

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**DEBTOR'S MOTION FOR AN ORDER AUTHORIZING AND ESTABLISHING
PROCEDURES FOR INTERIM PAYMENT OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES TO PROFESSIONALS PURSUANT TO
SECTIONS 105(A), 327 AND 331 OF THE BANKRUPTCY CODE**

Forward Foods LLC ("Forward Foods" or the "Debtor"), debtor and debtor in possession in the above-captioned chapter 11 case, hereby moves this Court, pursuant to sections 105(a), 327 and 331 of Title 11 of the United States Code (the "Bankruptcy Code"), and Rule 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 2016-1 of the Local Rules of Bankruptcy Practice and Procedure (the "Local Rules") for the entry of an order authorizing and establishing procedures for interim payment of compensation and reimbursement of expenses to professionals retained in this case (the "Motion"). In support of this Motion, the Debtor 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. Sections 105(a), 327, and 331 of the Bankruptcy Code, Bankruptcy Rule 2016 and Local Rule 2016-1 provide the statutory predicate 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.

RETENTION OF PROFESSIONALS

17. On the Petition Date, the Debtor, as debtor in possession, filed applications seeking authority to retain legal counsel Benesch Friedlander Coplan & Aronoff LLP. The Debtor may need to retain other professionals and special counsel in this case. In addition, a statutory committee of unsecured creditors (the "Committee") may be appointed in this case and, if appointed, will likely retain counsel and, possibly, other professionals.

RELIEF REQUESTED

18. By this Motion, the Debtor requests the entry of an order authorizing and establishing procedures for compensating and reimbursing professionals retained pursuant to section 327 of the Bankruptcy Code (individually, a "Professional" and collectively, the "Professionals"), on a monthly basis, on terms comparable to those procedures established in other chapter 11 cases. *See e.g., In re Harnischfeger Indus., Inc.*, Case No. 99-2171 (PJW) (Bankr. D. Del. June 7, 1999). Such an order will streamline the professional compensation

process and enable the Court and all other parties to monitor the professional fees incurred in this chapter 11 case more effectively.

19. The proposed interim compensation payment procedures set forth below (the "Interim Fee Payment Procedures") will permit each Professional subject to these procedures to present to (i) the Debtor, (ii) Debtor's counsel, (iii) the United States Trustee (the "UST"), (iv) counsel to the CIT Group/Commercial Services, Emigrant Capital Corporation, Next Proteins, Inc., and Comerica Bank, and (v) counsel to any Committee appointed in this case, with a copy of a thirty day fee statement (the "Monthly Fee Statement") setting forth the services rendered and the expenses incurred by each Professional during the immediately preceding month (the "Compensation Period").

20. The Debtor seeks approval of the following Interim Fee Payment Procedures:

- a. On or before the 25th day of each month following the month for which compensation is sought, each Professional seeking interim compensation under these Interim Fee Payment Procedures shall serve a Monthly Fee Statement upon: (a) Debtor, 2542 Business Pkwy, Unit #2, Minden, NV 89423; (b) counsel for the Debtor, Bradford J. Sandler, Esq., Benesch Friedlander Coplan & Aronoff LLP, 222 Delaware Avenue, Suite 801, Wilmington, DE 19801; (c) counsel for Next Proteins, Inc.: Allen Matkins Leck Gamble Mallory & Natsis LLP, Attn: Debra A. Riley, 501 West Broadway, 15th Floor, San Diego, CA 92101-3541; (d) counsel for The CIT Group/Commercial Services, Inc.: Buchalter Nemer, Attn: Matthew W. Kavanaugh, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017-2457; (e) counsel for Comerica Bank: Bodman LLP, Attn: David J. Nowaczewski, 1901 St. Antoine Street, 6th Floor at Ford Field, Detroit, MI 48226; (f) counsel for Emigrant Capital Corp., Attn: Ed Burns and Ken Walters, 6 E. 43rd Street, New York, NY 10017; (g) counsel for the Committee; and (h) Office of the United States Trustee, 844 King Street, Suite 2207, Wilmington, DE 19801.
- b. Each entity receiving a Monthly Fee Statement will have fifteen (15) days after the date of service thereof to review the Monthly Fee Statement and serve an objection, if any, thereto (such deadline being the "Objection Deadline").

