

ORDERED.

Dated: October 13, 2023



Jacob A. Brown
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re)	
SURGE TRANSPORTATION)	Case No.: 3:23-bk-1712-JAB
INC., ¹)	Chapter 11
Debtor.)	
_____)	

ORDER (I) AUTHORIZING RELEASE AND DISCHARGE OF CUSTOMERS, AND (II) BARRING CARRIERS FROM ASSERTING DIRECT CLAIMS AGAINST DEBTOR’S CUSTOMERS

This Chapter 11 Case is before the Court upon the motion filed by debtor, Surge Transportation, Inc. (“Surge”), seeking an order establishing certain procedures and protections to aid in the collection of prepetition accounts receivable owed to Surge, including the entry of a bar order supplementing the automatic stay and expressly prohibiting carriers from pursuing collections from Surge’s shipping customers for

¹ The Federal Employer Identification Number of the Debtor is 81-224742. The principal address of the Debtor is 7077 Bonneval Road, Suite 550, Jacksonville, Florida 32216.

freight transportation charges owed by Surge (the “Motion”). (Doc. 110). A hearing on the Motion was held on September 18, 2023 (the “Hearing”). Upon the evidence presented and this Court’s ruling on the record at the conclusion of the Hearing, the Court makes the following Findings of Fact and Conclusions of Law.²

Jurisdiction

1. The jurisdictional predicates for this order are 28 U.S.C. § 1334(e), 28 U.S.C. § 157, including, without limitation, subsections (2)(A) and (6), and Bankruptcy Code §§ 105, 362 and 541.

Findings of Fact

2. Surge is a Jacksonville based trucking/freight broker licensed with the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration specializing in sourcing extra truckload capacity during peak seasons. Surge maintains satellite offices in Chicago, Illinois and Ashburn, Virginia.

3. Surge’s customers are primarily suppliers of consumer goods and include numerous Fortune 1000 shippers and manufacturers like Kraft Heinz, Anheuser Busch, and Dannon. Surge also services a number of high-volume consignees like Ace Hardware and Chewy. Consignees differ from shippers in that they buy and receive products from manufacturers.

² This order constitutes findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

4. As a broker of freight transportation services, Surge coordinates the transportation of freight for the benefit of shipping customers (each a “Shipper” and collectively, “Shippers”) and consignees (each a “Consignee” and collectively, “Consignees”) through the use of third-party truck, independent contractors, and owner-operators (each a “Carrier” and collectively, the “Carriers”). Surge’s invoices include, but do not separately itemize, transportation charges and commissions attributable to each shipment.

5. Before a Carrier is engaged by Surge to haul product for its customers, Surge requires that the Carrier sign a standardized Broker Carrier AGREEMENT containing the following language:

Broker Carrier AGREEMENT

Pay Terms and Conditions

CARRIER agrees to the payment plan terms and conditions selected via MyCarrierPackets and agrees that such terms and conditions will apply on all invoices unless a written or email request is submitted and is provided a reasonable amount of time to implement such change.

* * *

11. FREIGHT CHARGE COLLECTION. CARRIER agrees that BROKER has the *exclusive right* to handle all billing of freight charges to the Customer for the transportation services provided herein, and, as such, CARRIER agrees to refrain from all collection efforts against the shipper, receiver, consignor, consignee or the Customer unless authorized in writing by BROKER.

12. WAIVER OF CARRIER’S LIEN. CARRIER shall not withhold any goods of any Customer on account of any

dispute as to rates or any alleged failure to receive payment of freight charges incurred under this Agreement. CARRIER further agrees that BROKER has the discretionary right to offset any payments owed to CARRIER hereunder for liability incurred by CARRIER pursuant to Section 9 of this Agreement. (emphasis added).

6. Though there have been six iterations of the Broker Carrier AGREEMENT over Surge's existence, the foregoing provisions are present in each revision. (Surge's Exs. 1, 3-6).

7. Importantly, the Broker Carrier AGREEMENT contains language which purports to override any contrary provision contained in any bill of lading or other documents that were issued or entered into among Surge's Carriers and Shippers:

3. SHIPMENT DOCUMENTATION. . . . Any terms, conditions and provisions of the bill of lading, manifest of other form of receipt or contract shall be subject and subordinate to the terms, conditions and provisions of this Agreement.

