

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<b>In re:</b>	:	<b>Chapter 11</b>
	:	
<b>FORWARD FOODS, LLC</b>	:	<b>Case No. 09-10545 (KJC)</b>
	:	
	:	
<b>Debtor.</b>	:	

**MOTION OF DEBTOR AND DEBTOR IN POSSESSION FOR  
THE ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING SECURED  
POST-PETITION FINANCING, (II) GRANTING SENIOR LIENS, JUNIOR LIENS AND  
SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) PROVIDING  
ADEQUATE PROTECTION, (IV) GRANTING LIMITED RELIEF FROM THE  
AUTOMATIC STAY, (V) SCHEDULING A FINAL HEARING, AND  
(VI) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor” or “Forward Foods”) hereby moves for the entry of interim and final orders pursuant to sections 105, 362 and 364 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (i) Authorizing Secured Post-Petition Financing, (ii) Granting Senior Liens, Junior Liens And Superpriority Administrative Expense Status, (iii) Providing Adequate Protection, (iv) Granting Limited Relief From The Automatic Stay, (v) Scheduling A Final Hearing, and (vi) Granting Related Relief (the “Motion”). In support of this Motion, the Debtor relies on the Declaration of J. Patrick Muldoon in Support of First Day Motions (the “Affidavit”), which Affidavit has been filed simultaneously herewith and which Affidavit is hereby incorporated by reference, and respectfully represents as follows:

## Statement Pursuant to Federal Rule of Bankruptcy Procedure 4001

### Summary of Terms

Interest Rate for the DIP Financing:	15% per annum. <i>See</i> Credit Agreement § 2.09.
Maturity Date of the DIP Financing:	December 31, 2009. <i>See</i> Credit Agreement, p. 7.
Events of Default:	Customer events of default for a transaction of this nature (payment default, cessation of business, conversion of case). <i>See</i> Credit Agreement, Art. VII.
Grant of Liens to Lender:	Junior lien on Prepetition Collateral, Senior position on Post-Petition Collateral, Superpriority over administrative expenses (with Carve-Out). <i>See</i> Credit Agreement § 2.13(a).
Adequate Protection:	Abandon Prepetition Receivables and Inventory, \$5,000 monthly payment for all other Prepetition Collateral and maintain equipment and insurance. <i>See</i> Credit Agreement § 2.13(c).
Borrowing Limit:	\$4,000,000. <i>See</i> Credit Agreement § 2.01.

### Jurisdiction

This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### General Background

#### A. The Chapter 11 Case

1. On February 17, 2009 (the "Petition Date"), the Debtor commenced its reorganization case by filing a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code").

2. The Debtor is continuing in possession of its properties and is operating and managing its business, as debtor in possession, pursuant to sections 1107 and 1108 of the

Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed to date.

**B. The Debtor's Business and the Recall Leading to Chapter 11**

3. Forward Foods commenced operations on September 1, 2006, when several individuals and Emigrant Capital Corporation ("Emigrant Capital" or the "Lender") purchased the assets (the "Asset Purchase") of a protein bar business from Next Proteins, Inc. ("Next Proteins"), David A Jenkins ("Jenkins") and Bluegrass Bars, LLC ("Bluegrass") (collectively, Next, Jenkins and Bluegrass are referred to as the "Sellers").

4. 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 \$50 million annual sale retail brand platform, and is the leading high protein brand in health and fitness stores.

5. A majority of the volume of the products produced by Forward Foods are sold directly to mass marketers as well as regional convenience and grocery stores, drugstores and health and fitness clubs.

**(i) The Product Recall**

6. 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 were 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.

7. 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 (the "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.

8. The effect of the Recall is material and is a leading cause of the Debtor's need to initiate these proceedings.

9. As of the Petition Date, the Debtor employed 53 individuals and regularly employed 15 temporary workers. It also contracted with 14 brokers who place sales with many regional and local retailers, which brokers generate a material portion of the Debtor's sales.

10. These proceedings are the direct result of the voluntary recall because of the scope of the affected products and the anticipated effect the Recall will have on the Debtor's outstanding receivables, and with regard to the need to replace a significant percentage of the inventory maintained by Forward Foods for sale.

**C. Capital Structure**

11. 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").

12. The Asset Purchase was financed through a senior financing agreement with The CIT Group/Commercial Services, Inc. ("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.

13. Emigrant Capital invested \$12.72 Million in the company at closing to finance the purchase of the assets. Five other parties, including Next Protein, also made an additional investment of \$755,000.

14. Since the date of the Asset Purchase, Emigrant Capital 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.

15. The Debtor estimates that it owes its various trade vendors approximately \$2.5 Million.

**D. The Proposed DIP Financing**

16. The Debtor requires debtor in possession ("DIP") financing in order to maintain its operations and preserve its going concern value while it attempts to obtain the additional financing necessary to restructure its secured debt, deal with the adverse effects of the Recall, and enable it to emerge from bankruptcy. The Debtor sought financing from CIT, Comerica and Next Protein, and they all refused to extend post-petition financing or even participate in any post-petition financing to the Debtor. Emigrant Capital was the only prepetition secured creditor willing to extend post-petition financing to the Debtor. The Debtor

believes, based on its current financial situation due to the Recall, it will be unable to obtain unsecured financing or any financing on terms better than those terms as set forth herein.

17. Due to the adverse financial effect of the Recall on the Debtor, the Debtor decided to pursue the filing of a chapter 11 case in order to preserve its going concern value for all its creditors. Without the proposed post-petition financing from Emigrant Capital, the Debtor will be forced to immediately shut-down operations and liquidate.

18. Since the Debtor has no ability to offer extensive adequate protection to CIT and Comerica, Emigrant Capital has agreed to seek a subordinate lien on all assets of the Debtor subject to valid perfected prepetition lien on the Debtor's assets, a first priority lien in and upon the Post-Petition Collateral (as defined in the Interim Order) and a superpriority lien over all administrative claims other than those in the Budget as may ultimately be approved for payment by the Court. Thus, the Debtor determined that it would seek short term DIP financing on a non-priming basis that would allow it to survive and remain administratively solvent in chapter 11 while it attempted to obtain additional financing that would restructure its capital structure and allow it to deal with the adverse effects of the Recall.

19. The Debtor believes that the universe of parties willing to lend money to the Debtor under its current circumstances was virtually non-existent. The Debtor, however, discussed financing consistent with a 13-week budget with CIT and Comerica as well as with Next Protein. All declined. However, Emigrant Capital, as a junior lienholder, was the Debtor's only pre-petition secured lender that expressed an interest in providing, and willingness to provide, the DIP financing necessary to allow the Debtor to file its chapter 11 case, and preserve and maximize value for the Debtor's estate and creditors.

20. The Debtor believes that because the proposed DIP Financing (as defined below) has no fees and is non-priming, nothing remotely similar to the DIP Financing could be obtained from any other lender, especially in light of the significant adverse effects of the Recall.

21. Emigrant Capital has agreed to provide the Debtor with a working capital facility (the "DIP Financing") in the maximum amount of \$4,000,000. The terms of the DIP Financing are set forth in the DIP Financing Term Sheet attached hereto as Exhibit A, and the draft credit agreement is attached hereto as Exhibit B. If approved, the DIP Financing will provide the Debtor with the cash required to fund operations through the week of May 8, 2009, in accordance with the proposed budget attached hereto as Exhibit C (the "Budget"). After this thirteen (13) week period, in order for the Debtor's chapter 11 case to continue, the Debtor must obtain additional debtor-in-possession financing.

