

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

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

**MOTION FOR APPROVAL OF SETTLEMENT BETWEEN SURGE
TRANSPORTATION, INC. AND RTS FINANCIAL SERVICE, INC.**

(Expedited Hearing Requested)

Debtor, Surge Transportation, Inc. (“Debtor” or “Surge”), moves the Court, pursuant to § 105(a) of title 11 of the United States Code, and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of an order authorizing and approving that certain Settlement Agreement dated February 15, 2024 (the “Settlement Agreement”) by and between Surge and RTS Financial Service, Inc. (“RTS”), and in support of this motion states:

Jurisdiction And Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

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.

3. The statutory predicate for the relief sought herein is § 105(a) of the Bankruptcy Code, and Rule 9019 of the Bankruptcy Rules.

Background

4. On July 24, 2023 (the “Petition Date”), Surge filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Case”).

5. Surge is a Jacksonville, Florida based trucking/freight broker, engaged in, among other things, sourcing extra truckload capacity during peak season periods on short lead times. As a broker, Surge economically acts as a middleman between its customers (the “Customers”), who are generally suppliers/shippers of consumer goods, and motor carriers (“Carriers”), who provide freight delivery services for the goods.

6. Since the Petition Date Surge has continued to operate as a trucking/freight broker and to manage its financial and business affairs as a debtor in possession under §§ 1107(a) and 1108 of the Bankruptcy Code.

7. RTS is a factoring company that factors accounts receivable for various Carriers that provide freight delivery services for, among others, Surge and its Customers. RTS asserts that as of the Petition Date, Surge and its Customers were separately and independently indebted to RTS in the amount of \$2,546,623.90 on account of pre-petition freight transportation charges assigned to RTS by various Carriers (the “RTS Claim”).

8. As a result of the bankruptcy filing, RTS has designated Surge receivables as being ineligible for factoring through RTS. Inasmuch as the majority of Carriers with whom Surge transacts business factor their receivables through RTS, the designation is impacting Surge’s ability to fulfill Customer orders.

9. In the 90 days preceding the Petition Date, RTS received payments totaling \$3,787,585, some or all of which may arguably be avoided as preferential transfers under §§ 547(b) and 550 of the Bankruptcy Code.

10. In order for Surge's reorganization efforts to be successful, it is necessary that Surge be able to fill its Customers orders and that Surge's Carriers be able to factor receivables through RTS. Surge has therefore requested that RTS allow its Carriers to factor Surge receivables through RTS in exchange for a waiver of potential avoidance claims against RTS and its Customers.

11. After several weeks of negotiations, Surge is pleased to report that it has reached an agreement with RTS, appended hereto as **Exhibit A**, which Surge believes will accomplish the desired objectives outland above.

The Settlement Agreement

12. The material terms of the Settlement Agreement are as follows:

a. **Approval of Surge Receivables for Funding.** Subject to conditions detailed in the Settlement Agreement, effective in February 2024, RTS will provide a credit rating of "D" to Surge, which rating is subject to change by RTS at any time utilizing commercially reasonable discretion based upon its history of providing credit scores to its customers. Upon the posting of the letter of credit described below, Surge's credit rating shall be raised to "C."

b. **Reduction of RTS' Claim.** In consideration of the releases and other concessions provided herein, RTS agrees to reduce its claim against the bankruptcy estate by thirty percent (30%) contingent upon confirmation of a Plan of Reorganization which incorporates the material terms of the Settlement Agreement. Accordingly, RTS shall be deemed to have an Allowed General Unsecured Claim of \$1,782,636.70 for plan distribution purposes. In the event Surge agrees to a lesser percentage discount on the allowance of any claim held by a similarly situated factor who is owed more than \$250,000, the discount percentage applicable to RTS shall be reduced to match the terms of that Settlement Agreement. In an effort to help

preserve Surge's relationship with its Carriers, RTS agrees, prospectively, to forego seeking further recourse against its Carriers on account of any Surge invoices factored prior to the Petition Date.