8. In the normal course of business, Surge paid its Carriers from funds received from the sale of receivables to its factor, Triumph Financial Services, LLC, which conducts business under the name Triumph Business Credit ("Triumph"). It did not wait until the receivables were collected from its customers before paying its Carriers, even though it reserved the right to do so in its Broker Carrier AGREEMENT. The proceeds from the factoring transaction, as well as collections on non-factored receivables, were then placed in Surge's operating account, or delivered to an affiliate of Triumph, TriumphPay, to pay the Carriers at Surge's discretion. At

no point in its existence did Surge ever segregate freight charges from other revenues, and nothing in the Broker Carrier AGREEMENT requires it to do so.

9. As of the Petition Date, Surge had approximately \$10,182,647 in uncollected accounts receivable, inclusive of invoices sold to Triumph under the factoring agreement. In turn, Surge owes Carriers approximately \$12 million in unpaid freight charges.

10. Notwithstanding Surge's bankruptcy filing, Carriers – or their factors – are now contacting Surge's Shippers and Consignees directly and demanding payment under the theory that the Shippers or Consignees are severally liable for any unpaid invoices associated with the shipment and delivery of their products. (Surge's Exs. 7,8,12,13). The argument is premised on the suggestion that the bills of lading issued by Shippers and Consignees renders the Shipper or Consignee severally liable for payment of transportation charges, and therefore provides an independent right of action against the Shipper or Consignee, notwithstanding the contractual waivers contained in the Broker Carrier AGREEMENT. This "dual liability" threat is delaying collections, impairing availability under the factoring agreement with Triumph, and causing Shippers and Consignees to place orders for new shipments elsewhere. This interference threatens the very viability of Surge and its ability to reorganize.

11. In addition, a subset of the Carriers and their factors contend that the transportation charges included in each invoice belong to them, and Surge merely acts as a conduit on their behalf. They thus argue that Surge's factor, Triumph, has no right

to retain the collections for prepetition freight transportation charges contained in the invoices which Surge sold to it.

12. The resolution of these important issues is secondary however to the immediate and pressing need to ensure collection of the prepetition accounts receivable. Whether Surge, Triumph, the Carriers, or others are entitled to the proceeds of prepetition accounts, it is important for all parties that the accounts be collected immediately, preserving, without prejudice, the opportunity for Carriers to seek an adjudication of rights to the funds collected in the appropriate context. To achieve these goals and facilitate the collection of accounts as expeditiously as possible, it is imperative that Shippers and Consignees first be shielded from direct claims and actions by Carriers with the prospect of double payment exposure eliminated.

13. A copy of the Motion, together with notice of the Hearing were furnished by mail to all creditors and parties in interest on August 29, 2023. (Doc. 113). Sufficient notice and opportunity to be heard has thus been given to all affected creditors.

14. OTR Capital, LLC (“OTR”), Alexander, Winton & Associates, Inc. (“AWA”) and Baxter Bailey & Associates, Inc. (“BBA”) (collectively, the “Objecting Parties”),³ all of whom were present or represented at the Hearing, filed a joint

³ The Objecting Parties allege in their Emergency Motion to Withdraw the Reference that they are “recipients of rights originating from [approximately five hundred and sixty Carriers] and ‘stand in the shoes’ of the [Carriers] to collect unpaid freight charges.” (Doc. 138, p. 5). They further allege that “[w]hile the nature of the consideration paid by the Carrier Assignees for the assignments varies (AWA and BBA agreed to pay a certain percentage of the amounts

Objection to the Motion. (Doc. 151). The Objecting Parties have each filed adversary proceedings against Triumph seeking to establish their entitlement to that portion of the accounts receivables collected by Triumph under the factoring agreement which are attributable to freight charges.

15. Triumph has advised the Court that it would disgorge funds arising from pre-petition accounts to the Objecting Parties if there is a final, non-appealable order that determines that any of the Objecting Parties, as a matter of law and fact, have any right to seek recovery from Triumph for any freight charges arising from prepetition shipments brokered by Surge the proceeds of which have been collected by Triumph post-petition. In connection with this advisement, Triumph has not agreed to waive any of its rights and reserves all rights, claims and defenses.

16. At the Hearing, the Court admitted the following exhibits: (i) Surge's exhibits 1 and 3 through 19; and (ii) the Objecting Parties' exhibits 1 through 11. Additionally, the following witnesses testified at the Hearing: (i) Omar Singh, Surge's president and sole owner; (ii) Adam Pearce, the owner of Pearce Enterprises, LLC, a Carrier to whom Surge owes a pre-petition debt; and (iii) Drew Zucker, OTR's vice president of finance.

actually collected to their respective carriers in exchange for the assignment of rights while OTR is [a] factor which purchased the receivables subject to the terms of its factoring arrangement with its carrier-assignors), each of the Carrier Assignees is the first-party owner of the rights they assert to collect, which are the freight charges for the subject shipments." (Id.)