22. As stated in the Affidavit of J. Patrick Muldoon In Support of First Day Motions, litigation arising from the Asset Purchase among the Debtor, Emigrant Capital and the Sellers has been settled in principle. The settlement is now being memorialized in a writing by the parties, and as a condition to extending and making the DIP Financing, the settlement must be approved by this Court. The Debtor anticipates filing a motion to approve the settlement under Bankruptcy Rule 9019 shortly (if it has not done so already), and will seek to have a hearing on that motion at the same time as a Final hearing on this Motion. While the terms of the settlement will be discussed in a separate motion, it is sufficient to state that the settlement is anticipated, if approved, to contribute \$975,000 to the costs associated with the Recall. Without the approval of the settlement, and thus, the failure of the required condition in order to obtain the DIP Financing, the Debtor will not have any post-petition financing, and it and its estate and

creditors will suffer immediate and irreparable harm by being forced to immediately shut-down operations and liquidate.

### **RELIEF REQUESTED**

23. By this Motion, the Debtor seeks the entry of interim and final orders, pursuant to sections 105, 362 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001, (i) Authorizing Secured Post-Petition Financing, (ii) Granting Senior Liens, Junior Liens And Superpriority Administrative Expense Status, (iii) Providing Adequate Protection, (iv) Granting Limited Relief From The Automatic Stay, (v) Scheduling A Final Hearing, and (vi) Granting Related Relief.

### **BASIS FOR RELIEF REQUESTED**

#### **A. Necessary Showing Under Section 364 of the Bankruptcy Code**

24. Pursuant to section 364 of the Bankruptcy Code, a court may authorize a debtor to obtain credit or incur debt the repayment of which is entitled to superpriority administrative expense status or is secured by a lien on the debtor's property where a debtor is unable to obtain credit on an unsecured basis. Specifically, section 364(c) of the Bankruptcy Code provides as follows:

- (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt –
  - (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
  - (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
  - (3) secured by a junior lien on property of the estate that is subject to a lien.

25. The Debtor does not have the consent of CIT or Comerica to use cash collateral. As a consequence, all of the Debtor's postpetition expenses must be paid from DIP financing or from postpetition funds that are not the proceeds of CIT prepetition collateral. The Debtor was unable to obtain financing in the form of unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense or solely in exchange for the grant of a superpriority administrative expense claim pursuant to section 364(c)(1) of the Bankruptcy Code. Accordingly, the Debtor proposes to obtain postpetition financing from Emigrant Capital by providing a super priority administrative expense claim pursuant to section 364(c)(1) of the Bankruptcy Code and a security interest in substantially all of the Debtor's assets pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code. The liens granted to the Emigrant Capital will not prime any validly perfected and enforceable prepetition liens in the Debtor's assets.

26. The Debtor was unable to obtain financing on terms more favorable than those proposed by the Lender. In fact, the Debtor believes that without the DIP Financing from the Lender, there would have been no other party willing to provide postpetition funding to the Debtor because of the adverse effects of the Recall. Accordingly, the Debtor believes that the terms of the DIP Financing represent the best financial package currently available to the Debtor. Unsuccessful discussions concerning post-petition funding were conducted with CIT, Comerica and Next Proteins.

27. The Debtor submits that, given its prepetition efforts to identify potential lending sources, no further search is required at this time. See Bray v. Shenandoah Fed. Sav. & Loan Ass'n. (In re Snowshoe Co., Inc.), 789 F.2d 1085, 1088 (4th Cir. 1986); In re Ames Dep't. Stores, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (holding that the debtor made a reasonable effort

to secure financing where it approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders). While there are a few lenders likely to be able and willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." In re Sky Valley, Inc., 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), aff'd, sub nom.; Anchor Say. Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 120 n.4 (N.D. Ga. 1989); see also, In re Ames, 115 B.R. at 40.

28. The Debtor further submits that the terms of the DIP Financing are appropriate and reasonable and that deference should be given to the Debtor's reasonable business judgment. See, Group of Institutional Investors v. Chicago Mil. St. P. & Prac. Ry., 318 U.S. 523, 550 (1943) (holding that decisions regarding the rejection or assumption of a lease is left to the business judgment of the debtor); In re Lifeguard Indus., Inc., 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) ("[B]usiness judgment should be left to the board room and not to this Court"); see also In re Trans World Airlines, Inc., 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the interim loan, receivables facility and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment on behalf of TWA ... [were] reasonable under the circumstances and in the best interest of TWA and its creditors."); In re TM Carlton House Partners, LTD, 91 B.R. 349, 358 (Bankr. E.D. Pa. 1988) (holding that due to the debtor's distinct awareness of its own financial needs, the court would not second-guess its business judgment to put aside cash to effectuate a refinancing of its debts.); cf., In re Simasko Prod. Co., 47 B.R. 444, 449 (D. Colo. 1985) ("business judgments should be left to the board room and not to this Court").

**B. Need for Immediate Borrowings to Avoid Irreparable Harm**

29. Bankruptcy Rule 4001 permits a court to approve a debtor's request for the use of postpetition financing on an interim basis "to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Fed. R. Bankr. P. 4001. This type of interim relief is necessary for them to avoid immediate and potentially irreparable damage to the Debtor's business. As discussed above, the DIP Financing provides the Debtor with thirteen (13) weeks of financing during which time the Debtor will be seeking additional DIP financing. The Debtor believes that the Budget provides for the payment of all currently anticipated administrative expenses in its chapter 11 case for the stated time period, including certain adequate protection payment to CIT and Comerica. Without immediate DIP Financing, the Debtor will be forced to shut-down its operations immediately and commence a liquidation, which will cause immediate and irreparable harm to its estate and creditors.

30. Pursuant to Bankruptcy Rule 4001(c)(2), the Debtor is required to give fifteen (15) days notice of the Final Hearing. As set forth in the Budget, the Debtor will need to draw down on the DIP Financing in order to fund its operations prior to the Final Hearing. Accordingly, the Debtor hereby seeks authority to borrow funds under the DIP Financing, pending the Final Hearing on the Motion, on an interim basis up to the amount set forth in the Budget (including the permitted variance) that will accrue before the Final Hearing.

31. The Debtor submits that sufficient notice of this interim relief was provided pursuant to sections 102(1), 362, and 364 of the Bankruptcy Code, and Bankruptcy Rules 2002 and 4001(c), and other applicable procedures. Specifically, the Debtor provided notice of the first-day hearing in these chapter 11 cases by facsimile or hand delivery on the following parties: (i) the Office of the United States Trustee for the District of Delaware, (ii) the

creditors identified on the Debtor's list of twenty (20) largest unsecured creditors, (iii) counsel to CIT and Comerica, (iv) counsel to Next Protein, and (v) counsel to the Lender.

**C. The DIP Loan Agreement Was Negotiated in Good Faith**

32. Section 364(e) of the Bankruptcy Code provides as follows:

The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

33. The DIP Financing and all other related documents were negotiated in good faith and at arm's-length between the Debtor and the Lender. Accordingly, the Debtor submits that any loans or extensions of credit to be made by the Lender should be deemed to have been made in good faith within the meaning of section 364(e) of the Bankruptcy Code.

**D. Provisions Implicating Local Rule 4001-2**

34. Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") requires that certain provisions contained in postpetition loan agreements be highlighted, and that a debtor must provide justification for the inclusion of such highlighted provision(s). **Such provisions are highlighted in the proposed Interim Order attached hereto as Exhibit C and consist of: (a) the Debtor requests that the final order approving the DIP Loan contain a waiver of all parties rights to surcharge the DIP Lender's collateral under section 506(c) of the Bankruptcy Code; and (b) the Budget (attached hereto as Exhibit B) currently provides for**

**a different carve-out amount for the professional fees of a Committee.** The Debtor believes that these provisions are justified and necessary in the context and circumstances of this case.

**E. Adequate Protection and Limited Relief from the Automatic Stay to CIT and Comerica**

35. As stated above, the Lender is not seeking to prime any prepetition secured creditor that has a valid and enforceable lien, but will be granting adequate protection to CIT and Comerica for the use of the Debtor's equipment upon which liens in favor of CIT and Comerica attach. The Debtor's cash existing on the Petition Date allegedly constitutes proceeds of the Prepetition Collateral (as defined in the Interim Order) and, therefore, allegedly is cash collateral of CIT and Comerica within the meaning of Bankruptcy Code section 363(a). CIT and Comerica are allegedly entitled, pursuant to Bankruptcy Code sections 361 and 363(e), to adequate protection of their interest in the Prepetition Collateral, including for the use of cash collateral, the use, sale or lease of the Prepetition Collateral (other than cash collateral), and for the imposition of the automatic stay to the extent not otherwise relieved herein.