c. **Letter of Credit.** Surge shall post and maintain for a period of twelve (12) months a letter of credit in favor of RTS in the amount of \$100,000 to help ensure that all undisputed post-confirmation receivables factored through RTS are timely paid. The letter of credit shall be in a form and substance acceptable to both Surge and RTS and shall not be subject to any liens in favor of Surge's secured creditor, Triumph Financial Services, Inc., d/b/a Triumph Business Credit ("Triumph"), or any other third party.²

d. **Waiver of Preference Claims.** In consideration of the concessions contained in the Settlement Agreement, Surge, for itself and on behalf of its bankruptcy estate, waives all avoidance claims which may be asserted against RTS pursuant to 11 U.S.C. §§ 544, 547, 548, 549 and 550. Surge further agrees that it will not seek avoidance of any payments made to Carriers who factored receivables through RTS totaling less than \$25,000 in the aggregate.

e. **Damages for Breach and Release of Claims.** In the event RTS shall have materially breached its obligations under the Settlement Agreement within two (2) years of the Petition Date, the release of avoidance claims shall be rescinded. Upon bankruptcy court approval (as defined below) which is a condition precedent to any obligations of RTS hereunder, and subject to the preceding sentence, Surge on behalf of itself and, without limitation, on behalf of its directors, officers, shareholders, employees, partners, associates, representatives, agents, assigns, members, predecessors, successors, subsidiaries and attorneys, shall be deemed to have fully and forever released and discharged RTS and, without limitation, its directors, officers, shareholders, employees, partners, associates, representatives, agents, assigns, members, predecessors, successors, subsidiaries, affiliates and attorneys, from any and all claims, causes of action, suits, demands, costs, damages, losses, liabilities, or obligations of any character, past, present or future, whether in law or in equity, contract or tort, known or unknown, which such party had or now has against the other parties or any third parties relating to, arising out of, or are in any way connected to the credit rating for Surge. Nothing herein shall be deemed or construed as a release of any claim arising from a breach of the Settlement Agreement.

f. **Conditions Precedent.** Except as outlined in subparagraph a above, the Agreement, and all compromises and releases contained therein,

² The initial letter of credit will be posted by Omar Singh personally, to be replaced with Surge's funds when cash flow permits.

are conditioned upon and shall not be deemed effective until the following events have occurred and are no longer subject to rehearing or appeal:

- i. A Plan of Reorganization containing all material terms outlined herein shall have been confirmed;
- ii. Triumph or another lender shall have funded an exit facility loan in an amount not less than \$1,500,000;
- iii. Surge shall have posted the letter of credit in favor of RTS; and
- iv. Surge's Plan of Reorganization shall have been substantially consummated.

13. The Settlement Agreement is the product of good faith, arm's-length negotiations between the Debtor and RTS. As set forth below, approval of the Settlement Agreement is in the best interests of the Debtor, the Debtor's estate, and its creditors.

Basis for Relief

14. Bankruptcy Rule 9019(a) provides that on a motion by the trustee, or in this case, a debtor in possession, and after notice and a hearing the court may approve a compromise or settlement. "The decision of a [t]rustee in Bankruptcy to enter a settlement is made within his or her business judgment. Compromises are generally approved if the Bankruptcy Court finds that they meet the business judgment of the trustee." *U.S. v. Hartog*, 597 B.R. 673, 679 (S.D. Fla. 2019) (internal citations omitted). When considering compromises or settlements for approval, the bankruptcy court is to "determine whether the proposed settlement is fair and equitable." *In re Air Safety Int'l, L.C.*, 336 B.R. 843, 852 (S.D. Fla. 2005). Settlements or compromises should be approved unless they "fall

below the lowest point in the range of reasonableness.” *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993).

15. Here, it is imperative that Surge be able to actually deliver freight as requested by its Customers. To do so, it needs to have a sufficient volume of Carriers bidding to deliver those loads. Like Surge, the vast majority of Carriers in the transportation industry factor their receivables, preferring not to await payment from the shipper or broker who requested their services. If a broker or shipper is deemed an adverse credit risk by the Carrier’s factor, however, then the receivables generated by that shipper or broker are deemed ineligible and cannot be factored. The Carriers will not therefore do business with the ineligible shipper or broker.

16. RTS is one of the largest factoring companies in the transportation industry. It is essential to Surge’s reorganization therefore that the payables which it generates be deemed eligible for factoring through RTS. After weeks of negotiations, Surge believes it finally has reached a compromise with RTS that will allow Carriers who sell receivables to RTS to factor receivables owed to them by Surge.