17. The Court's additional findings of fact and conclusions of law made on the record at the conclusion of the Hearing are incorporated herein by reference.

Conclusions of Law

18. Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title." Courts have used § 105(a) to issue orders establishing procedures similar to those sought here as well as enjoining creditors where the conduct to be enjoined, as here, substantially interferes with the reorganization of the debtor. *See, e.g., In re Eagle-Picher Indus., Inc.*, 963 F.2d 855 (6th Cir. 1992); *accord, Lazarus Burman Assocs. v. National Westminster Bank USA (In re Lazarus Burman Assocs.)*, 161 B.R. 891, 897 (Bankr. E.D.N.Y. 1993) (holding that a § 105 injunction is appropriate if the creditor's action against the non-debtor entity will have a deleterious effect on the estate).

19. In Chapter 11 cases involving freight brokers, it is not uncommon for Carriers to argue that a Shipper or Consignee is ultimately liable for the payment of their invoices even if the Shipper or Consignee has already paid the freight charges to a Broker. The argument is typically premised on Section 7 of the Uniform Bill of Lading, which reads as follows:

The Consignor shall be liable for the freight and all other lawful charges, except that if the Consignor stipulates, by signature, in the space provided for that purpose on the face of the bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the Consignor ... shall not be liable for such charges. . . .

20. As recognized in *Louisville & N.R. Co. v. Central Iron & Coal, Co.*, 265 U.S. 59, 66-67 (1924), however, there is a virtually unfettered right (absent discriminatory intent) of parties to shipping arrangements to contractually assume or disavow liability for freight and carrier charges. Cases such as *In re USA Motor Express, Inc.*, CV-06-J-4875-NE, 2007 WL 3087295 at *4 (N.D. Ala. 2007) further that rule. In that instance, the court explained:

The contracts before this court are unambiguous and clearly state the intentions of the parties. [The carriers] were well aware that [the broker] was subcontracting its loads to them. The [carriers] knew they contracted with [the broker] to obtain loads to carry and in return, they were to be paid for hauling these loads by [the broker], regardless of from where the loads originated, and regardless of whether [the broker] had been paid by the [consignee] for those loads. Similarly, [the consignee's] contract with [the broker] clearly states the intention of the parties that [the consignee] would tender payment to [the broker] directly for loads tendered to [the broker] for shipment, regardless of whether [the broker] actually hauled that load. To allow plaintiffs to proceed directly against [the consignee] renders not one, but two contracts meaningless.

Id. at *5.

21. These prepetition waivers are enforceable in this circuit. *See e.g. Nat. Shipping Co. of Saudia Arabia v. Omni Lines, Inc.*, 106 F.3d 1544, 1546-47 (11th Cir. 1997). (“[T]he shipper is liable *unless released by the carrier* – is the best rule”)(emphasis added). Moreover, “[i]t is only where the *parties* fail to agree or where discriminatory practices are present that the [bill of lading] default terms bind the parties.” *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 479 (9th Cir. 2000).

22. Surge required each Carrier with whom it conducted business prepetition to accept the Broker Carrier AGREEMENT described above whereby the Carrier unambiguously agreed (i) to look solely to Surge for payment, and (ii) that it would not contact the Shippers directly. Broker Carrier AGREEMENT ¶ 11. That same agreement further provides that “[a]ny terms, conditions and provisions of the bill of lading, manifest or other form of receipt or contract shall be subject and subordinate to the terms, conditions and provisions of this agreement.” Broker Carrier AGREEMENT ¶ 3. The Court therefore finds that Surge is likely to prevail on the issue of whether the Carriers waived their rights to pursue collections directly from the Shippers.

23. The Bar Order requested by Surge is also consistent with the parties’ prepetition conduct and simply reinforces the automatic stay without Surge having to suffer significant interference with its reorganization efforts or to seek recourse, after the fact, from each Carrier which violates the automatic stay:

. . . The definition of ‘property of the estate’ includes the Debtor’s *right to collect* accounts receivable. . . .

Section 362(a)(3) of the Code enjoins ‘any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.’ Based on the foregoing, this Court finds that Graham’s collection of freight charges from the Debtor’s consignees amounts to a violation of § 362 and of this Court’s restraining order. Accordingly, Graham is enjoined from pursuing the collection of its pre-petition freight charges directly from the Debtor’s consignees.

In re Chateaugay Corp., 78 B.R. 713, 725 (Bankr. S.D. N.Y.1987)(emphasis in original).

