

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**APPLICATION TO RETAIN AND TO EMPLOY THE GARDEN CITY GROUP, INC.,
AS CLAIMS, NOTICE, AND BALLOTING AGENT**

Forward Foods LLC (“Forward Foods” or the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, hereby applies (the “Application”) for an order authorizing the employment and retention of The Garden City Group, Inc. (“Garden City”) as claims, notice and balloting agent (the “Claims Agent”) for the bankruptcy case of Debtor. A proposed order is attached hereto as Exhibit A. In support of this Application, 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. 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). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief sought herein is 28 U.S.C. § 156(c), as supplemented by Rule 2002(f) of the Federal Rules of Bankruptcy Procedure and Local Rule 2002-1(f).

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 the 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 REASONS THEREFOR

17. By this Application, the Debtor seeks entry of an order authorizing it to retain and employ Garden City as the Claims Agent to, *inter alia*: (a) serve as the Court's noticing agent to mail notices to the Debtor's creditors, interest holders and parties in interest; (b) provide, if necessary, computerized claims, objection and balloting database services; and (c) provide, if necessary, expertise, consultation and assistance in claims, interests and ballot processing and with the dissemination of other administrative information related to the Debtor's bankruptcy case. The Debtor also requests that the Court release all filed claims and interest directly to Garden City. In support of this Application, the Debtor submits the Affidavit of Jeffrey Stein, Esq. (the "Stein Affidavit") attached hereto as Exhibit B.

18. 28 U.S.C. § 156(c), which governs the staffing and expenses of bankruptcy courts, states in pertinent part:

Any court may utilize facilities or services, either on or off the court's premises, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under the provisions of title 11, United States Code, where the cost of such facilities or services are paid for out of the assets of the estate and are not charged to the United States. The utilization of such facilities or services shall be subject to such conditions and limitations as the pertinent circuit council may prescribe.

28 U.S.C. § 156(c).

19. Bankruptcy Rule 2002 generally regulates the notices that must be provided to creditors, interest holders and other parties in interest in bankruptcy cases. Under Bankruptcy

Rule 2002, the Court may direct that a person other than the Clerk of the Court give notice of the various matters described therein. The Debtor's engagement of Garden City as the Claims Agent is therefore expressly authorized under section 156(c) of Title 28 of the United States Code, Bankruptcy Rule 2001, and the Local Rules.

20. The Debtor has identified over 200 creditors and other parties in interest to whom certain notices, including notice of the commencement of the chapter 11 case, and voting documents, must be sent. Local Rule 2002-1(f) requires the appointment of a claims agent in all cases with more than 200 creditors, unless the Court orders otherwise.

21. Garden City is a data processing firm that specializes in noticing, claims processing, and other administrative tasks in chapter 11 cases. The Debtor wishes to engage Garden City to (a) send out certain designated notices, (b) maintain claims and interest files, (c) maintain claims and interest registers, and (d) act as voting agent with respect to certain creditors in this case. The Debtor believes that such assistance will expedite the service of notices required under Bankruptcy Rule 2002 and the Local Rules, streamline the claims and interests administration process, and permit the Debtor to focus on its reorganization efforts.

22. The Debtor believes that Garden City is well-qualified to serve in the capacity as claims, notice, and balloting agent. The Debtor chose Garden City based on both its experience and the competitiveness of its fees. Garden City has provided identical or substantially similar services in other Chapter 11 cases in Delaware, including, among others: *In re Jancor Companies Inc., et al.*, case no. 08-12556 (MFW), *In re Comfort Co., Inc.*, case no. 08-12305 (MFW), *In re DG Liquidation Corp.*, case no. 08-10601 (CSS), *In re KCMVNO, Inc.*, case no. 08-10600 (BLS), *In re Supplements LT Inc.*, case no. 08-10446 (KJC), *In re ProRhythm, Inc.*, case no. 07-11861 (KJC), *In re S-Tran Holdings, Inc., et al.*, case no. 05-11391 (RB), *In re Flintkote Company*, case no. 04-11300 (JKF), *In re Factory 2-U Stores, Inc.*, case no. 04-10111

(PJW), *In re Magnatrax Corporation*, case no. 03-11402 (PJW), *In re HQ Global Holdings, Inc., et al.*, case no. 02-10760 (MFW), *In re Federal-Mogul Global, Inc.*, case no. 01-10578 (AMW) and *In re ACandS, Inc.*, case no. 02-12687 (RJN).

23. The Debtor proposes to retain Garden City on substantially the terms and conditions set forth in the Bankruptcy Administration Agreement (the "Agreement") between the Debtor and Garden City, attached hereto as Exhibit C.

24. Garden City has represented to the Debtor that it neither holds nor represents any interest adverse to the Debtor's estate on matters for which it is to be retained and employed and that it has no prior connection with the Debtor, except as disclosed in the Stein Affidavit.

25. The Debtor anticipates that Garden City would perform some or all of the following services, among others, at the request of the Debtor, the Court, or the Clerk's Office:

- (a) notify all potential creditors of the filing of the Debtor's bankruptcy petition and of the setting of the first meeting of creditors, pursuant to Bankruptcy Code § 341, under the proper provisions of the Bankruptcy Code and the Bankruptcy Rules;
- (b) maintain an official copy of the Debtor's schedules of assets and liabilities and statement of financial affairs (collectively, the "Schedules") listing the Debtor's known creditors and the amounts owed thereto;
- (c) notify all potential creditors of the existence and amount of their respective claims, as evidenced by the Debtor's books and records and as set forth in their Schedules;
- (d) furnish a notice of the last day for the filing of proofs of claim and a form for the filing of a proof of claim, after such notice and form are approved by this Court;
- (e) file with the Clerk an affidavit or certificate of service which includes a copy of the notice, a list of persons to whom it was mailed (in alphabetical order), and the date the notice was mailed, within seven days of service;
- (f) docket all claims received, maintain the official claims register (the "Claims Register") for the Debtor on behalf of the Clerk, and provide the Clerk with a certified duplicate unofficial Claims Register on a monthly basis, unless otherwise directed;

- (g) specify, in the Claims Register, the following information for each claim docketed: (i) the claim number assigned, (ii) the date received, (iii) the name and address of the claimant and agent, if applicable, who filed the claim, (iv) the filed amount of the claim, if liquidated, and (v) the classification(s) of the claim (e.g. secured, unsecured, priority, etc.) according to the proof of claim;
- (h) record all transfers of claims and provide any notices of such transfers required by Bankruptcy Rule 3001;
- (i) make changes in the Claims Register pursuant to Court Order;
- (j) upon completion of the docketing process for all claims received to date by the Clerk's office, turn over to the Clerk copies of the Claims Register for the Clerk's review;
- (k) maintain the Claims Register for public examination without charge during regular business hours;
- (l) maintain the official mailing list for the Debtor, which shall be available upon request by a party-in-interest or the Clerk, of all entities that have filed a proof of claim;
- (m) assist with, among other things, solicitation, calculation, and tabulation of votes and distribution, as required in furtherance of confirmation of the Plan;
- (n) provide and maintain a website where parties can view claims filed, status of claims, and pleadings or other documents filed with the Court by the Debtor;
- (o) Thirty days prior to the close of this case, an order dismissing Garden City would be submitted terminating its services upon completion of its duties and responsibilities and upon the closing of this case; and
- (p) at the close of the case, box and transport all original documents in proper format, as provided by the Clerk's office, to the Federal Records Center.

26. In addition, the Debtor may utilize other services offered by Garden City such as disbursing and other related administrative services that may be requested by the Debtor, including but not limited to assisting the Debtor with the preparation of a master creditor list and any amendments thereto, and to the extent necessary, gathering data in conjunction with the preparation of the Debtor's Schedules.

27. The proposed fees to be charged by Garden City are set forth in the Agreement. The Debtor believes that the rates to be charged by Garden City for its services in connection with noticing, claims processing, and the solicitation process are competitive and either at or below the rates charged by its competitors. Prior to the filing of the chapter 11 case, the Debtor agreed to pay, upon Court approval of this Motion, Garden City a retainer of \$15,000 for anticipated expenses that Garden City expect to incur.

28. The Debtor requests that the fees and expenses of Garden City incurred in the performance of the above-described services be treated as an administrative expense of the Debtor's chapter 11 estate and be paid by the Debtor in the ordinary course of business, without the need to file any fee applications or otherwise seek Court approval for the compensation of its services and reimbursement of its expenses.¹ Garden City has informed the Debtor that it will maintain records of all services provided, showing dates, categories of services, fees charged, and expenses incurred and that it would serve monthly invoices on: (i) the Debtor; (ii) counsel for the Debtor; (iii) the Office of the United States Trustee; and (iv) counsel for any official committees that may be appointed in this case.

29. In the event this case is converted to a case under chapter 7 of the Bankruptcy Code, the Debtor requests that Garden City continue to be paid for its services until the claims filed in this case has been completely processed, and that if claims agent representation is necessary in the converted chapter 7 case, Garden City would continue to be paid in accordance with 28 U.S.C. section 156(c).

¹ As administrative agent and adjunct to the Court, the Debtor does not believe that Garden City is a "professional" whose retention is subject to approval under Bankruptcy Code § 327 or whose compensation is subject to approval under Bankruptcy Code § 330 or 331.

30. The Debtor has many creditors, and accordingly, Garden City may have rendered and may continue to render services to certain of these creditors. Garden City has not and will not represent the separate interests of any such creditor in this case. Additionally, Garden City employees may, in the ordinary course of their personal affairs, have relationships with certain creditors of the Debtor. For example, one or more of Garden City's employees may have obligations outstanding with financial institutions that are creditors of the Debtor.

31. To the best of the Debtor's knowledge, information, and belief, and except as disclosed in the Stein Affidavit, the employees of Garden City have no relationship to the Debtor, its creditors, or the United States Trustee for this Region. In the Stein Affidavit, Garden City has represented that it neither holds nor represents any interest adverse to the Debtor's estate and that it is a "disinterested person," as referenced in Bankruptcy Code § 327(a) and as defined in Bankruptcy Code § 101(14), as modified by Bankruptcy Code § 1107(b).

32. Garden City has informed the Debtor that it would not employ any past or present employee of the Debtor for work that involves the Debtor's bankruptcy proceedings.

33. For the foregoing reasons, the Debtor believes that the retention of Garden City is in its best interest and the best interests of its estate, creditors, and other parties in interest, and therefore, the Debtor desires to retain and employ Garden City as their claims, notice, and balloting agent upon the terms set forth herein and in the Agreement.

NOTICE

34. 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, the Debtor submits that no other or further notice is required.

WHEREFORE, Debtor requests that the Court enter an order, substantially in the form of Exhibit A hereto, authorizing the employment and retention of Garden City as claims, notice and balloting agent and granting such other and further relief as the Court deems just and proper.

Dated: February 17, 2009
Wilmington, DE

Respectfully submitted,

/s/ Bradford J. Sandler

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