17. Under the terms of the compromise, RTS will approve Surge receivables for factoring in exchange for a waiver of potential preference claims against RTS. Besides removing an obstacle to rehabilitation, this concession was deemed necessary because the successful pursuit of preference claims against RTS will in turn result in RTS pursuing recourse against the very Carriers which Surge is trying to attract, thereby defeating the underlying goal.

18. Surge also made this concession in recognition of the fact that RTS likely has a significant new value defense to the underlying preference claims (perhaps as much

as \$2,546,623), and that the cost of pursuing the preference claims will be significant. Surge also believes that clearing the impediment to its Carriers' factoring with RTS will result in Surge receiving an exit facility loan which will produce a distribution greater than any distribution which creditors could hope to achieve through Surge's pursuit of preference claims against RTS, particularly if the Carriers who are forced to indemnify RTS are permitted to file claims against the estate.³

19. To help ensure that the benefits of the compromise do in fact outweigh the downside of waiving the preference claims against RTS, Surge has negotiated a 30% reduction of RTS' claim (i.e. a \$763,987 reduction), which in turn will boost the percentage distribution to similarly situated creditors, thus offsetting to some degree the economic impact associated with waiving any potential preference claims.

20. Importantly, the waiver of preference claims and the reduction in RTS' allowed claim are both contingent upon the entry of an order confirming Surge's plan of reorganization. See Settlement Agreement ¶ 11. The preference claims are not therefore lost if Surge's reorganization fails.

21. In the Eleventh Circuit, the factors courts consider in determining whether to approve the settlement include: (i) the probability of success in the litigation; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and (iv) the paramount interest of the creditors and proper deference to their reasonable views in the premises. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990) (establishing the legal standard for approval of settlements). In evaluating the settlement,

³ Surge is presently negotiating an exit facility loan of at least \$1.5 million.

the Court “need not rest its decision whether to approve a settlement upon a resolution of ultimate factual and legal issues which underlie the disputes that are proposed to be compromised ... rather, the Court may, and should, make a pragmatic decision on the basis of all equitable factors.” *In re Holywell Corp.*, 93 B.R. 291 (Bankr. S.D. Fla. 1988) (emphasis in original, citations omitted).

22. Though the Court is not necessarily bound by the Debtor’s business judgment in settling a matter, that judgment is normally afforded some measure of deference. *See, e.g., In re Iridium Operating, LLC*, 478 F.3d 452, 462 (2nd Cir. 2007)(“[W]hile the ‘approval of a settlement rests in the Court’s sound discretion, the debtor’s business judgment should not be ignored”); and *In re Kerner*, 599 B.R. 751, 756 (Bankr. S.D.N.Y. 2019)(“the Court may give weight to the informed judgment of the trustee or debtor-in-possession and their counsel that a compromise is fair and equitable”).

23. Application of the *Justice Oaks II* factors to the justifications outlined above establishes that the settlement between Surge and RTS, as memorialized in the Settlement Agreement, is well within the range of reasonableness and in the best interests of the estate and its creditors. Accordingly, Surge respectfully submits that the Settlement Agreement should be approved.

THAMES | MARKEY

/s/ Richard R. Thames

By _____
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Attorneys for Surge Transportation, Inc.

Certificate of Service

I hereby certify that on February 21, 2024, the foregoing pleading was transmitted to the Clerk of the Court for uploading to the Case Management/Electronic Case Files (“CM/ECF”) System, which will send a notice of electronic filing to the persons who have consented to the receipt of pleadings through electronic means. I further certify that on February 21, 2024, a copy of the foregoing was served by U.S. Mail, postage prepaid to the “Short List” list of creditors and parties in interest listed on the mailing matrix attached hereto.

/s/ Richard R. Thames

Attorney

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Chicago, Illinois 60603-2300

Bank of America
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Citibank Europe, PLC
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Fort Worth, Texas 76161

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General Counsel, Legal Dept.
115 55th Street
Clarendon Hills, Illinois 60514

Crestmark TPG, LLC
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E2Open/Bluejay Solutions, LLC
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Carlsbad, California 92008

England Carrier Services
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St. Louis, Missouri 63195

Firstline Funding Group
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Saint John Capital Corp.
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Oklahoma City, Oklahoma 73132

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U.S. Securities & Exchange
Commission
Office of Reorganization
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Internal Revenue Service
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Philadelphia, PA 19101-7346

U.S. Small Business Administration
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EXHIBIT “A”

SETTLEMENT AGREEMENT (RTS)

THIS SETTLEMENT AGREEMENT (this “Agreement”) is made and entered into this 15th day of February, 2024, by and between **SURGE TRANSPORTATION, INC.** (“Surge”) and **RTS FINANCIAL SERVICE, INC.** (“RTS”) (collectively, the “Parties”).