36. The Debtor is not seeking authorization to use cash collateral, and requests the Court to authorize the Debtor to abandon the prepetition accounts receivable and inventory to CIT and Comerica. The Debtor intends to purchase the usable inventory from CIT and Comerica with the authorized DIP financing. Debtor seeks authority for limited relief from the automatic stay to authorize CIT and Comerica to apply proceeds of the prepetition accounts receivable and inventory sales to their Credit Facility.

37. CIT and Comerica are granted adequate protection for any diminution in the value of their Prepetition Collateral resulting from: (a) the DIP Liens and security interests granted by the DIP Loan Documents (as defined in the Interim Order) or otherwise pursuant to Bankruptcy Code section 364(c)(3); (b) the use, sale or lease of the Prepetition Collateral (other

than cash collateral, primarily equipment) pursuant to Bankruptcy Code section 363(c); and (c) the imposition of the automatic stay pursuant to Bankruptcy Code section 362(a).

38. Accordingly, the Debtor proposes that CIT and Comerica are granted the following adequate protection:

- (i) The Debtor shall be authorized to abandon to CIT and Comerica the Released Inventory (as defined in the Interim Order) and the Prepetition Accounts Receivable (as defined in the Interim Order);
- (ii) CIT and Comerica shall be authorized to collect the Prepetition Accounts Receivable and sell the Released Inventory, and apply the proceeds thereof to their secured claim;
- (iii) As adequate protection for the Debtor's use of its equipment and intangible property, CIT and Comerica shall retain their prepetition liens and receive a monthly payment of \$5,000.00 on the 1<sup>st</sup> day of each month, commencing on March 1, 2009;
- (iv) The Debtor shall maintain its equipment in good working order and maintain insurance on the equipment;
- (v) Effective upon the date of the Interim Order and without the necessity of the execution by the Debtor of mortgages, security agreements, pledge agreements, financing statements or otherwise, CIT and Comerica are granted valid and perfected, replacement security interests in, and liens on, all of the Debtor's right, title and interest in, to and under the Prepetition Collateral.

39. Under the circumstances, the Debtor submits that the adequate protection and limited relief from stay provided herein is reasonable and sufficient to protect the interests of CIT and Comerica, *provided, however*, nothing contained in this Motion or in the Interim Order shall affect or impair CIT's or Comerica's right to seek additional adequate protection of its interest, or the Debtor's right to seek to reduce the amount of adequate protection provided for therein.

**F. Request for Final Hearing and the Proposed Notice Thereof**

40. The Debtor requests that the Final Hearing on the Motion be scheduled in accordance with Bankruptcy Rule 4001(c)(2). The Debtor intends to serve notice of the Final Hearing via regular first-class U.S. Mail to all appropriate parties in accordance with the Bankruptcy Rules and Local Rules.

41. The Debtor further requests that any opposition to the relief requested in the Motion be in writing, filed with the Court, and served upon (a) **William I. Kohn, Esq.**, Benesch Friedlander Coplan & Aronoff LLP, 2300 BP Tower, 200 Public Square, Cleveland, OH 44114-2378, fax (216) 363-4588; (b) **Bradford J. Sandler, Esq.**, Benesch Friedlander Coplan & Aronoff LLP, 222 Delaware Avenue, Suite 801, Wilmington, DE 19801, fax (302) 442-7012; (c) counsel for Emigrant Capital Corp., Attn: Ed. Burns and Ken Walters, 6 E. 43<sup>rd</sup>, New York, NY 10017; (d) 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; (e) counsel for The CIT Group/Commercial Services, Inc.: Buchalter Nemer, Attn: Matthew W. Kavanaugh, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017-2457; (f) counsel for Comerica Bank: Bodman LLP, Attn: David J. Nowaczewski, 1901 St. Antoine Street, 6<sup>th</sup> Floor at Ford Field, Detroit, MI 48226; (f) **The Office of the United States Trustee**, 844 King Street, Suite 2207, Lockbox 35, Wilmington, DE 19801, fax (302) 573-6497; and (g) any other parties requesting notice in this case.

42. No previous application for the relief requested herein has been made to this or any other Court.

WHEREFORE, the Debtor respectfully request that the Court enter the Interim and Final Orders (i) Authorizing Secured Post-Petition Financing, (ii) Granting Senior Liens, Junior Liens And Superpriority Administrative Expense Status, (iii) Providing Adequate Protection, (iv) Granting Limited Relief From The Automatic Stay, (v) Scheduling A Final Hearing, and (vi) Granting Related Relief, and grant such other and further relief as is just and proper.

Dated: February 17, 2009  
Wilmington, DE

Respectfully submitted,

BENESCH, FRIEDLANDER,  
COPLAN & ARONOFF LLP

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*Proposed Counsel for Forward Foods LLC,  
Debtor and Debtor in Possession*

**Forward Foods LLC**

**Summary of Terms for DIP facility**

**Borrower:** Forward Foods LLC (the "Borrower")

**Lender:** Emigrant Capital Corp. (the "Lender")

**Loan Facility:** Debtor-in-Possession credit facility (the "Loan") pursuant to a Credit Agreement (the "Credit Agreement")

**Amount of the Loan:** \$4,000,000, in the aggregate, to be advanced in accordance with the Borrower's budget ("Approved Budget") which is mutually agreed upon by the parties. Advances will require two (2) business days notice and shall be made in increments of \$50,000.

**Interest Rate:** 15.0% per annum on the amounts advanced to Borrower, payable monthly in arrears.

**Default Interest Rate:** Upon the occurrence of an Event of Default, the interest rate shall be increased to 18.0% per annum.

**Security:** Obligations under the Note will be secured by all post-petition tangible and intangible assets of the Lender assets including, without limitation, the issued and outstanding stock of any subsidiaries, and a second lien on all Pre-Petition Collateral and insurance claims related to the recall.

**Use of Proceeds:** Proceeds of the Loan are intended to support the ongoing operating needs of the Borrower as debtors-in-possession under Chapter 11 of the Bankruptcy Code.

**Closing Date:** Date of filing or Final Order?

**Maturity Date:** The earlier of (i) December 31, 2009 and (ii) an order of the Bankruptcy Court confirming a Reorganization Plan (the "Maturity Date").

**Representations and Warranties; Covenants** The Credit Agreement will include usual and customary representations and warranties for a transaction of this nature.

**Events of Default:** Each of the following will be an event of default under the terms of the Note:

1. The Borrower is continuing production at its Minden facility after May 1, 2009.
2. Other customary events of default for a transaction of this nature.

**Reporting:** The Lender shall receive a rolling 13 week cash flow, financial statements and business updates on a monthly basis in a form reasonably acceptable to the Lender as long as the Loan is outstanding.

**Indemnification:** The Credit Agreement will contain customary indemnification provisions for a transaction of this type.

**Fees and Expenses:** The Borrower shall be responsible for all of the out-of-pocket expenses of the Lender (including legal fees and expenses of the Lender) in connection with the Credit Agreement.

**Governing Law:** The laws of the State of New York will govern the Credit Agreement.

**General:** This Term Sheet is intended to be indicative of the principal terms of the Loan and does not purport to specify all of the terms, conditions, representations and warranties, affirmative and negative covenants, and other provisions that will be contained in the final documents for the Credit Agreement.

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CREDIT AGREEMENT

dated as of

February \_\_, 2009

among

FORWARD FOODS LLC,  
Borrower and Debtor-in-Possession  
Under Chapter 11 of the Bankruptcy Code,

and

EMIGRANT CAPITAL CORP.,  
Lender.

