

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**MOTION OF THE DEBTOR FOR (I) INTERIM RELIEF AND (II) FINAL
AUTHORITY TO CONTINUE FINANCING ARRANGEMENT FOR INSURANCE
PREMIUMS NECESSARY TO MAINTAIN INSURANCE COVERAGE**

Forward Foods LLC (“Forward Foods” or the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, hereby moves for entry of (i) an interim order (the “Interim Order”) and (ii) a final order (the “Final Order”) pursuant to section 105(a), 363 and 364 of the Bankruptcy Code authorizing the Debtor to perform under the terms of a commercial insurance premium finance and security agreement (the “Finance Agreement”) with Cananwill, Inc. (“Cananwill”), pursuant to which Cananwill will provide the Debtor with such financing that will allow the Debtor to pay insurance premiums (the “Premiums”) related to various insurance policies (the “Policies”) required to be maintained by the Debtor. A proposed Interim Order is attached hereto as Exhibit A, and a proposed Final Order is attached hereto as Exhibit B. 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”), and respectfully represents as follows:

Statement Pursuant to Federal Rule of Bankruptcy Procedure 4001

Summary of Terms

Interest Rate for the Finance Agreement: Annual percentage rate of 5.99%. *See* Exhibit B, Page 1 of 2.

Maturity Date of the Finance Agreement: June 1, 2009. *See* Exhibit B, Page 1 of 2.

Events of Default: Nonpayment of installment payments. *See* Exhibit B, Page 1 of 2.

Grant of Liens to Lender: Cananwill is granted a first priority security interest in all payments due to Debtor under the various insurance policies paid through the Finance Agreement. *See* Exhibit B, Page 1 of 2.

Adequate Protection: No other lender holds a security interest in the property covered by the Finance Agreement, therefore no adequate protection payments are necessary.

Borrowing Limit: \$177,419.45. *See* Exhibit B, Page 1 of 2.

Summary of Relief Requested

Through this Motion, Debtor seeks authority to continue to perform under the existing terms and conditions of the Finance Agreement in order to continue financing the payment of insurance premiums for certain insurance policies.

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 these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief requested herein is sections 105(a) and 364(c) of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

2. Simultaneously herewith (the "Petition Date"), the Debtor filed with this Court a 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 property and assets as debtor in possession. No trustee, examiner or committee of creditors has yet been appointed in the Debtor's chapter 11 case.

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.

The Debtor's Insurance Coverage

17. Prior to filing its petition under chapter 11 of the Bankruptcy Code, the Debtor, in the ordinary course of its business, maintained various types of insurance coverage including property and casualty policies.

18. Due to the high risk of liability related to the Debtor's operations, it is crucial that the Debtor continue to maintain such insurance during its postpetition operations to protect and maintain the value of the Debtor's assets for the benefit of the Debtor's estate and creditors.

19. Under the Finance Agreement with Cananwill, a copy of which is attached hereto as Exhibit C, the Debtor has financed a total of \$177,419.45 in Premiums for seven separate Policies at 5.99% interest. The Debtor is obligated to make eight installments of \$22,678.49 under the Finance Agreement. Non-payment of the installment is grounds for cancellation of the Policies.

20. The Debtor has made three installment payments under the Finance Agreement, leaving a total outstanding balance of \$109,383.98 in Premiums under the Policies. The Debtor's obligations under the Finance Agreement are secured by all sums payable to the Debtor pursuant to the Policies.

21. The Debtor has failed to make its January 15, 2009, installment payment, and has received notice that the policies will be cancelled if payment is not received on or before February 17, 2009.

22. The Debtor's budget does not contain adequate funds that would permit the Debtor to make a cash payment in the amount of \$109,383.98 to pay the outstanding insurance premiums under the Policies. The Debtors are unable to obtain unsecured credit to finance the outstanding premiums due under the Policies.

RELIEF REQUESTED AND BASIS THEREFOR

23. By this Motion, the Debtor seek entry of (i) an Interim Order and (ii) a Final Order authorizing the Debtor to perform under the terms of the Financing Agreement with Cananwill pursuant to sections 105(a) and 364 of the Bankruptcy Code and Bankruptcy Rule 4001.

24. Section 364(b) of the Bankruptcy Code provides that after notice and a hearing, the Court may authorize the trustee or debtor in possession to obtain unsecured credit or to incur unsecured debt as an administrative expense. 11 U.S.C. § 364(b).

25. Section 364(c) of the Bankruptcy Code further provides:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of [the Bankruptcy Code] as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt –

.....

(2) secured by a lien on property of the estate that is not otherwise subject to a lien.

26. The Court has further authority under section 105(a) of the Bankruptcy Code to “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).

27. Courts have recognized the authority under section 105(a) for Bankruptcy Courts to authorize the payment of prepetition obligations when doing so is essential to the continued operation of the debtor under the “necessity of payment rule” or the “doctrine of necessity.” *See In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 177 (Bankr. S.D.N.Y. 1989).

28. The United States Trustee’s Operating Guidelines for Chapter 11 Cases (the “Guidelines”) requires the Debtor to maintain insurance coverage throughout the chapter 11 case. *See* Guidelines ¶ 3 (Jan. 26, 2009) (requiring maintenance, as appropriate, of general comprehensive liability, property loss from fire, theft, water or other extended coverage, workers’ compensation, vehicle, products liability, fidelity bonds for employees and such other insurance as is customary in the debtor’s business).