- c. In the event that the Debtor, the UST, the Committee or the Lenders (collectively, the "Notice Parties") has an objection to the compensation or reimbursement sought in a particular Monthly Fee Statement, such objecting party shall, on or before the applicable Objection Deadline, serve upon the Professional whose statement is objected to, and except to the extent duplicative of the foregoing clause, the other persons designated to receive the Monthly Fee Statements in subparagraph (a) above, a written objection to the fee statement (an "Objection to Fee Statement"), together with a complete description and statement setting forth the precise nature of the objection and the amount at issue.
- d. At the expiration of the Objection Deadline described above, if no objection to the Monthly Fee Statement is received by the Professional and the Debtor, the Professional submitting the Monthly Fee Statement shall file a certificate of no objection with the Court, after which the Debtor shall be authorized to pay such Professional eighty percent (80%) of the fees and one hundred percent (100%) of the expense reimbursements requested in the Monthly Fee Statement.
- e. If the Debtor receives an Objection to Fee Statement objecting to the entire amount of a Monthly Fee Statement, the Debtor shall not pay any such Monthly Fee Statement to which an Objection to Fee Statement has been filed unless and until the Court enters an order authorizing payment pursuant to the affected Professional's Interim Fee Application (defined below).
- f. If the Debtor receives an Objection to Fee Statement objecting to a portion of a Monthly Fee Statement, the Debtor shall pay the undisputed portion of the Monthly Fee Statement in accordance with the procedure set forth in subparagraph (d) above. The Debtor shall not pay the disputed portion of any such Monthly Fee Statement unless and until the Court enters an order authorizing payment pursuant to the affected Professional's Interim Fee Application (defined below).
- g. If a Monthly Fee Statement of any Professional exceeds the maximum amount allocated to such Professional under any budget approved by the Court in connection with the DIP Financing (a "Budget"), such maximum amount being calculated after applying any applicable roll-forward credit balances from prior periods under such Professional's allocation in the Budget, the Debtors shall not pay any such excess amount unless and until the Court enters an order authorizing payment of such excess amount pursuant to the affected Professional's Interim Fee Application (defined below).

- h. The first Monthly Fee Statement shall be due on or before April 25, 2009 and may include fees and expenses from the Petition Date through and including March 31, 2009.
- i. Professionals submitting Monthly Fee Statements shall not be required to deduct the amount of any security retainers paid from the compensation requested.
- j. These Interim Fee Payment Procedures shall not waive any statutory requirements of the Professionals to obtain interim and final orders of the Court approving their compensation, all amounts paid or reimbursed hereunder remaining expressly subject to the Court's authority to disgorge any such amounts pending final approval.
- k. Every three months each of the Professionals shall file with the Court and serve on the parties identified in subparagraph (a) above an application for interim Court approval and allowance of compensation and reimbursement of expenses (individually, an "Interim Fee Application," and collectively, "Interim Fee Applications"), in accordance with Bankruptcy Code section 331 and further orders of the Court. Such Interim Fee Applications shall be filed and served no later than the 30th day following the last day of the compensation period for which compensation is sought.
- l. Upon filing an Interim Fee Application, each Professional shall serve a notice of its Interim Fee Application on all parties that have requested service of papers pursuant to Bankruptcy Rule 2002(g) (the "2002 Parties"), which notice shall state (i) the name of the Professional seeking compensation; (ii) the period for which such compensation is sought; (iii) the amount previously received by such Professional in accordance with the procedures set forth herein; and (iv) the amount of compensation sought in the Interim Fee Application;
- m. Pursuant to further Orders of the Court, hearings on Interim Fee Applications may be consolidated at periodic omnibus hearings as reasonably necessary to conserve the estate's resources and ensure judicial economy.
- n. All Interim Fee Applications shall comply with the requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the guidelines of the Office of the UST and the Local Rules of the Court.
- o. The payment of any compensation pursuant to a Monthly Fee Statement, as set forth herein, shall not prejudice the rights of any parties in interest from objecting to, or responding to any objection to,

