



marketing and sales strategy consulting firm and, just prior to joining Forward Foods, I served as Senior Vice President of Healthy Food Holdings, Inc. a conglomerate comprised of several consumer food production units.

4. This Affidavit is submitted on behalf of Forward Foods, the debtor and debtor in possession in the above-caption proceeding, in support of the various motions (the "First Day Motions") filed as part of these proceedings. Part II of this Affidavit describes the business activities and background of the Debtor. Part III sets forth the relevant facts in support of the First Day Motions. I have reviewed the First Day Motions and, to the best of my knowledge and belief, the matters contained therein are true and accurate.

## **II. BUSINESS ACTIVITIES AND BACKGROUND OF THE DEBTOR**

5. Simultaneously herewith (the "Petition Date"), Forward Foods 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.

6. Forward Foods 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.

7. Forward Foods is primarily owned by Emigrant Capital Corporation ("Emigrant"), a private equity company.

8. Forward Foods is headquartered in Minden, Nevada and manufactures product in two leased facilities, both located in Minden. Forward Foods employs 52 individuals and regularly employs 25 temporary workers. In its business Forward Foods also contracts with 14 brokers who represent our brand with many regional and local retailers. A material portion of the sales of Forward Foods is made through these brokers.

9. A majority of the volume of the products produced by Forward Foods 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**

10. Forward Foods 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").

11. 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. Forward Foods also entered into a subordinated note with NP in the original principal amount of \$2.5 million.

12. 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.

13. 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.

14. Since the purchase of the protein bar business, Forward Foods 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, Forward Foods 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.

15. On December 15, 2008, Forward Foods 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.

16. Forward Foods, 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 Forward Foods 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 Forward Foods of the alleged defaulted license agreement as to specific trademarks to permit continued use by Forward Foods 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.

17. On January 29, 2009, Forward Foods 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. Forward Foods has contracted with PCA for a proprietary spiced roasted peanut for use in several of Forward Foods' 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 Forward Foods.

18. As a matter of policy, Forward Foods 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 Forward Foods 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 Forward Foods 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.

19. 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.

#### **Review of Assert Liens and Security Interest**

20. The senior management of Forward Foods, in consultation with legal counsel, has reviewed and analyzed public filings to determine, among other things, the validity and priority of asserted liens and security interest.

21. Upon such review and analysis, Forward Foods has determined that the asserted liens and security interest of CIT, Comerica, and NP are valid and duly perfected senior liens, shared among those creditors, as of the Petition Date.

### **III. FACTS IN SUPPORT OF FIRST DAY MOTIONS**

22. The First Day Motions request various Court orders (collectively, the "First Day Orders") that the Debtor believes are necessary to enable it to operate in chapter 11 with a minimum of disruption and loss of productivity. Relevant facts supporting entry of the First Day Orders are provide below.

#### **Continued Use of Existing Centralized Cash Management System, Existing Bank Accounts, and Existing Business Forms**

23. Prior to the commencement of this chapter 11 case, in the ordinary course of its business, Forward Foods utilized a centralized cash management system. Forward Foods' cash management system is designed to efficiently collect, transfers, and disburse funds generated through Forward Foods' operations and to accurately record such

collections, transfers and disbursements as they are made. A schedule accurately identifying Forward Foods' prepetition bank accounts (collectively, the "Bank Accounts") is attached to the Debtor's First Day Motion requesting authority to continue prepetition and management systems. I believe that all Bank Accounts are in stable banking institutions with FDIC or FSLIC insurance where applicable.

24. Under Forward Foods' cash management system, deposits are handled as follows: cash collected or received by Forward Foods is received into its lock box account kept with Citibank.

25. Forward Foods also utilizes a centralized payroll account (the "Payroll Account"), which is a zero balance type of account into which funds are transferred from the Operating Accounts (defined below) as payroll checks, including direct deposits, are presented to the Payroll Account. The Payroll Account is held with Citibank.

26. In addition, Forward Foods maintains one primary operating account and one unused secondary operating account (the "Operating Accounts"), both held with Citibank, for disbursements of Forward Foods' accounts payables.

#### **Prepetition Wages/Salaries and Related Items.**

27. Forward Foods employs approximately 29 hourly employees in the operations ("Employees"), and 23 salaried employees ("Salaried Employees") including the undersigned as CEO and Nancy Huber as Chief Financial Officer ("CFO"). Forward Foods also employs 25-30 temporary workers ("Temporary Employees") through a placement service, depending on the volume of business.

28. As of the Petition Date, all of the Employees and Salaried Employees were owed or have accrued entitlements to various sums for: (a) wages, (b) salaries, (c)

commissions (d) vacation pay, (e) sick leave pay, (f) holiday pay and (g) miscellaneous payroll items (collectively, the "Prepetition Compensation"). Prepetition compensation is also owed to Temporary Employees. Employees and Salaried Employees are paid every two weeks. The next payroll for is payable on February 20, 2009. Forward Foods is in arrears with regard to salaries owed to the Salaried Employees, but current with regard to wages owed to the Employees.

29. In addition, as of the Petition Date, Forward Foods has made deductions from Employees' paychecks to make payments on behalf of the Employees with regard to insurance programs, taxes, alimony, garnishment and support payments, and other similar programs on account of which Forward Foods deducts a sum of money from an Employee's paycheck and pays that amount to a third party ("Deductions"). As of the Petition Date, the Debtor estimates that accrued unpaid Prepetition Compensation and Deductions aggregate approximately \$304,197.43 as of the Petition Date.