24. In situations like here, where the to-be enjoined action would have a detrimental effect on a debtor's estate -- i.e., irreparable injury -- an injunction such as that requested by this motion is appropriate. For example, in *In re Eleets Transportation Company, Inc.*, the Court recognized that Shippers may be reluctant to pay invoices owing to a freight broker debtor if they had to defend or perhaps even pay the carrier as well (Case No. 3:12-bk-8151-JAF, Doc. 360). The court therefore entered a bar order, similar to that requested here, enjoining freight carriers from asserting claims directly against a freight broker's customers. *Id.*

25. A bar order, similar in form, was also entered by Judge Glenn in *In re Network F.O.B., Inc.*, Case No. 3:16-bk-3416-PMG, 2017 WL 11569065 (Bankr. M.D. Fla. June 23, 2017). There, the court entered a bar order in connection with a settlement among the Trustee, a factor, and various creditors, finding the bar order was necessary to facilitate the collection of outstanding receivables.

26. On August 29, 2023, in order to protect Surge's Shipper customers from the dual payment exposure described above, the Court entered the Final Order Approving Debtor-in-Possession Financing and Pre-Petition Factoring and Security Agreement with Triumph Financial Services, LLC, dated August 29, 2023 (the "DIP Financing Order"). (Doc. 112).

27. The DIP Financing Order provides:

Except as expressly provided in this Final Order, pursuant to Bankruptcy Code Section 362(a), no person, including, but not limited to, any motor carriers and any assignee or agent of any motor carriers, shall be entitled to: (i)

communicate directly with any one or more of Debtor's shippers or consignees for purposes of seeking to collect any pre-petition freight charges owed by the Debtor or (ii) take any action or otherwise pursue any claim directly against any of the Debtor's shippers or consignees in order seek to obtain payment of any prepetition freight charges owing by the Debtor as a result of any surface freight transportation services provided to, or for the benefit of the Debtor. Any shipper and consignee of the Debtor that makes payment directly to Triumph, as assignee of the Debtor's right to receive payment of any Accounts whether arising prepetition and/or post-petition shall be deemed discharged and released from any liability to any other party with respect to such payment.

¶ 28.

28. The DIP Financing Order has not been appealed, nor did any party timely file a motion for rehearing thereof. Accordingly, the DIP Financing Order is final and non-appealable.⁴ The relief provided herein supplements that relief and is not intended to modify or supplant the relief granted in the DIP Financing Order.

29. Because continued actions by Carriers against Surge's Shippers or Consignees will substantially interfere with the collection of Surge's accounts receivable, the relief requested herein is more than warranted -- it is absolutely necessary. By the same token, the Carriers will still have the right to seek adjudication of their rights, if any, to the prepetition receivables collected by Triumph through the filing of an appropriate adversary proceeding.

30. In determining whether to approve a proposed Bar Order, the Court must consider whether it is fair and equitable. "In making such a determination, courts

⁴ See Fed. R. Bankr. P. 8002 (stating that notice of appeal must be filed within 14 days after entry of the order being appealed).

consider the interrelatedness of the claims that the bar order precludes, the likelihood of non-settling defendants to prevail on the barred claim, [and] the complexity of the litigation . . .” *In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). The relief sought through the Motion supplements the automatic stay in the broker/carrier context by prohibiting competing claims to Surge’s receivables and providing much needed assurances to Surge’s customers that they do not face dual payment liability. Allowing Triumph to apply the payments as received preserves availability under the parties’ factoring agreement and eliminates interest accrual attendant to any delay in payment.

31. Furthermore, based upon the evidence presented thus far in this case, the Court finds that the Carriers are unlikely to prevail on their argument that the bill of lading supersedes the contractual waivers which the Carriers signed or the parties’ course of dealing.⁵ Shippers and Consignees are also protected under the proposed Bar Order by having to make only a single payment, which was their bargain with both Surge and the Carriers. The proposed Bar Order is therefore fair and equitable.