Preliminary Statement. Surge is a Jacksonville, Florida based trucking/freight broker licensed with the U.S. Department of Transportation and the United States Federal Motor Carrier Safety Administration specializing in sourcing extra truckload capacity during peak seasons and other periods of high demand. The Debtor’s customers are primarily suppliers of consumer goods including large Fortune 1000 shippers and manufacturers.

On July 24, 2023 (the “Petition Date”), Surge filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in that certain case styled *In re Surge Transportation, Inc.*; United States Bankruptcy Court, Middle District of Florida, Jacksonville Division; Case No. 3:23-bk-1712-JAB (the “Bankruptcy Case”).

On the Petition Date, RTS was owed \$2,546,623.90 on account of freight transportation charges which it factored on account of its freight carrier customers (the “RTS Claim”).

In the ninety (90) days preceding the Petition Date, RTS received payments totaling \$3,787,558.00, some or all of which may be avoidable as preferential transfers under 11 U.S.C. §§ 547(b) and 550.

Surge is in the process of developing a plan of reorganization (the “Proposed Plan”) to be funded by Triumph Financial Services, Inc., doing business as Triumph Business Credit (“Triumph”), or one of its affiliates, pursuant to which Surge will make available at least \$1,500,000 in loan proceeds to be distributed to administrative, priority and general unsecured creditors in order of their priority. Triumph’s exit funding will be contingent upon the entry of a bar order by the bankruptcy court, to be contained within an order confirming Surge’s Proposed Plan, enjoining all carriers and other persons who provided freight transportation services to Surge from seeking disgorgement or claiming ownership of any portion of the receivables which Surge factored through Triumph.

As a result of the bankruptcy filing, RTS has designated Surge receivables as being ineligible for factoring through RTS. Inasmuch as the majority of carriers with whom Surge transacts business factor their receivables through RTS, the designation is impacting Surge’s ability to fulfill customer orders.

In order to make the Proposed Plan successful and repay the exit facility loan, it is necessary that Surge's carriers be able to factor receivables through RTS. Surge has therefore requested that RTS allow its customers to factor Surge receivables, in amounts acceptable by RTS in its sole discretion, through RTS in exchange for a waiver of potential avoidance claims against RTS and its customers.

In consideration of these premises, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

Agreement

1. **Recitals.** The recitals set forth in the Preliminary Statement are true and correct.

2. **Approval of Surge Receivables for Funding.** Effective February __, 2024, RTS will provide a credit rating of "D" to Surge, which rating is subject to change by RTS at any time utilizing commercially reasonable discretion based upon its history of providing credit scores to its customers. Upon the posting of the letter of credit described in paragraph 4 below, Surge's credit rating shall be raised to "C." The conditions for maintenance of the "C" rating are as follows:

a. (i) Triumph shall maintain its "Quick Pay" program for at least twelve (12) months following confirmation of Surge's Proposed Plan or (ii) Surge's "days to pay" shall not exceed five (5) days; and

b. The outstanding balance of Surge accounts purchased by RTS from its factoring customers shall not exceed the amount of the letter of credit or a lower amount in RTS' commercially reasonable discretion based upon its history of providing credit scores to its customers.

At any point in time the AR volume with RTS exceeds the amount of the Letter of Credit, Surge may maintain its "C" rating by increasing the amount of the letter of credit referenced in paragraph 4 below.

To the extent any other material circumstances arise that cause RTS in its commercially reasonable discretion based upon its history of provided credit scores to its customer to determine that the risk of Surge being able to make the payments is outside the normal parameters for the current rating, RTS may change the rating for Surge to any other rating based upon its credit rating parameters following advance written notice to Surge. The parties shall then work together in good faith to find solutions that would allow Surge to maintain its credit score.

3. **Reduction of RTS' Claim.** In consideration of the releases and other concessions provided herein, RTS agrees to reduce its claim against the bankruptcy estate by thirty percent (30%) contingent upon confirmation of the Proposed Plan which incorporates the material terms of this Agreement. Accordingly, RTS shall be deemed to

have an Allowed General Unsecured Claim of \$1,782,636.70 for plan distribution purposes. In the event Surge agrees to a lesser percentage discount on the allowance of any claim held by a similarly situated factor who is owed more than \$250,000, the discount percentage applicable to RTS shall be reduced to match the terms of that settlement. In an effort to help preserve Surge's relationship with its carriers, RTS agrees, prospectively, to forego seeking further recourse against its carriers on account of any Surge invoices factored prior to the Petition Date.

4. **Letter of Credit.** Upon Triumph's funding of the exit facility loan, Surge shall post and maintain for a period of twelve (12) months a letter of credit in favor of RTS in the amount of \$100,000 to help ensure that all undisputed post-confirmation receivables factored through RTS are timely paid. The letter of credit shall be in a form and substance acceptable to both Surge and RTS and shall not be subject to any liens in favor of Triumph or any other third party.

5. **Waiver of Preference Claims.** In consideration of the concessions contained herein, and subject to the provisions of paragraph 6 below, Surge, for itself and on behalf of its bankruptcy estate, waives all avoidance claims which may be asserted against RTS pursuant to 11 U.S.C. §§ 544, 547, 548, 549 and 550. Surge further agrees that it will not seek avoidance of any payments made to carriers who factored receivables through RTS totaling less than \$25,000 in the aggregate.

6. **Damages for Breach and Release of Claims.** In the event RTS shall have materially breached its obligations hereunder within two (2) years of the Petition Date, the release of avoidance claims provided in paragraph 5 above shall be rescinded. Upon bankruptcy court approval (as defined below) which is a condition precedent to any obligations of RTS hereunder, and subject to the preceding sentence, Surge on behalf of itself and, without limitation, on behalf of its directors, officers, shareholders, employees, partners, associates, representatives, agents, assigns, members, predecessors, successors, subsidiaries and attorneys, shall be deemed to have fully and forever released and discharged RTS and, without limitation, its directors, officers, shareholders, employees, partners, associates, representatives, agents, assigns, members, predecessors, successors, subsidiaries, affiliates and attorneys, from any and all claims, causes of action, suits, demands, costs, damages, losses, liabilities, or obligations of any character, past, present or future, whether in law or in equity, contract or tort, known or unknown, which such party had or now has against the other parties or any third parties relating to, arising out of, or are in any way connected to the credit rating for Surge. Nothing herein shall be deemed or construed as a release of any claim arising from a breach of this Agreement.

7. **Consent to Bar Order in Favor of Triumph.** Surge's ability to fund its exit from the Chapter 11 process is dependent upon financing from Triumph. As a condition to funding that exit facility, Triumph will require the issuance of a bar order in the Bankruptcy Case enjoining any carrier or factor from asserting a claim of ownership to all or any part of the receivables which Surge factored through Triumph. RTS consents to the entering of such a bar order and injunction on the condition that Triumph fund the exit facility described in the preliminary statement:

8. **Surge's Obligations.** Surge believes that prompt confirmation of the Proposed Plan will best facilitate Surge's business and financial restructuring and is in the best interests of Surge's creditors and other parties in interest. Accordingly, Surge hereby expresses its intention to seek prompt approval of the Proposed Plan outlined herein. Without limiting the foregoing, for so long as this Agreement remains in effect, and subject to each Party fulfilling its respective obligations as provided herein, Surge agrees:

a. to use commercially reasonable efforts to file and obtain final approval of the Proposed Plan, solicit the requisite votes in favor of, and to obtain confirmation of Surge's the Proposed Plan to the extent possible within sixty (60) days of this Agreement; and

b. to otherwise use commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by the Proposed Plan as they pertain to RTS;

9. **RTS' Obligations.** Nothing herein shall be deemed to be a solicitation of votes in favor of or against the Proposed Plan, with RTS expressly maintaining the right to vote in favor of or against any such plan. However, for so long as this Agreement remains in effect and has not been terminated in accordance with the terms hereof, and subject to the Surge fulfilling its respective obligations as provided herein, RTS shall:

a. not pursue, propose, support, or encourage the pursuit, proposal or support of, any chapter 11 plan or other restructuring or reorganization for, or the liquidation of Surge that is inconsistent the terms of the Proposed Plan, described generally herein;

b. not commence any proceeding or prosecute, join in, or otherwise support any objection to oppose or object to any plan of reorganization proposed by Surge which contains the material terms of this Agreement; and

c. not take any other action (including, without limitation, initiating any legal proceeding) that is inconsistent with, or that would delay consummation of, a plan of reorganization proposed by Surge which contains the material terms of this Agreement.

10. **Intent.** This Agreement is intended to settle disputes between the Parties. While the Parties agree herein to support approval of the Proposed Plan, this Agreement is not and shall not be deemed to be a solicitation for consent to the to be developed plan of reorganization in contravention of applicable non-bankruptcy law or § 1125(b) of the Bankruptcy Code.

11. **Conditions Precedent.** Except as provided in paragraph 2 above, this Agreement, and all compromises and releases contained herein, are conditioned upon and

shall not be deemed effective until the following events have occurred and are no longer subject to rehearing or appeal:

- a. The Proposed Plan containing all material terms outlined herein shall have been confirmed;
- b. Triumph shall have funded the exit facility in an amount not less than \$1,500,000;
- c. Surge shall have posted the letter of credit in favor of RTS; and
- d. Surge's Proposed Plan shall have been substantially consummated.

12. Termination Events Applicable to All Parties. This Agreement may be terminated prior to the confirmation of Surge's Proposed Plan upon the occurrence of any of the following events (each, a "Termination Event"):

- a. By either Party if the other Party shall have breached any of its material obligations under this Agreement;
- b. By RTS if Surge's Proposed Plan is not consistent in all material respects with this Agreement;
- c. By either Party, if the Bankruptcy Case shall have been dismissed or converted to a case under chapter 7 of the Bankruptcy Code, or an interim or permanent trustee, a responsible officer or an examiner with powers beyond the duty to investigate and report (as set forth in §§ 1106(a)(3) and (4) of the Bankruptcy Code) shall be appointed to oversee or operate Surge in the Bankruptcy Case or if Surge files a motion seeking any of the foregoing relief;
- d. By either Party, if any court (including the bankruptcy court) shall determine this Agreement to be unenforceable; and
- e. By either Party, upon entry of an order by the bankruptcy court denying confirmation of the Proposed Plan.

13. Effect of Termination. Upon termination of this Agreement, all obligations and releases hereunder shall terminate and shall be of no further force and effect.

14. Bankruptcy Court Approval. This Agreement is subject to bankruptcy court approval following such notice and opportunity to object as required by law. Surge shall be responsible for obtaining such approval within fourteen (14) days of the execution of this Agreement. Following bankruptcy court approval, this Agreement shall be binding in all respects without need for further documentation, subject only to the Conditions Precedent outlined in paragraph 11 above (as qualified by paragraph 2 above).

15. **Representations and Warranties.** Each of the Parties represents and warrants to each other Party, severally but not jointly (and solely with respect to itself), that the following statements are true, correct and complete as of the date hereof:

a. **Corporate Power and Authority.** It is duly organized, validly existing, and in good standing under the laws of the state or country of its organization, and has all requisite corporate, partnership or other power and authority to enter into this Agreement and to carry out the transactions contemplated by, and to perform its respective obligations under, this Agreement;

b. **Authorization.** The execution and delivery of this Agreement and the performance of its obligations hereunder have been duly authorized by all necessary corporate, partnership or other action on its part;

c. **Binding Obligation.** This Agreement has been duly executed and delivered by it and constitutes its legal, valid and binding obligation, enforceable in accordance with the terms hereof, subject to bankruptcy court approval; and

d. **No Conflicts.** The execution, delivery and performance (when such performance is due) of this Agreement do not and shall not (i) violate any provision of law, rule or regulation applicable to it or any of its subsidiaries or its certificate of incorporation or bylaws or other organizational documents or those of any of its subsidiaries, or (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any material contractual obligation to which it or any of its subsidiaries is a party.