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## SCHEDULES & EXHIBITS

### SCHEDULES:

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### EXHIBITS:

Exhibit A	Order
Exhibit B	Approved Budget
Exhibit C	Form of Opinion of Borrower's Counsel
Exhibit D	Form of Compliance Certificate

THIS CREDIT AGREEMENT dated as of February \_\_\_, 2009 (as it may be amended or modified from time to time, this "Agreement"), between FORWARD FOODS LLC ("Forward Foods" or the "Borrower"), debtor-in-possession in a case pending under Chapter 11 of the Bankruptcy Code, as Borrower, and EMIGRANT CAPITAL CORP. ("Lender"), as Lender.

#### RECITALS

WHEREAS, Forward Foods commenced operations on September 1, 2006, when a group of investors led by the Lender purchased the assets (the "Asset Purchase") of a protein bar business from Next Proteins, Inc. ("Next Proteins"), David A. Jenkins ("Jenkins") and Bluegrass Bars LLC ("Bluegrass") (collectively, the "Sellers"). The Asset Purchase was financed through a senior financing agreement with The CIT Group/Commercial Services, Inc. ("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 (the "Term B Loan") in an original principal balance of \$4 million. Forward Foods also entered into a subordinated note with Next Proteins in the original principal amount of \$2.5 million. Emigrant Capital invested \$12.72 Million in the company at closing to finance the purchase of the assets. Five other parties, including Next Protein, also made an additional investment of \$755,000; and

WHEREAS, the Borrower is a party to certain financing agreements with The CIT Group/Commercial Services, Inc., Comerica Bank and Next Proteins, Inc., as lenders (collectively, the "Existing Lenders"); and

WHEREAS, the Existing Lenders have extended credit to Forward Foods consisting of revolving credit loans and term loans, in an aggregate principal or face amount of \$ \_\_\_\_\_ outstanding as of the Petition Date; and

WHEREAS, Forward Foods has secured all of its obligations under or in respect of the financing agreements with the Existing Lenders (collectively, the "Existing Obligations"), by granting to the Existing Lenders a security interest in and lien upon substantially all of their existing and after-acquired personal and real property; and

WHEREAS, the Existing Obligations are secured by liens on and security interests in substantially all of the existing and after-acquired personal and real property of Forward Foods, subject to no prior liens or security interests except as permitted by the financing agreements ; and

WHEREAS, on February \_\_\_, 2009 (the "Petition Date"), the Borrower filed a voluntary petition with the Bankruptcy Court initiating the Case and has continued in its possession of its assets and in the management of its respective businesses pursuant to Bankruptcy Code Sections 1107 and 1108; and

WHEREAS, an immediate and ongoing need exists for the Borrower to obtain additional funds in order to continue the operation of the business of the Borrower as debtor-in-possession under Chapter 11 of the Bankruptcy Code and, accordingly, the Borrower has requested that the Lender extend post-petition financing to the Borrower; and

WHEREAS, to provide guarantees and security for the repayment of the Loans and the payment of the other Obligations of the Borrower hereunder and under the other Loan Documents, the Borrower shall provide to the Lender, pursuant to this Agreement, the other Loan Documents and the Orders, the following (each as more fully described herein):

(a) a promise from the Borrower to comply with the due and punctual payment and performance of the Obligations of the Borrower hereunder;

(b) with respect to the Obligations of the Borrower, an allowed administrative expense claim in the Case pursuant to Section 364(c)(1) and (c)(2) of the Bankruptcy Code having super-priority over all administrative expenses of the kind specified in Sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726(b), 1112 and 1114 of the Bankruptcy Code;

(c) a perfected first priority Lien, pursuant to Section 364(c)(2) of the Bankruptcy Code, upon all unencumbered property, and all cash and cash equivalents, of the Borrower; and

(d) a perfected Lien, pursuant to Section 364(c)(3) of the Bankruptcy Code, upon all of the Borrower's property that is subject to valid and perfected Liens in existence on the Petition Date or perfected thereafter to the extent such post-Petition Date perfection is expressly permitted under the Bankruptcy Code, and subject to other Permitted Encumbrances junior to such valid and perfected Liens, provided that such Lien shall not attach to any Chapter 5 Claims; and

WHEREAS, all of the claims and the Liens granted pursuant to the Loan Documents and the Orders in the Case to the Lender shall be subject to the Carve-Out and the Permitted Encumbrances, in each case to the extent provided in the Orders; and

WHEREAS, since the purchase of the protein bar business, Forward Foods and its major investor and lender, Emigrant, have been in dispute (the "Dispute") with the Sellers with regard to various aspects of disclosure and other matters involving the purchase, which Dispute has now been settled in principle (the "Settlement"), and which Settlement must be approved by the Bankruptcy Court in order for the Lender to be required to lend any postpetition financing to the Borrower; and

WHEREAS, under the terms of the Settlement, among other things, the Term B Loan shall be assigned to the Lender, and the equity interest held by the Sellers in the Borrower shall be assigned to the Lender.

## TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, and for other good and valuable consideration, the parties hereto agree as follows:

## ARTICLE I

### Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms have the meanings specified below:

"Account" has the meaning assigned to such term in the Security Agreement.

"Account Debtor" means any Person obligated on an Account.

"Affiliate" means, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

"Applicable Rate" means fifteen per cent (15.00%) per annum.

"Approved Budget" means the Budget of the Borrower attached hereto as Exhibit B, as the same may be amended, supplemented or otherwise modified from time to time to the extent consented to in writing by the Lender.

"Availability Period" means the period from and including the Effective Date to the earlier of the Maturity Date and the date of termination of the Commitment.

"Available Revolving Commitment" means, at any time, the Revolving Commitment then in effect *minus* the Revolving Exposure and all accrued and unpaid interest, fees and expenses at such time.

"Bankruptcy Code" means 11 U.S.C. §§ 101-1330, as amended.

"Bankruptcy Court" means the United States Bankruptcy Court for the District of Delaware.

"Borrower" means Forward Foods LLC.

"Borrowing Request" means a request by the Borrower for a Revolving Borrowing in accordance with Section 2.03.

"Business Day" means any day that is not a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to remain closed.

"Capital Expenditures" means, without duplication, any expenditure or commitment to expend money for any purchase or other acquisition of any asset which would be classified as a fixed or capital asset on a consolidated balance sheet of the Borrower prepared in accordance with GAAP.

"Capital Lease Obligations" of any Person means the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

"Carve-Out" has the meaning assigned to such term in Section 2.13.

"Case" means the Chapter 11 bankruptcy case now or to be pending in the Bankruptcy Court for Borrower.

"Cash Collateral" has the meaning set forth in Section 363(a) of the Bankruptcy Code.

"Change in Control" means a change in the current membership of the Board of Directors of the Borrower that occurs outside of the ordinary course of business.

"Change in Law" means (a) the adoption of any law, rule or regulation after the date of this Agreement, (b) any change in any law, rule or regulation or in the interpretation or application thereof by any Governmental Authority after the date of this Agreement or (c) compliance by the Lender (or, for purposes of Section 2.14(b), by any lending office of the Lender or by the Lender's holding company, if any) with any request, guideline or directive (whether or not having the force of law) of any Governmental Authority made or issued after the date of this Agreement.

"Chapter 5 Claims" means the Borrower's claims for fraudulent or preferential transfers under Chapter 5 of the Bankruptcy Code.

"Code" means the Internal Revenue Code of 1986, as amended from time to time.

"Collateral" means any and all property owned, leased or operated by a Person covered by the Collateral Documents and any and all other property of the Borrower, now existing or hereafter acquired, that may at any time be or become subject to a security interest or Lien in favor of the Lender, to secure the Secured Obligations.

"Collateral Access Agreement" has the meaning assigned to such term in the Security Agreement.

"Collateral Documents" means, collectively, the Security Agreement and any other documents granting a Lien upon the Collateral as security for payment of the Secured Obligations.

"Collection Account" has the meaning assigned to such term in the Security Agreement.