Order and Injunction

It is therefore ORDERED:

1. The Motion is Granted. All objections thereto are overruled.
2. All persons and entities who have held, hold or may hold claims, rights, causes of action, liabilities, liens, or any interests of any kind or nature against Surge

⁵ It is not lost on the Court that the Objecting Parties appear to be pursuing recovery on a contingency basis, and their actions may be an effort to force a greater recovery on what may ultimately be determined to be a general unsecured claim.

or any property of Surge arising out of or relating to surface freight transportation services provided to Surge (collectively, the “Carriers”), regardless of the filing, lack of filing, lack of appearances in this case, allowance or disallowance of any such claim or interest, and any successors, assigns or representatives of any such person or entity, including factors, are hereby precluded, barred and enjoined from the commencement or continuation of any action or proceeding (whether formal or informal, and including, without limitation, making demand) against any person or entity to whom Surge provided goods or services at any time (a “Shipper” or “Consignee”) seeking or demanding payment from such Shipper or Consignee of any amount owed by Surge (whether severally, jointly or otherwise) to such person or entity. Without limiting the generality of the foregoing, all Carriers who provided services to Surge prior to July 24, 2023, for which they have not been paid are hereby precluded, barred and enjoined from seeking, demanding or taking any other action, the purpose of which is to obtain payment of amounts owed by Surge (whether severally, jointly or otherwise) from any Shipper or Consignee of Surge.

3. This injunction is permanent as to all parties receiving notice of the Motion or this Order. The injunction shall not be permanent but shall remain a temporary injunction remaining in effect, without further notice or hearing, and without security or bond being posted, as to the Objecting Parties until the conclusion of the adversary proceedings filed by the Objecting Parties and any appeals therefrom, or until further order of this Court.

4. All Shippers and Consignees of Surge are hereby precluded, barred and permanently enjoined from (a) making payment of amounts owed by such Shipper or Consignee on account of goods or services provided by Surge to any Carrier or any other person or entity representing such Carrier except Surge, or if the account was factored by Triumph, to Triumph, and (b) setting off, recouping against or deducting from any amount owed to Surge any amount owed or allegedly owed by Surge to any Carrier. Without limiting the generality of the foregoing, no Shipper or Consignee shall be entitled to assert that (i) the failure of Surge to pay any Carrier or transportation provider or other Shipper relieves or discharges such Shipper or Consignee, in whole or in part, from its obligation to make payment to Surge or (ii) adjudication of any claim of Surge against such Shippers or Consignees seeking to recover amounts owed for goods or services provided requires joinder of any Carrier as an indispensable party.

5. Each Shipper, Consignee, person, entity, or customer of Surge is hereby directed to pay any amounts owed Surge to Surge or, if the receivable has been factored through Triumph, to Triumph, without setoff recoupment or any defense due to any issues related to unpaid freight charges owed by Surge to its Carriers. Upon payment to Surge or Triumph, as applicable, the respective Shipper, Consignee, person, entity or customer shall be irrevocably discharged of any liability to the Carrier, the Carrier's factor, or any other party entitled to assert rights on behalf of the Carrier with respect to the invoice such payment is intended to satisfy.

6. Until otherwise ordered by this Court, Surge may utilize all collections received on non-factored receivables to operate its business without prejudice to any claims which the Carriers may later make to such receivables. Triumph, for its part, is permitted to apply all payments received from Shippers or Consignees towards the obligations owed to it without prejudice to the rights of any Carrier to assert whatever rights it may have to such payments against Triumph.

7. The injunctions and prohibitions contained in this Order are in addition to, and do not reduce, modify or eliminate, the protections and prohibitions contained in §§ 362 and 553 of the Bankruptcy Code. Furthermore, Surge retains the right to seek contempt sanctions or damages from any person on account of violation of the automatic stay provided in § 362 of the Bankruptcy Code.

8. Similarly, this Order is not intended to modify or supplant the relief granted in the DIP Financing Order. Further, nothing herein shall prejudice any party's rights under the DIP Financing Order or be deemed to affect, diminish or otherwise impact the rights of the Official Committee of Unsecured Creditors reserved under the DIP Financing Order or that certain Stipulation among the Debtor, Triumph and the Committee filed September 12, 2023 to investigate and challenge the factoring agreement between Surge and Triumph. (Doc. 35). By the same token, nothing herein shall prejudice the Objecting Parties' prosecution of the adversary proceedings which they have filed against Triumph.

9. Surge, Triumph and the Objecting Parties are directed to mediate their respective disputes before an agreed upon or court-selected mediator. The Court will

conduct a hearing on October 25, 2023, at 1:30 p.m. to discuss the timing of said mediation. The hearing will be held in Courtroom 4C, 4th Floor, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida 32202. The parties shall meet and confer prior to said hearing to discuss selection of the mediator and to identify the issues to mediated. Debtor shall file a report identifying the issues to be mediated prior to the October 25, 2023, hearing.

American Legal Claim Services, LLC is directed to serve a copy of this Order on interested parties who are non-CM/ECF users and file a proof of service within three days of entry of the Order.