16. **Miscellaneous.**

a. **Notices.** Any notice required or desired to be served, given or delivered under this Agreement shall be in writing, and shall be deemed to have been validly served, given or delivered if provided by personal delivery, or upon receipt of email delivery, as follows:

i. if to Surge, to:

Richard R. Thames, Esq.
Thames|Markey
50 North Laura Street, Suite 1600
Jacksonville, Florida 32202

ii. if to RTS, to:

RTS Financial Service, Inc.
Attn: Jim Maurer
9300 Metcalf Avenue
Overland Park, Kansas 66212

b. **Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the state of Florida, without regard to any conflicts of law provision which would require the application of the law of any other jurisdiction. By its execution and delivery of this Agreement, each of the Parties hereby irrevocably and unconditionally agrees for itself that any legal action, suit or proceeding against it with respect to any matter under or arising out of or in connection with this Agreement or for recognition or enforcement of any judgment rendered in any such action, suit or proceeding, shall be brought in the bankruptcy court for the Middle District of Florida, Jacksonville Division.

c. **Headings.** The headings of the sections, paragraphs and subsections of this Agreement are inserted for convenience only and shall not affect the interpretation hereof.

d. **Interpretation.** This Agreement is the product of negotiations of the Parties, and in the enforcement or interpretation hereof, is to be interpreted in a neutral manner, and any presumption with regard to interpretation for or against any Party by reason of that Party having drafted or caused to be drafted this Agreement, or any portion hereof, shall not be effective in regard to the interpretation hereof.

e. **Successors and Assigns.** This Agreement is intended to bind and inure to the benefit of the Parties and their respective successors, assigns, heirs, transferees, executors, administrators and representatives.

f. **No Third-Party Beneficiaries.** Unless expressly stated herein, this Agreement shall be solely for the benefit of the Parties and no other person or entity shall be a third-party beneficiary hereof.

g. **No Waiver of Participation and Reservation of Rights.** Except as expressly provided in this Agreement and in any amendment between the Parties, nothing herein is intended to, or does, in any manner waive, limit, impair or restrict the ability of each Party to protect and preserve their rights, remedies and interests, including without limitation, its claims against the other Party or its full participation in the Bankruptcy Case. If the transactions contemplated by this Agreement or in the Proposed Plan are not consummated, or if this Agreement is terminated for any reason, the Parties fully reserve any and all of their rights.

h. No Admissions. This Agreement shall in no event be construed as or be deemed to be evidence of an admission or concession on the part of any Party of any claim or fault or liability or damages whatsoever. Each Party denies any and all wrongdoing or liability of any kind and does not concede any infirmity in the claims or defenses which it has asserted or could assert. No Party shall have, by reason of this Agreement, a fiduciary relationship in respect of any other Party or any party in interest in the Bankruptcy Case, and nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon any Party any obligations in respect of this Agreement except as expressly set forth herein.

i. Counterparts. The Parties may execute this Agreement in multiple counterparts, each of which constitutes an original, and all of which, collectively, constitute only one agreement. The signatures of all of the Parties need not appear on the same counterpart, and delivery of an executed counterpart signature page by facsimile or by electronic counterpart such as a pdf. document is as effective as executing and delivering this Agreement in the presence of the other parties to this Agreement.

j. Representation by Counsel. Each Party acknowledges that it has been represented by counsel in connection with this Agreement and the transactions contemplated herein. Accordingly, any rule of law or any legal decision that would provide any Party with a defense to the enforcement of the terms of this Agreement against such Party based upon lack of legal counsel shall have no application and is expressly waived.

k. Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersede all prior and contemporaneous agreements, representations, warranties and understandings of the Parties, whether oral, written or implied, as to the subject matter hereof.

IN WITNESS WHEREOF THE UNDERSIGNED HAVE CAUSED THIS AGREEMENT TO BE DULY EXECUTED AND DELIVERED BY THEIR RESPECTIVE, DULY AUTHORIZED OFFICERS AS OF THE DATE FIRST ABOVE WRITTEN.

~~COHEN & PALOMMBO P. C.~~

~~By _____
Jeffrey D. Cohen~~

~~The Times Building
32 Parking Plaza, Suite 19003
Admore, Pennsylvania 19003~~

~~Attorneys for OTR Capital, LLC~~

RTS FINANCIAL SERVICES, INC.

By 
Ken Bowman, Vice President and CFO

THAMES | MARKEY

By Richard R. Thames
Richard R. Thames

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Attorneys for Surge Transportation, Inc.

SURGE TRANSPORTATION, INC.

By Omar Singh
Omar Singh
Its President