

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

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

**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**