30. In the ordinary course of its business, Forward Foods employs Temporary Employees and brokers in addition to its direct hires. Temporary employment agencies providing workers are paid monthly and the various brokers who place orders for certain regional customers are traditionally paid monthly. It would cause a hardship on Forward Foods if the Debtor was not able to retain its Temporary Employees by continuing, in the ordinary course, payments to the temporary employee agencies which supply such individuals and to maintain ordinary course payments to the brokers who provide a significant volume of sales, particularly in this treacherous time of dealing with product recalls. Forward Foods owes approximately \$152,000 to its Temporary Employees and \$72,000 to its brokers.

### **Debtor in Possession Financing, Use of Cash Collateral**

31. The post-petition financing the Debtor proposes to obtain is from Emigrant, on a secured basis and is critical to Forward Foods' continued viability. Without such post-petition financing, Forward Foods will be forced to immediately shutdown its operations. Even a short cessation of business operations, in light of the recall, would have a devastating negative effect on Forward Foods' ability to continue its business and would be fatal to the reorganization efforts and prospects.

32. As a result of the prepetition investigation of asserted liens and security interest that Forward Foods and its legal counsel undertook as described above, I believe that CIT, Comerica and NP have a joint valid, duly perfected, first priority security interest in substantially all of the assets of Forward Foods. Further, I am unaware of the existence of any claim against CIT or Comerica or any basis upon which to challenge their lien securing the indebtedness under the pre-petition lending facility. The claims I believe Forward Foods has against NP have been tentatively resolved pending this Court's approval.

33. It is my understanding that Emigrant has agreed to extend post-petition credit to the Debtor subject to and in accordance with the terms and conditions of certain debtor in possession financing orders and related stipulations (such aggregate financing referred to as "DIP Financing").

34. The DIP Financing provided by Emigrant is in the maximum available amount of \$4 million to be advanced pursuant to an agreed Budget which is attached to the Motion seeking authorization for the Debtor to enter into the DIP Financing.

35. The DIP Facility matures at the earlier of December 31, 2009, conversion of the case, or a confirmation of a Plan of Reorganization.

36. A condition of the DIP Facility is the approval of the settlement among the Debtor, Emigrant and NP which has been submitted by separate Motion to be set for hearing upon notice.

37. Emigrant will be granted a subordinated lien on all assets of the Debtor subject to the perfected prepetition liens on all assets and Emigrant will be granted a super-priority lien over all administrative claims other than those in the Budget as may ultimately be approved for payment by the Court.

**Continuation of Existing Insurance Financing Agreement**

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

39. Due to the high risk of liability related to Forward Foods' operations, it is crucial that Forward Foods continue to maintain such insurance during its post-petition operations to protect and maintain the value of Forward Foods' assets for the benefit of Forward Foods' estate and creditors.

40. Under a commercial insurance premium finance and security agreement (the "Finance Agreement") with Cananwill, a copy of which is attached to the Motion seeking authority to continue performance under the Finance Agreement, Forward Foods has financed a total of \$177,419.45 in insurance premiums (the "Premiums") for seven separate insurance policies (the "Policies"). Forward Foods 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.

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

42. Forward Foods 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.

43. Forward Foods' budget does not contain adequate funds that would permit Forward Foods to make a cash payment in the amount of \$109,383.98 to pay the outstanding insurance premiums under the Policies. Forward Foods is unable to obtain unsecured credit to finance the outstanding premiums due under the Policies.

#### **Prepetition Taxes Obligations and Related Items**

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

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

46. 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.

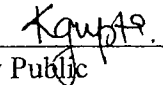
**IV. CONCLUSION**

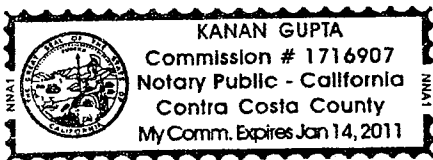
47. Based upon the foregoing, I believe that the relief requested in the First Day Motions is in the best interest of the Debtor, its creditors, parties subject to the recall, the Employees and all parties in interest and should be granted in all respects.

FURTHER AFFIANT SAYETH NAUGHT.

  
J. Patrick Muldoon, Chief Executive Officer

SWORN TO BEFORE ME and subscribed in my presence this 13<sup>th</sup> day of February, 2009.

  
Notary Public



**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, DscIsDue,  
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 9:50 AM EST and filed on 2/17/2009

**Case Name:** Forward Foods LLC

**Case Number:** 09-10545-KJC

**Document Number:** 8

**Docket Text:**

Affidavit in Support of *First Day Motions of J. Patrick Muldoon* Filed By Forward Foods LLC (Sandler, Bradford)

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

**Document description:**Main Document

**Original filename:**E:\32199\Executed Muldoon Affidavit.pdf

**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=983460418 [Date=2/17/2009] [FileNumber=6965667-0]  
[2425c846826da7ee895cb76bbafaffb145a857b06911111c3742665a77878c1c1b8d  
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**09-10545-KJC Notice will be electronically mailed to:**

Bradford J. Sandler on behalf of Debtor Forward Foods LLC

bsandler@beneschlaw.com,

svandyk@beneschlaw.com;rlemischbeneschlaw.com;jhoover@beneschlaw.com;docket@aol.com;docket@beneschlaw.com;lbehra@beneschlaw.com

United States Trustee

USTPREGION03.WL.ECF@USDOJ.GOV

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