"Commitment" means the commitment of the Lender to make Revolving Loans hereunder, as such Commitment may be (a) increased from time to time, and (b) reduced or increased from time to time pursuant to assignments by or to the Lender pursuant to Section 8.04. [The initial amount of the Lender's Revolving Commitment is \$4,000,000.]

"Confirmation Order" means an order of the Bankruptcy Court confirming a Reorganization Plan in the Case.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. "Controlling" and "Controlled" have meanings correlative thereto.

"Default" means any event or condition which constitutes an Event of Default or which upon notice, lapse of time or both would, unless cured or waived, become an Event of Default.

"Disclosed Matters" means the actions, suits and proceedings and the environmental matters disclosed in Schedule 3.06.

"Document" has the meaning assigned to such term in the Security Agreement.

"dollars" or "\$" refers to lawful money of the United States of America.

"Effective Date" means the date on which the conditions specified in Section 4.01 are satisfied (or waived in accordance with Section 8.02), which date shall occur as promptly as practicable after the entry of the Interim Order, but no later than 10 days after such entry.

"Environmental Laws" means all laws, rules, regulations, codes, ordinances, orders, decrees, judgments, injunctions, notices or binding agreements issued, promulgated or entered into by any Governmental Authority, relating in any way to the environment, preservation or reclamation of natural resources, the management, release or threatened release of any Hazardous Material or to health and safety matters.

"Environmental Liability" means any liability, contingent or otherwise (including any liability for damages, costs of environmental remediation, fines, penalties or indemnities), of the Borrower directly or indirectly resulting from or based upon (a) violation of any Environmental Law, (b) the generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials, (c) exposure to any Hazardous Materials, (d) the release or threatened release of any Hazardous Materials into the environment or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

"Equity Interests" means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity ownership interests in a Person, and any warrants, options or other rights entitling the holder thereof to purchase or acquire any such equity interest.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Affiliate" means any trade or business (whether or not incorporated) that, together with a Borrower, is treated as a single employer under Section 414(b) or (c) of the Code or, solely for purposes of Section 302 of ERISA and Section 412 of the Code, is treated as a single employer under Section 414 of the Code.

"ERISA Event" means (a) any "reportable event", as defined in Section 4043 of ERISA or the regulations issued thereunder with respect to a Plan (other than an event for which the 30-day notice period is waived); (b) the existence with respect to any Plan of an "accumulated funding deficiency" (as defined in Section 412 of the Code or Section 302 of ERISA), whether or not waived; (c) the filing pursuant to Section 412(d) of the Code or Section 303(d) of ERISA of an application for a waiver of the minimum funding standard with respect to any Plan; (d) the incurrence by the Borrower or any of its ERISA Affiliates of any liability under Title IV of ERISA with respect to the termination of any Plan; (e) the receipt by the Borrower or any ERISA Affiliate from the PBGC or a plan administrator of any notice relating to an intention to terminate any Plan or Plans or to appoint a trustee to administer any Plan; (f) the incurrence by the Borrower or any of its ERISA Affiliates of any liability with respect to the withdrawal or partial withdrawal from any Plan or Multiemployer Plan; or (g) the receipt by the Borrower or any ERISA Affiliate of any notice, or the receipt by any Multiemployer Plan from the Borrower or any ERISA Affiliate of any notice, concerning the imposition of Withdrawal Liability or a determination that a Multiemployer Plan is, or is expected to be, insolvent or in reorganization, within the meaning of Title IV of ERISA.

"Event of Default" has the meaning assigned to such term in Article VII.

"Excluded Taxes" means, with respect to the Lender, or any other recipient of any payment to be made by or on account of any obligation of the Borrower hereunder, (a) income or franchise taxes imposed on (or measured by) its net income by the United States of America, or by the jurisdiction under the laws of which such recipient is organized or in which its principal office is located or, in the case of the Lender, in which its applicable lending office is located, and (b) any branch profits taxes imposed by the

United States of America or any similar tax imposed by any other jurisdiction in which the Borrower is located.

"Existing Lenders" has the meaning assigned to such term in the recitals of this Agreement.

"Existing Obligations" has the meaning assigned to such term in the recitals of this Agreement.

"Final Order" means an order of the Bankruptcy Court entered in the Case after a final hearing under Bankruptcy Rule 4001, granting final approval of this Agreement and the other Loan Documents and granting the Liens and Super-priority Claims described in the recitals of this Agreement in favor of the Lender, in a form and substance reasonably satisfactory to the Lender and counsel to the Lender.

"Financial Officer" means the chief financial officer, principal accounting officer, treasurer or controller of the Forward Foods.

"First Day Motions" has the meaning assigned to such term in Section 4.01.

"Forward Foods" means Forward Foods LLC, a Delaware limited liability company and debtor-in-possession under the Case.

"Funding Account" has the meaning assigned to such term in Section 4.01(g).

"GAAP" means generally accepted accounting principles in the United States of America.

"Governmental Authority" means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"Hazardous Materials" means all explosive or radioactive substances or wastes and all hazardous or toxic substances, wastes or other pollutants, including petroleum or petroleum distillates, asbestos or asbestos containing materials, polychlorinated biphenyls, radon gas, infectious or medical wastes and all other substances or wastes of any nature regulated pursuant to any Environmental Law.

"Indebtedness" of any Person means, without duplication, (a) all obligations of such Person for borrowed money or with respect to deposits or advances of any kind, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person upon which interest charges are customarily paid, (d) all obligations of such Person under conditional sale or other title retention agreements relating to property acquired by such Person, (e) all obligations of such Person in respect of the deferred purchase price of property or services (excluding current accounts payable incurred in the ordinary course of business), (f) all Indebtedness of others secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (g) all guarantees by such Person of Indebtedness of others, (h) all Capital Lease Obligations of such Person, (i) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty, (j) all obligations, contingent or otherwise, of such Person in respect of bankers' acceptances, (k) obligations under any liquidated earn-out and (l) obligations of such Person to purchase securities or other property arising out of or in connection with the sale of the same or substantially similar securities or property or any other Off-Balance Sheet Liability. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person's ownership interest in or other relationship

with such entity, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

"Indemnified Taxes" means Taxes other than Excluded Taxes.

"Interim Order" means an order of the Bankruptcy Court entered in the Case after an interim hearing under Bankruptcy Rule 4001, granting interim approval of this Agreement and the other Loan Documents and granting the Liens and Super-priority Claims described in the recitals of this Agreement in favor of the Lender, substantially in the form attached as Exhibit A, or otherwise in a form and substance reasonably satisfactory to the Lender and counsel to the Lender.

"Inventory" has the meaning assigned to such term in the Security Agreement.

"Lender" means Emigrant Capital Corp.

"Lien" means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge or security interest in, on or of such asset, (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset and (c) in the case of securities, any purchase option, call or similar right of a third party with respect to such securities.

"Loan Documents" means this Agreement, any promissory notes issued pursuant to the Agreement, the Collateral Documents, and all other agreements, instruments, documents and certificates identified in Section 4.01 executed and delivered to, or in favor of, the Lender and including, without limitation, all other pledges, powers of attorney, consents, assignments, contracts, notices and letter of credit agreements. Any reference in the Agreement or any other Loan Document to a Loan Document shall include all appendices, exhibits or schedules thereto, and all amendments, restatements, supplements or other modifications thereto, and shall refer to the Agreement or such Loan Document as the same may be in effect at any and all times such reference becomes operative.

"Loans" means the loans and advances made by the Lender pursuant to this Agreement.

"Material Adverse Effect" means a material adverse effect on (a) the business, assets, operations, prospects or condition, financial or otherwise, of the Borrower taken as a whole, (b) the ability of the Borrower to perform any of its obligations under the Loan Documents to which it is a party, (c) the Collateral, or the Lender's Liens on the Collateral or the priority of such Liens, or (d) the rights of or benefits available to the Lender thereunder.