29. Nonpayment of the installments due under the Finance Agreement will result in Cananwill seeking relief from the automatic stay to terminate the Policies or to demand adequate protection payments. *See TIFCO, Inc. v. U.S. Repeating Arms Co.*, 67 BR. 990, 994-95 (Bankr. D. Conn. 1986) (recognizing insurance finance companies are secured by unearned premiums financed pursuant to a premium finance agreement).

30. Cancellation of the Policies would be in violation of the United States Trustee’s Guidelines mandating the continuation of insurance coverage throughout a chapter 11 case. Cancellation would further place property of the estate at severe risk of loss, therefore continuation of the Policies is in the best interest of the Debtor’s creditors and the estate.

31. Accordingly, the Debtor seeks authorization to continue its insurance financing pursuant to the Finance Agreement, including the payment of all monthly obligations, whether prepetition or postpetition and to renew or enter into new financing arrangements as may be required as the annual terms of the existing Finance Agreement expire, without further order of this Court, in the ordinary course of business. Pursuant to the Finance Agreement, Cananwill's existing security interest on all sums payable to the Debtor pursuant to the Policies will continue.

32. Because the Debtor's Finance Agreement is schedule to terminate on February 17, 2009, if the Debtor does not make the January 2009 installment on or before that date, the Debtor seeks entry of an Interim Order authorizing the Debtor to continue its obligations under the Finance Agreement until such time as a Final Order is entered. *See* Bankruptcy Rule 4001(c)(2) (permitting court to "authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing."). The Debtor's performance under the Finance Agreement pending entry of a Final Order is necessary to protect the assets of the estate from diminishment due to a lapse in insurance coverage.

33. This Court and other Courts have granted the same or similar relief in other chapter 11 cases. *See, e.g., In re Quaker Fabrics Corp.*, Ch. 11 Case No. 07-11146 (KG) (Bank. D. Del. September 5, 2007) (granting the authority to honor the terms of a debtor's existing insurance premium financing agreement); *In re New Century TRS Holdings, Inc.*, Ch. 11 Case No. 07-10416 (KJC) (Bankr. D. Del. April 3, 2007) (approval of continuation of prepetition insurance premium financing agreement granted as first day relief); *In re Premium Papers Holdco. LLC*, Ch. 11 Case No. 06-10269 (CSS) (Bankr. D. Del March 22, 2006) (approval of continuation of prepetition insurance premium financing agreement granted as first day relief).

34. The Debtor submit 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.

35. To the extent that the Policies or related agreements may be deemed executory contracts within the meaning of section 365 of the Bankruptcy Code, the Debtor does not at this time seek authority to assume such contracts.

NOTICE

36. 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.

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

CONCLUSION

WHEREFORE, the Debtor respectfully request entry of an Interim Order and Final Order, in the form annexed hereto, granting the Debtor the authority to perform under the terms of the Finance Agreement with Cananwill pursuant to 11 U.S.C. § 364(c) and Bankruptcy Rule 4001, and such other and further relief as is just.

Dated: February 17, 2009
Wilmington, DE

Respectfully submitted,

/s/ Bradford J. Sandler

Bradford J. Sandler, Esquire (No. 4142)
Jennifer R. Hoover, Esquire (No. 5111)
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
222 Delaware Avenue, Suite 801
Wilmington, DE 19801
(302) 442-7010 (Telephone)
(302) 442-7012 (Facsimile)
bsandler@beneschlaw.com
jhoover@beneschlaw.com

-and-

William Kohn, Esquire (OH 0005749)
Kari Coniglio, Esquire (OH 0081463)
200 Public Square
2300 BP Tower
Cleveland, OH 44114
(216) 363-4500
(216) 363-4588
wkohn@beneschlaw.com
kconiglio@beneschlaw.com

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.)
)
_____)

**INTERIM ORDER GRANTING MOTION OF THE DEBTOR FOR AUTHORITY TO
CONTINUE FINANCING ARRANGEMENT FOR INSURANCE PREMIUMS
NECESSARY TO MAINTAIN INSURANCE COVERAGE**

Upon consideration of the motion (the “Motion”)¹ of the Debtor for an order, under sections 105(a) and 364(c) Bankruptcy Code and Bankruptcy Rule 4001, authorizing the Debtor to perform under the terms of a commercial insurance premium finance and security agreement (the “Finance Agreement”) with Cananwill, Inc. (“Cananwill”), including the payment of all monthly obligations, whether prepetition or postpetition and to renew or enter into new financing arrangements as may be required as the annual terms of the existing Finance Agreement expire, without further order of this Court, in the ordinary course of business; and upon the Muldoon Affidavit; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested in the Motion is in the best interests of the Debtor, its estate, creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor, it is hereby

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

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED to the extent set forth herein.
2. The Debtor is authorized, but not directed, to continue performing under the Finance Agreement and to pay the premiums and related charges arising under or in connection with the Policies as such premiums and charges become due.
3. The Debtor is authorized to pay all outstanding prepetition obligations due under the Finance Agreement and to pay all postpetition obligations as they become due pending entry of a Final Order.
4. The Court finds and determines that the requirements of Bankruptcy Rule 4001 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.
5. Neither the provisions contained herein, nor any actions or payments made by the Debtor pursuant to this Order, shall be deemed an assumption of the Finance Agreement, or shall otherwise constitute a waiver of the Debtor's rights under section 365 of the Bankruptcy Code or an admission by the Debtor that the Finance Agreement constitutes an executory contract within the meaning of section 365 of the Bankruptcy Code.
6. Neither the provisions contained herein, nor any actions or payments made by the Debtor pursuant to this Order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.
7. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated: _____, 2009
Wilmington, Delaware

United States Bankruptcy Judge

