

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**DEBTOR’S APPLICATION PURSUANT TO SECTION 327(a) OF THE BANKRUPTCY
CODE AND BANKRUPTCY RULE 2014 FOR AN ORDER AUTHORIZING THE
RETENTION AND EMPLOYMENT OF BENESCH, FRIEDLANDER, COPLAN &
ARONOFF LLP AS ATTORNEYS FOR DEBTOR AND DEBTOR IN POSSESSION**

Forward Foods LLC, (“Forward Foods” or the “Debtor”), the debtor and debtor in possession in the above-captioned chapter 11 case, by this application (the “Application”), respectfully seek the issuance and entry of an order, pursuant to section 327(a) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) and Rule 2014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing and approving the retention of Benesch, Friedlander, Coplan & Aronoff LLP (“BFC&A” or the “Firm”) as attorneys for the Debtor in this chapter 11 case. In support of this Application, the Debtor relies upon and incorporates by the reference the *Affidavit of J Patrick Muldoon in Support of First Day Motions* (the “Muldoon Affidavit”) and the *Verified Statement of Bradford J. Sandler* (the “Sandler 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). The venue of the Debtor’s chapter 11 case and this Application is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Section

327(a) of the Bankruptcy Code and Bankruptcy Rule 2014 provide the statutory predicates for the relief sought herein.

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 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

16. By this Application, the Debtor seeks to employ and retain BFC&A as its bankruptcy counsel with regard to the filing and prosecution of its chapter 11 case. Accordingly, the Debtor respectfully requests entry of an order under section 327(a) of the Bankruptcy Code authorizing the Debtor to employ and retain BFC&A as its attorneys under a general retainer to perform the legal services that will be necessary during the Debtor's chapter 11 case, as more fully described below.

17. The Debtor has selected BFC&A as its attorneys because of, among other reasons, the Firm's extensive experience in and knowledge of business reorganizations under chapter 11 of the Bankruptcy Code. BFC&A is well suited for the type of representation required by the

Debtor, inasmuch as the Firm possesses substantial bankruptcy, debt restructuring, creditors' rights, tax, environmental, labor, finance and litigation expertise, and BFC&A's attorneys have had significant roles in many large bankruptcy cases and reorganizations under the Bankruptcy Code. Moreover, BFC&A is familiar with the Debtor's business and financial affairs and many of the potential legal issues that may arise in the context of this reorganization case. Accordingly, the Debtor believes that BFC&A is well qualified and able to represent the Debtor in this case in a most efficient and responsive manner.

**NECESSITY FOR EMPLOYMENT AND
PROFESSIONAL SERVICES TO BE RENDERED**

18. The services of attorneys under a general retainer are necessary to enable the Debtor to discharge its duties as debtor in possession. Subject to the jurisdiction and further order of this Court, BFC&A will undertake to render the following services to the Debtor:

- a. Advising the Debtor of its rights, powers, and duties as a debtor in possession continuing to operate and manage its business and property;
- b. Attending meetings and negotiating with representatives of creditors and other parties in interest;
- c. Preparing on behalf of the Debtor all necessary and appropriate applications, motions, pleadings, draft orders, notices, schedules, and other documents, and reviewing all financial and other reports to be filed with the Court in this chapter 11 case;
- d. Advising the Debtor concerning, and preparing responses to, applications, motions, pleadings, notices, and other papers that may be filed and served in this chapter 11 case;
- e. Advising the Debtor concerning, and assisting in the negotiation and documentation of, the refinancing or sale of its assets, debt and lease restructuring, executory contract and unexpired lease assumptions, assignments or rejections, and related transactions, as the case may be;
- f. Reviewing the nature and validity of liens asserted against the Debtor's property and advising the Debtor concerning the enforceability of such liens;

- g. Advising the Debtor concerning the actions that they might take to collect and recover property for the benefit of their estates;
- h. Counseling the Debtor in connection with the formulation, negotiation, and confirmation of a plan or plans of reorganization and related documents; and
- i. Performing such other legal services for and on behalf of the Debtor as may be necessary or appropriate in the administration of its chapter 11 case and business, including advising and assisting the Debtor with respect to debt restructuring, corporate governance issues related to such restructuring, stock or asset dispositions and general business and litigation matters.

19. It is necessary and essential that the Debtor, as debtor in possession, employ the Firm under a general retainer to render the foregoing professional services.

20. BFC&A has indicated a willingness to act on behalf of the Debtor in such capacity.

**CONNECTIONS WITH THE DEBTOR, ITS
CREDITORS, ITS INSIDERS, AND ITS
RESPECTIVE ATTORNEYS AND ACCOUNTANTS**

21. To the best of the Debtor's knowledge, the partners and associates of BFC&A do not have any connection with the Debtor, its creditors, its insiders, its shareholders, or its respective attorneys or accountants, except as set forth in the Sandler Affidavit, a true and accurate copy of which is annexed hereto as Exhibit A.

22. As set forth in the Sandler Affidavit, BFC&A is a "disinterested person" as that term is defined in section 101(14) of the Bankruptcy Code in that:

- a. Neither BFC&A nor any attorney at the Firm holds or represents an interest adverse to the Debtor's estate.
- b. Neither BFC&A nor any attorney at the Firm is or was a creditor, an equity security holder or an insider of the Debtor.
- c. Neither BFC&A nor any attorney at the Firm is or was, within two years before the Petition Date, a director, officer, or employee of the Debtor.

- d. BFC&A does not have an interest materially adverse to the interests of the Debtor's estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, or connection with, or interest in the Debtor, or for any other reason.

23. No attorney at BFC&A is related to any United States District Judge or United States Bankruptcy Judge for the District of Delaware or to the United States Trustee for such district or to any known employee in the office thereof.

PROPOSED COMPENSATION

24. During the 90 days prior to the commencement of this case, BFC&A was paid approximately \$48,694.40 for current legal services provided to the Debtor, representing (1) \$10,997.50 in the review and evaluation of a composition agreement as an alternative to a bankruptcy filing and (2) \$37,696.90 in negotiating the settlement with NP. These amounts do not include amounts incurred in the preparation of the necessary first-day documents and pleadings. Such amount does not include a security retainer in the amount of \$75,000, \$25,000 of which was received on February 12, 2009, and \$50,000 of which is to be received upon entry of an interim order approving the DIP Facility. The source of such payments presently held by BFC&A was the usual operating revenues of the Debtor.

25. Subject to allowance by the Court, BFC&A will charge the Debtor for its legal services on an hourly basis in accordance with its ordinary and customary hourly rates as in effect on the date services are rendered. The current hourly rates charged by the primary or lead BFC&A attorneys and paraprofessionals who are expected to provide professional services to the Debtor are as follows:¹

¹ It has been the historical practice of BFC&A to reset its hourly rates annually, effective October of each year.

Partners:	William I. Kohn	\$695.00
	Bradford J. Sandler	\$535.00
Associates:	Jennifer R. Hoover	\$330.00
	Kari Coniglio	\$230.00
Paralegals:	Sandi Van Dyk	\$215.00
	Lisa Behra	\$175.00

26. The Debtor understands that BFC&A will bill its customary reimbursements as charged generally to bankruptcy and non-bankruptcy clients alike, and in accordance with applicable guidelines. BFC&A is customarily reimbursed for all expenses incurred by it in connection with the representation of a client in a given matter. Such expenses include, without limitation, travel costs, long distance calls, express mail, special or hand deliveries, copying costs, document processing, computerized legal research, court fees, transcript costs and, in general, all identifiable expenses that would not have been incurred except for representation of a particular client.

27. BFC&A intends to apply to this Court for allowance of compensation and reimbursement of expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and orders of this Court.

28. For the above reasons, the Debtor submits that BFC&A's employment is necessary and in the best interest of the Debtor and its estate.

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

WHEREFORE, the Debtor requests entry of an order in the form attached hereto granting the relief requested herein and such other and further relief as is just and proper.

Dated: February 17, 2009

Forward Foods LLC
Debtor and Debtor in Possession

By: /s/ J. Patrick Muldoon
J. Patrick Muldoon
Chief Executive Officer

3. BFC&A has extensive experience and knowledge in business reorganizations under chapter 11 of the Bankruptcy Code and believes that it is qualified to represent the Debtor in this case in a cost-effective, efficient, and timely manner.

SERVICES TO BE RENDERED

4. The Debtor has requested that BFC&A render the following legal services in this case:

- (a) Advising the Debtor of its rights, powers, and duties as a debtor in possession continuing to operate and manage its business and property;
- (b) Attending meetings and negotiating with representatives of creditors and other parties in interest;
- (c) Preparing on behalf of the Debtor all necessary and appropriate applications, motions, pleadings, draft orders, notices, schedules, and other documents, and reviewing all financial and other reports to be filed with the Court in this chapter 11 case;
- (d) Advising the Debtor concerning, and preparing responses to, applications, motions, pleadings, notices, and other papers that may be filed and served in this chapter 11 case;
- (e) Advising the Debtor concerning, and assisting in the negotiation and documentation of, the refinancing or sale of its assets, debt and lease restructuring, executory contract and unexpired lease assumptions, assignments or rejections, and related transactions;
- (f) Reviewing the nature and validity of liens asserted against the Debtor's property and advising the Debtor concerning the enforceability of such liens;
- (g) Advising the Debtor concerning the actions that it might take to collect and recover property for the benefit of its estate;
- (h) Counseling the Debtor in connection with the formulation, negotiation, and confirmation of a plan or plans of reorganization and related documents; and
- (i) Performing such other legal services for and on behalf of the Debtor as may be necessary or appropriate in the administration of its chapter 11 case and business, including advising and assisting the Debtor with respect to debt restructuring, corporate governance issues related to such