"Material Indebtedness" means any indebtedness of the Borrower that is not disputed, contingent or unliquidated, for which the failure to pay could have a Material Adverse Effect on the Borrower.

"Maturity Date" means the earliest to occur of (a) December 31, 2009, or (b) the Reorganization Effective Date.

"Multiemployer Plan" means a multiemployer plan as defined in Section 4001(a)(3) of ERISA.

"Net Proceeds" means, with respect to any event, (a) the cash proceeds received in respect of such event including (i) any cash received in respect of any non-cash proceeds (including any cash payments received by way of deferred payment of principal pursuant to a note or installment receivable or purchase price adjustment receivable or otherwise, but excluding any interest payments), but only as and when received, (ii) in the case of a casualty, insurance proceeds and (iii) in the case of a condemnation or similar

event, condemnation awards and similar payments, net of (b) the sum of (i) all reasonable fees and out-of-pocket expenses paid to third parties (other than Affiliates) in connection with such event, (ii) in the case of a sale, transfer or other disposition of an asset (including pursuant to a sale and leaseback transaction or a casualty or a condemnation or similar proceeding), the amount of all payments required to be made as a result of such event to repay Indebtedness (other than Loans) secured by such asset or otherwise subject to mandatory prepayment as a result of such event and (iii) the amount of all taxes paid (or reasonably estimated to be payable) and the amount of any reserves established to fund contingent liabilities reasonably estimated to be payable, in each case during the year that such event occurred or the next succeeding year and that are directly attributable to such event (as determined reasonably and in good faith by a Financial Officer).

"Obligations" means all unpaid principal of and accrued and unpaid interest on the Loans, all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of the Borrower to the Lender or any indemnified party arising under the Loan.

"Off-Balance Sheet Liability" of a Person means (a) any repurchase obligation or liability of such Person with respect to accounts or notes receivable sold by such Person, (b) any indebtedness, liability or obligation under any sale and leaseback transaction which is not a Capital Lease Obligation, or (c) any indebtedness, liability or obligation under any so-called "synthetic lease" transaction entered into by such Person, or (d) any indebtedness, liability or obligation arising with respect to any other transaction which is the functional equivalent of or takes the place of borrowing but which does not constitute a liability on the balance sheets of such Person (other than operating leases).

"Other Taxes" means any and all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made hereunder or from the execution, delivery or enforcement of, or otherwise with respect to, this Agreement.

"PBGC" means the Pension Benefit Guaranty Corporation referred to and defined in ERISA and any successor entity performing similar functions.

"Permitted Encumbrances" means:

- (a) Liens imposed by law for taxes that are not yet due or are being contested in compliance with Section 5.04;
- (b) carriers', warehousemen's, mechanics', materialmen's, repairmen's and other like Liens imposed by law, arising in the ordinary course of business and securing obligations that are not overdue by more than 30 days or are being contested in compliance with Section 5.04;
- (c) pledges and deposits made in the ordinary course of business in compliance with workers' compensation, unemployment insurance and other social security laws or regulations;
- (d) deposits to secure the performance of bids, trade contracts, leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature, in each case in the ordinary course of business;
- (e) judgment liens in respect of judgments that do not constitute an Event of Default under clause (k) of Article VII;
- (f) easements, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or interfere with the ordinary conduct of business of the Borrower;

(g) Liens of the Existing Lenders.

provided that the term "Permitted Encumbrances" shall not include any Lien securing Indebtedness.

"Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

"Petition Date" has the meaning assigned to such term in the recitals of this Agreement.

"Plan" means any employee pension benefit plan (other than a Multiemployer Plan) subject to the provisions of Title IV of ERISA or Section 412 of the Code or Section 302 of ERISA, and in respect of which the Borrower or any ERISA Affiliate is (or, if such plan were terminated, would under Section 4069 of ERISA be deemed to be) an "employer" as defined in Section 3(5) of ERISA.

"Prepayment Event" means:

(a) any sale, transfer or other disposition (including pursuant to a sale and leaseback transaction) of any property or asset of the Borrower, other than dispositions described in Section 6.05(a); or

(b) any casualty or other insured damage to, or any taking under power of eminent domain or by condemnation or similar proceeding of, any property or asset of the Borrower; or

(c) the issuance by the Borrower of any Equity Interests, or the receipt by the Borrower of any capital contribution; or

(d) the incurrence by the Borrower of any Indebtedness, other than Indebtedness permitted under Section 6.01.

"Pre-Petition Collateral" means all property securing the Existing Obligations on which the Existing Lenders had valid, perfected and non-voidable Liens on the Petition Date.

"Related Parties" means, with respect to any specified Person, such Person's Affiliates and the respective directors, officers, employees, agents and advisors of such Person and such Person's Affiliates.

"Reorganization Effective Date" means the first Business Day on which all conditions to the consummation of the Reorganization Plan have been satisfied or waived, which will be the effective date of the Reorganization Plan.

"Reorganization Plan" means a plan of reorganization filed in the Case that has been approved or otherwise consented to by the Lender, in their sole discretion.

"Report" means reports prepared by the Lender or another Person showing the results of appraisals, field examinations or audits pertaining to the Borrower's assets from information furnished by or on behalf of the Borrower, after the Lender has exercised its rights of inspection pursuant to this Agreement.

"Requirement of Law" means, as to any Person, the Certificate of Incorporation and By-Laws or other organizational or governing documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"Restricted Payment" means any dividend or other distribution (whether in cash, securities or other property) with respect to any Equity Interests in the Borrower, or any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, acquisition, cancellation or termination of any such Equity Interests in the Borrower or any option, warrant or other right to acquire any such Equity Interests in the Borrower.

"Revolving Exposure" means, at any time, the sum of the outstanding principal amount of Revolving Loans at such time.

"Revolving Loan" means a Loan made pursuant to Section 2.01.

"Secured Obligations" means all Obligations owing to the Lender or its Affiliates.

"Security Agreement" means that certain Pledge and Security Agreement, dated as of the date hereof, between the Borrower and the Lender, and any other pledge or security agreement entered into, after the date of this Agreement by the Borrower (as required by this Agreement or any other Loan Document), or any other Person, as the same may be amended, restated or otherwise modified from time to time.

"Subordinated Indebtedness" of a Person means any Indebtedness of such Person the payment of which is subordinated to payment of the Secured Obligations to the written satisfaction of the Lender.

"Super-priority Claim" means a claim of the Borrower and any Subsidiary Guarantor which is an administrative expense claim having priority over any or all administrative expenses of the kind specified in Sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726(b), 1112 and 1114 of the Bankruptcy Code.

"Taxes" means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

"Transactions" means the execution, delivery and performance by the Borrower of this Agreement, the borrowing of Loans and other credit extensions and the use of the proceeds thereof.

"UCC" means the Uniform Commercial Code as in effect from time to time in the State of New York or any other state the laws of which are required to be applied in connection with the issue of perfection of security interests.

"Withdrawal Liability" means liability to a Multiemployer Plan as a result of a complete or partial withdrawal from such Multiemployer Plan, as such terms are defined in Part I of Subtitle E of Title IV of ERISA.

SECTION 1.02. Terms Generally. The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation". The word "will" shall be construed to have the same meaning and effect as the word "shall". Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein), (b) any reference herein to any Person shall be construed to include such Person's successors and assigns, (c) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, (d) all references herein to

Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, this Agreement and (e) the words "asset" and "property" shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

SECTION 1.03. Accounting Terms; GAAP. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP, as in effect from time to time; provided that, if the Borrower notifies the Lender that the Borrower requests an amendment to any provision hereof to eliminate the effect of any change occurring after the date hereof in GAAP or in the application thereof on the operation of such provision (or if the Lender notifies the Borrower that the Lender **requests** an amendment to any provision hereof for such purpose), regardless of whether any such notice is given before or after such change in GAAP or in the application thereof, then such provision shall be interpreted on the basis of GAAP as in effect and applied immediately before such change shall have become effective until such notice shall have been withdrawn or such provision amended in accordance herewith.

## ARTICLE II

### The Credits

SECTION 2.01. Commitment. Subject to the terms and conditions set forth herein, the Lender agrees to make Revolving Loans to the Borrower from time to time during the Availability Period in an aggregate principal amount outstanding at any time that will not exceed \$4,000,000.00 in accordance with the Approved Budget. Within the foregoing limits and subject to the terms and conditions set forth herein, the Borrower may borrow, prepay and reborrow Revolving Loans.

SECTION 2.02. Loans and Advances. (a) Each Advance shall be made as part of the Loan.

(b) Advances shall be made in multiples of \$50,000 and in accordance with the Approved Budget.

SECTION 2.03. Borrowing Procedures; Requests for Revolving Borrowings.

(a) Notices by the Borrower to the Lender of requests for Revolving Loans other than pursuant to Section 2.03(a). To request a Revolving Loan, the Borrower shall notify the Lender of such request in writing with at least two (2) Business Days' notice.

SECTION 2.04. Funding of Revolving Loans. The Lender shall make each Revolving Loan to be made by it hereunder on the proposed date thereof available to the Borrower by promptly crediting the amounts in immediately available funds, to the Funding Account(s).

SECTION 2.05. Termination of Commitment. (a) Unless previously terminated, the Commitment shall terminate on the Maturity Date.

(b) The Borrower may at any time, and without any penalty, terminate the Commitment upon (i) the payment in full of all outstanding Loans, together with accrued and unpaid interest thereon, (ii) the payment in full of the accrued and unpaid fees, and (iii) the payment in full of all reimbursable expenses and other Obligations together with accrued and unpaid interest thereon.

(c) The Borrower shall notify the Lender, in writing, of any election to terminate the Commitment under paragraph (b) of this Section, specifying such election and the effective date thereof. Any termination of the Commitment shall be permanent.

SECTION 2.06. Repayment and Amortization of Loans; Evidence of Debt. (a) The Borrower hereby unconditionally promises to pay to the Lender for its account the then unpaid principal amount of each Revolving Loan on the Maturity Date.

(b) The Lender may request that Loans made by it be evidenced by a promissory note or notes. In such event, the Borrower shall prepare, execute and deliver to the Lender a promissory note or notes payable to the order of the Lender (or, if requested by the Lender, to the Lender and its registered assigns) and in a form approved by the Lender. Thereafter, the Loans evidenced by such promissory note(s) and interest thereon shall at all times (including after assignment pursuant to Section 8.04) be represented by one or more promissory notes in such form payable to the order of the payee named therein (or, if such promissory note is a registered note, to such payee and its registered assigns).

SECTION 2.07. Prepayment of Loans. The Borrower shall have the right at any time and from time to time to prepay the Loans in whole or in part, subject to prior notice in accordance with this Section. Each such prepayment shall be accompanied by the payment of accrued but unpaid interest on the principal amount prepaid, to and including the date of prepayment.

SECTION 2.08. Fees and Expenses. The Borrower agrees to pay to the Lender all reasonable out-of-pocket expenses of the Lender (including, without limitation, all legal fees and expenses of the Lender) that it actually incurs in connection with the Loan Documents as more fully set forth in Section 8.03.

SECTION 2.09. Interest. (a) The Loans shall bear interest at the Applicable Rate, from the date advanced until the date repaid.

(b) Notwithstanding the foregoing, during the occurrence and continuance of a Default or an Event of Default, the Lender may, at its option, by notice to the Borrower, declare that all Loans shall bear interest at eighteen percent (18.00%) per annum.

(c) Accrued interest on each Loan shall be payable in arrears monthly, the first Business Day of the next succeeding month.

(d) All interest hereunder shall be computed on the basis of a year of 360 days, for the actual number of days elapsed.

SECTION 2.10. Taxes. (a) Any and all payments by or on account of any obligation of the Borrower hereunder shall be made free and clear of and without deduction for any Indemnified Taxes or Other Taxes; provided that if the Borrower shall be required to deduct any Indemnified Taxes or Other Taxes from such payments, then (i) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section) the Lender receives an amount equal to the sum it would have received had no such deductions been made, (ii) the Borrower shall make such deductions and (iii) the Borrower shall pay the full amount deducted to the relevant Governmental Authority in accordance with applicable law.

(b) In addition, the Borrower shall pay any Other Taxes to the relevant Governmental Authority in accordance with applicable law.

(c) The Borrower shall indemnify the Lender within 10 days after written demand therefor, for the full amount of any Indemnified Taxes or Other Taxes paid by the Lender on or with respect to any payment by or on account of any Obligation of the Borrower hereunder (including Indemnified Taxes or Other Taxes imposed or asserted on or attributable to amounts payable under this Section) and any penalties, interest and reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes or Other Taxes were correctly or legally imposed or asserted by the relevant

Governmental Authority. A certificate as to the amount of such payment or liability delivered to the Borrower by the Lender shall be conclusive absent manifest error.

(d) As soon as practicable after any payment of Indemnified Taxes or Other Taxes by the Borrower to a Governmental Authority, the Borrower shall deliver to the Lender the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to the Lender.

(e) If the Lender determines, in its sole discretion, that it has received a refund of any Taxes or Other Taxes as to which it has been indemnified by the Borrower or with respect to which the Borrower has paid additional amounts pursuant to this Section 2.10, it shall pay over such refund to the Borrower (but only to the extent of indemnity payments made, or additional amounts paid, by the Borrower under this Section 2.10 with respect to the Taxes or Other Taxes giving rise to such refund), net of all out-of-pocket expenses of the Lender and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund); provided, that the Borrower, upon the request of the Lender, agrees to repay the amount paid over to the Borrower (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Lender in the event the Lender is required to repay such refund to such Governmental Authority. This Section shall not be construed to require the Lender to make available its tax returns (or any other information relating to its taxes which it deems confidential) to the Borrower or any other Person.

SECTION 2.11. Payments Generally; Allocation of Proceeds; Sharing of Set-offs. (a) The Borrower shall make each payment required to be made by it hereunder (whether of principal, interest or fees, or of amounts payable under Section 2.10, or otherwise) prior to 2:00 p.m., prevailing Eastern time, on the date when due, in immediately available funds, without set-off or counterclaim. Any amounts received after such time on any date may, in the discretion of the Lender, be deemed to have been received on the next succeeding Business Day for purposes of calculating interest thereon. All such payments shall be made to the Lender at its offices at 6 East 43<sup>rd</sup> Street, 8<sup>th</sup> Floor, New York, NY 10017. If any payment hereunder shall be due on a day that is not a Business Day, the date for payment shall be extended to the next succeeding Business Day, and, in the case of any payment accruing interest, interest thereon shall be payable for the period of such extension. All payments hereunder shall be made in dollars.

(b) Any proceeds of Collateral received by the Lender (i) not constituting a specific payment of principal, interest, fees or other sum payable under the Loan Documents (which shall be applied as specified by the Borrower), or (ii) after an Event of Default has occurred and is continuing and the Lender so elects shall be applied first, to pay any fees, indemnities, or expense reimbursements including amounts then due to the Lender from the Borrower, second, to pay interest then due and payable on the Loans, third, to prepay principal of the Loans, and fourth, to the payment of any other Secured Obligation due to the Lender by the Borrower.

SECTION 2.12. Indemnity for Returned Payments. If after receipt of any payment which is applied to the payment of all or any part of the Obligations, the Lender is for any reason compelled to surrender such payment or proceeds to any Person because such payment or application of proceeds is invalidated, declared fraudulent, set aside, determined to be void or voidable as a preference, impermissible setoff, or a diversion of trust funds, or for any other reason, then the Obligations or part thereof intended to be satisfied shall be revived and continued and this Agreement shall continue in full force as if such payment or proceeds had not been received by the Lender and the Borrower shall be liable to pay the amount thereof to the Lender. The provisions of this Section 2.12 shall be and remain effective notwithstanding any contrary action which may have been taken by the Lender in reliance upon such payment or application of proceeds. The provisions of this Section 2.12 shall survive the termination of this Agreement.

SECTION 2.13. Priority, Liens and Certain Payments. (a) The Borrower hereby covenants, represents and warrants that, upon entry of the Interim Order (and the Final Order, as applicable), the

Obligations of the Borrower hereunder and under the Loan Documents (i) pursuant to Section 364(c)(1) of the Bankruptcy Code, shall at all times constitute allowed Super-priority Claims, (ii) pursuant to Section 364(c)(2) of the Bankruptcy Code, shall at all times be secured by a perfected first priority Lien on all Collateral that is otherwise not encumbered by a valid, perfected and non-avoidable Lien as of the Petition Date, and (iii) pursuant to Section 364(c)(3) of the Bankruptcy Code, shall be secured by a perfected junior Lien upon all Collateral that is subject to valid and perfected Liens in existence on the Petition Date or valid Liens perfected (but not granted) thereafter to the extent such post-Petition Date perfection in respect of a pre-Petition Date claim is expressly permitted under the Bankruptcy Code, and to other valid and perfected Liens which are senior (after giving effect to the Interim Order (and the Final Order, as applicable)) to the Liens granted to the Lender pursuant to the Interim Order (and the Final Order, as applicable); provided that such Lien shall not attach to any Chapter 5 Claims, subject and subordinate in each case with respect to subclauses (i) through (iii) above, only to the Carve-Out (as defined in Section 2.13). The Lender's Liens and Super-priority Claims shall at all times be senior to the rights of the Borrower and any successor trustee(s) or estate representative(s) in any case or proceeding under the Bankruptcy Code, and any Lien in the Collateral that is avoided or otherwise preserved for the benefit of the Borrower's estate shall be subordinate to these Liens. No Liens granted in the Collateral with respect to the Commitment and Super-priority Claims, and no claim of the Lender, shall be subject to subordination to any other lien or security interest or claim under Section 510 of the Bankruptcy Code or to surcharge under Section 506 of the Bankruptcy Code or otherwise.

(b) As to all Collateral, including, without limitation, all real property the title to which is held by the Borrower, or the possession of which is held by the Borrower pursuant to leasehold interest, the Borrower hereby assigns and conveys as security, grants a security interest in, hypothecates, mortgages, pledges and sets over unto the Lender, all of the right, title and interest of the Borrower in all of such Collateral, including without limitation, all owned real property and in all such leasehold interests, together in each case with all of the right, title and interest of the Borrower in and to all buildings, improvements, and fixtures related thereto, any lease or sublease thereof, all general intangibles relating thereto and all proceeds thereof. The Borrower acknowledges that, pursuant to the Orders, the Liens granted in favor of the Lender in all of the Collateral shall be perfected without the recordation of any Uniform Commercial Code financing statements, notices of Lien or other instruments of mortgage or assignment (although the Lender is hereby authorized by the Borrower to file such Uniform Commercial Code financing statements as it may deem desirable, in its sole discretion). The Borrower further agrees that (i) the Lender shall have rights and remedies set forth in Article VII in respect of the Collateral and (ii) if requested by the Lender, the Borrower shall enter into separate security agreements, pledge agreements and fee and leasehold mortgages with respect to such Collateral on terms reasonably satisfactory to the Lender.

(c) (i) The Existing Lenders shall retain its and their Liens on the Pre-Petition Collateral which Liens shall remain senior to the Liens granted hereby to the Lender.

(ii) The Borrower and Lender hereby agree that they shall apply the proceeds of all Pre-Petition Collateral consisting of Accounts and Inventory purchased pre-petition to the outstanding principal amount of the Existing Obligations. In no event shall the Borrower pay, nor shall the Existing Lenders receive, any interest on any of the Existing Obligations and, except as otherwise set forth herein, no other payments on the Existing Obligations shall be made to the Existing Lenders.

(iii) The Orders shall provide that, until the full and final payment of the Secured Obligations, at any time the Lender deems it necessary and for whatever reason, the Lender and its employees, representatives, professionals and agents shall, at no cost to Lender, have full, unfettered use of and access to all assets of the Borrower including, without limitation, all Pre-Petition Collateral (other than Pre-Petition Collateral consisting of Accounts and Inventory purchased pre-petition).

(d) Notwithstanding any provision of this Agreement or the Orders to the contrary, except with respect to the Collection Account as described below, after the Default Point, the liens, security

interests and Super-priority Claims granted to the Lender pursuant to this Agreement, Collateral Documents and the Orders shall be subject and subordinate to a carve-out (the "Carve-Out") for: (i) the payment of allowed professional fees and disbursements incurred by the Borrower's professionals retained, pursuant to Section 327 of the Bankruptcy Code, in accordance with the Approved Budget, and any professionals retained by any statutory committee of unsecured creditors appointed in the Case (and any disbursements of any member of such committee), pursuant to Section 1103 of the Bankruptcy Code, in an aggregate amount not to exceed \$15,000 per month as set forth in the Approved Budget; and (ii) quarterly fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) and any fees payable to the Clerk of the Bankruptcy Court; provided that amounts deposited in the Collection Account shall not be subject to the Carve-Out. The Carve-Out shall only be applicable in the event, and to the extent, that there are no unencumbered assets of the Borrower's estate which may be used to satisfy such fees and disbursements, it being understood and agreed that recourse for repayment of such fees and disbursements shall be made first to such unencumbered assets. The proceeds of the Carve-Out shall not be used by any Person to (i) prosecute or pursue any claims or causes of action against or with respect to the Lender, or (ii) challenge, object to, contest in any manner or raise any defense to, the validity, perfection, enforceability or priority of the liens and security interests of the Lender or the Super-priority Claims. Additionally, if no Default or Event of Default exists, the Borrower shall be permitted to pay professional fees and expenses to the extent the same are consistent with the Approved Budget and otherwise authorized by the Bankruptcy Court; provided, however, that any such allowed fees and expenses incurred consistent with the Approved Budget prior to a Default or an Event of Default shall be paid in conformity with the Approved Budget after such Default or Event of Default. For purposes of this Section 2.13(d), "Default Point" means that date when both (x) an Event of Default shall have occurred and (y) the Lender has ceased making extensions of credit to the Borrower hereunder. Notwithstanding any provision of this Agreement or the Orders to the contrary, neither the proceeds of any Loans nor the Collateral nor any proceeds thereof shall be used by any Person to (i) prosecute or pursue any claims or causes of action against or with respect to the Lender, or (ii) challenge, object to, contest in any manner or raise any defense to, the validity, perfection, enforceability or priority of the liens and security interests of the Lender or the Super-priority Claims.

SECTION 2.14. Security Interest in Collection Account. Pursuant to Section 364(c)(2) of the Bankruptcy Code, the Borrower hereby assigns and pledges to the Lender, and hereby grants to the Lender a first priority security interest, senior to all other Liens, if any, in all of the Borrower's right, title and interest in and to the Collection Account and any direct investment of the funds contained therein.

SECTION 2.15. Payment of Obligations. Upon the maturity (whether by acceleration or otherwise) of any of the Secured Obligations under this Agreement or any of the other Loan Documents, the Lender shall be entitled to immediate payment of such Secured Obligations (whether from the Borrower or any other Person) without further application to or order of the Bankruptcy Court.

SECTION 2.16. No Discharge; Survival of Claims. Borrower agrees that to the extent its Secured Obligations hereunder are not satisfied in full, (a) such Secured Obligations arising hereunder shall not be discharged by the entry of a Confirmation Order (and the Borrower pursuant to Section 1141(d)(4) of the Bankruptcy Code, hereby waives any such discharge) and (b) the Super-priority Claim granted to the Lender described in Section 2.13 shall not be affected in any manner by the entry of a Confirmation Order.

### ARTICLE III

#### Representations and Warranties

The Borrower represents and warrants to the Lender that:

SECTION 3.01. Organization; Powers. The Borrower is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, has all requisite power and