any Interim Fee Application or final fee application under Bankruptcy Code section 330.

- p. The first Interim Fee Applications shall be filed with the Court and served upon the parties identified in subparagraph (a) above on or before July 30, 2009 and shall cover the period from the Petition Date through June 30, 2009. Subsequent Interim Fee Applications will be due on the last day of the month following the preceding three month period for which compensation is sought.
- q. The Pendency of an Objection to payment of compensation or reimbursement of expenses shall not disqualify a Professional from the future payment of compensation or reimbursement of expenses pursuant to the Interim Fee Payment Procedures.

21. The Debtor further requests that each member of the Committee (if appointed) be permitted to submit statements of expenses and supporting vouchers to counsel for the Committee, who will collect and file such requests for reimbursement in accordance with the foregoing procedures for monthly and interim compensation and reimbursement to Professionals.

22. Absent the procedures set forth above, the Debtor believes it will accumulate significant obligations for professional services, which would have to be satisfied by way of lump-sum payments made approximately every 120 days. Such lump sum payments to the Professionals would be disruptive to the Debtor's cash flow and could substantially impair the Debtor's business operations. The procedures suggested herein will enable all parties to closely monitor the costs of administration and will provide for payment of fees and expenses of the Professionals in an efficient manner.

23. In addition, the Debtor further requests that the Court limit service of the Monthly Fee Statement, the Interim Fee Application, final fee applications, and hearing notices as follows: (i) the Notice Parties shall be entitled to receive the Monthly Fee Statements, Interim Fee Applications, final fee applications, and notices of any hearing thereon and (ii) the parties in interest requesting notice pursuant to Bankruptcy Rule 2002 shall be entitled to receive only the

Interim Fee Application and hearing notices. The Debtor submits that limiting notice in this manner will permit the most active parties in this case to monitor the fees and expenses of professionals.

APPLICABLE AUTHORITY

24. Section 331 of the Bankruptcy Code provides, in relevant part, as follows:

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the Court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement of expenses incurred before such date as is provided under section 330 of this title

11 U.S.C. § 331.

Further, section 105(a) of the Bankruptcy Code provides, in relevant part, that,

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules

11 U.S.C. § 105(a).

25. Substantially identical procedures for compensating and reimbursing court-approved professionals have been established in other chapter 11 cases of similar size and complexity. Such procedures are necessary, *inter alia*, to avoid having professionals indirectly fund the reorganization case. *In re International Horizons, Inc.*, 10 B.R. 895, 897 (Bankr. D. Ga. 1981) (court established procedures for monthly interim compensation). Appropriate factors to consider include "the size of [the] reorganization, the complexity of the issues included, and the time required on the part of attorneys for the debtors in providing services necessary to achieve a successful reorganization of the debtors." *Id.* Additional considerations, already highlighted

above, include the ability to (i) closely monitor professional fees and expenses and (ii) payment of such fees in a manner that is not disruptive to a debtor's cash flow and cash management.

26. Accordingly, the Debtor submits that the Interim Fee Payment Procedures are appropriate considering the factors set forth above and the specific circumstances of this case. Moreover, the Interim Fee Payment Procedures are appropriate and consistent with interim compensation procedures established in other cases in this District. Accordingly, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate and creditors, and therefore should be granted.

NOTICE

27. No 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; (c) counsel to the CIT Group/Commercial Services, 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.

