e0e496ccd8261485e7b1f2d6aaa5a840ba447879c555b96632f]]**09-10545-KJC Notice will be electronically mailed to:**

Bradford J. Sandler on behalf of Debtor Forward Foods LLC

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United States Trustee

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09-10545-KJC Notice will not be electronically mailed to: