

**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 TO COMPEL ALEXANDER WINTON & ASSOCIATES, INC.’S
COMPLIANCE WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019**

Debtor, Surge Transportation, Inc. (“Surge”), moves the Court for the entry of an order compelling Alexander Winton & Associates, Inc. (“AWA”) to comply with Rule 2019, Federal Rule of Bankruptcy Procedure (the “Motion”), and in support thereof states:

Background

1. Surge is a Jacksonville 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. The Debtor maintains satellite offices in Chicago, Illinois and Ashburn, Virginia.

2. Surge does not employ drivers directly nor maintain a fleet of equipment. The Debtor is instead a “digital” brokerage. Its business model is based on Application Programming Interface (or “API”) pricing, a software-based approach to bidding on jobs

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.

which permits real-time pricing and routing guide price optimization. API pricing allows the Debtor to instantly bid on a high number of jobs, matching customers with carriers at competitive rates.

3. The Debtor'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.

4. With its API model in place, Surge was well-positioned to leverage the supply-side stresses of the Covid-19 pandemic where on-line shopping spiked, resulting in suppliers scrambling to transport goods to distribution centers and then to end users. Surge experienced tremendous growth and prosperity during this period. For example, in 2020, the Debtor experienced 240% year-over-year sales growth, while in 2021, it experienced 260% year-over-year sales growth.

5. The dramatic increase in volume during the pandemic ended abruptly, however, beginning in the May timeframe when inflation, the war in Ukraine and the easing of Covid-19 restrictions began to suppress product demand and increase the cost of shipping. Surge, like many others in the industry, did not anticipate the rapid change in the demand for shipping services and failed to reduce overhead in a timely fashion. As a result, Surge became increasingly delinquent in the payment of carrier claims to the point where accounts payable now total nearly \$12 million owed to approximately 5,000 carriers. This Chapter 11 reorganization was filed on July 24, 2023 (the "Petition Date") as a means of addressing those claims in an orderly fashion.

6. On August 11, 2023, Motions for Admission of Cohen & Palombo, P.C. to Practice *Pro Hac Vice*, Designation of Local Counsel and Consent to Act were filed by Jeffrey D. Cohen and Timothy Frey on behalf of AWA [Docket Nos. 77 and 78] who in turn purport to represent 100 or more of the Debtor's creditors.

7. AWA is not itself a provider of transportation services, nor has Surge ever transacted business with the company. According to AWA's website, AWA "prides itself on being a contingency based collection firm."²

8. Since making its appearance, AWA has also filed a motion to withdraw the reference, and has initiated an adversary proceeding against Triumph Business Credit (Adversary No. 3:23-ap-00081-JAB). Absent compliance with Rule 2019, the Debtor is to determine if AWA in fact has standing to initiate such litigation.

9. AWA's counsel has since appeared before the Court on at least two occasions, the first arguing against the Debtor's motion for approval of a post-petition factoring agreement with Triumph Business Credit at a hearing held August 15, 2023, and the second on September 19, 2023, arguing against Debtor's Motion for Order (I) Authorizing Release and Discharge of Customers, and (II) Barring Carrier from Asserting Direct Claims Against Debtor's Customers (the "Bar Order").

10. At the conclusion of the September 19, 2023 hearing, the Court announced its intention to enter a permanent injunction or bar order against all parties who did not appear to oppose the Bar Order Motion, and a preliminary injunction or bar order against those parties represented by AWA. Absent an identification of the clients for whom

² www.awcollects.com

AWA is collecting, however it is impossible for Surge, the Court and other interested parties to determine who is barred on a permanent or preliminary basis.

11. In addition, Surge will at some point (hopefully in short order), present a plan of reorganization which will be circulated with an accompanying disclosure statement to all creditors entitled to vote thereon. If claims have in fact been assigned to AWA, then the mandatory disclosures and solicitation attendant the plan confirmation process need not be made to the creditors who have assigned their contractual rights to AWA. Identifying such parties is therefore imperative if for nothing else but to eliminate duplicative and inconsistent voting. To that same end, identification of the parties represented by AWA is necessary to determine if AWA is entitled to receive distributions or file ballots on behalf of its purported constituency. It is therefore imperative that AWA comply with its Rule 2019 obligations by date certain.

Jurisdiction and Venue

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

13. The statutory predicate for the relief requested herein is Federal Rule of Bankruptcy Procedure 2019.

Relief Requested

14. By this Motion, Surge respectfully requests the Court to enter an order, substantially in the form attached hereto as **Exhibit A**, compelling AWA to comply, by date certain, with Bankruptcy Rule 2019 by requiring AWA to, among other things, disclose the names of all parties who have assigned claims to it, the amount of each claim assigned to it, the date(s) such claims were acquired, the amount paid therefore, and its authority to act in a representative capacity for such creditors.

Basis for Relief

15. Bankruptcy Rule 2019(a) requires that every entity representing more than one creditor file a verified statement setting forth: (i) the name and address of the creditor; (ii) the nature and amount of the claim and the time it was acquired (unless alleged to have been acquired more than one year prior to the bankruptcy filing); (iii) a recital of the pertinent facts and circumstances in connection with the employment of the entity and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized and agreed to act; and (iv) the amounts of claims owned by the entity, the members of the committee, the times when acquired, the amounts paid therefore, and any sales or dispositions thereof. *See* Fed. R. Bankr. P. 2019(a); *see also In re Northwest Airlines, Inc.*, 363 B.R. 701, 702 (Bankr. S.D.N.Y. 2007) (“[b]y its plain terms, the Rule requires disclosure of the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefor, and any sales or other

disposition thereof.”) (internal quotations omitted). The use of the word “shall” in Rule 2019(a) indicates that compliance with the forgoing disclosure obligations is mandatory. Bankruptcy Rule 2019(c)(4) further requires the prompt filing of the instrument(s) authorizing AWA to act on behalf of the creditors it purports to represent.

16. The purpose of Rule 2019 is “to further the Bankruptcy Code’s goal of complete disclosure during the business reorganization process,” and “to cover entities which, during the bankruptcy case, act in a fiduciary capacity to those they represent, but are not otherwise subject to control of the court.” *Matter of CF Holding Corp.*, 145 B.R. 124, 126 (Bankr. D. Conn. 1992).

17. As evidenced throughout its participation in this case, AWA has undertaken a coordinated effort to speak with one voice on issues relevant to the respective interests of multiple creditors, yet the identity and composition of AWA’s represented constituency remains a near complete mystery to the Court, the Debtor and other creditors. For this and the other reasons stated herein, compliance with Rule 2019 should be required before AWA is permitted to take further action in this case.

Notice

18. Notice of this Motion has been provided to (i) the Office of the United States Trustee for the Middle District of Florida; (ii) counsel for AWA; (iii) counsel to the Committee, (iv) and all parties having requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, Debtor submits no other or further notice is necessary.

Conclusion

WHEREFORE, Surge requests the entry of an order substantially in the form attached hereto as **Exhibit A** (i) compelling AWA to comply with Bankruptcy Rule 2019 by date certain; (ii) precluding AWA's participation in this case until its disclosure deficiencies are fully remedied; and (iii) providing such other relief as is appropriate.

THAMES | MARKEY

/s/ Richard R. Thames

By _____

Richard R. Thames

Florida Bar No. 0718459
50 N. Laura Street, Suite 1600
Jacksonville, Florida 32202
(904) 358-4000
(904) 358-4001 Facsimile
rrt@thamesmarkey.law

- and -

HIRSCHLER FLEISCHER
1676 International Drive, Suite 1350
Tysons, Virginia 22102-4940
(703) 584.8900
(703) 584.8901 Facsimile
sleach@hirschlerlaw.com
kburgers@hirschlerlaw.com
dswan@hirschlerlaw.com

Attorneys for Surge Transportation, Inc.

Certificate of Service

I hereby certify that on September 21, 2023, the foregoing 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 all creditors and parties in interest who have consented to receiving electronic notices in this case.

/s/ Richard R. Thames

Attorney

EXHIBIT “A”

**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
_____)	

**ORDER GRANTING DEBTOR’S MOTION TO COMPEL
ALEXANDER WINTON & ASSOCIATES, INC.’S COMPLIANCE
WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 2019**

This Chapter 11 case is before the Court upon the motion filed by debtor, Surge Transportation, Inc. (“Surge” or “Debtor”), seeking an order compelling Alexander Winton & Associates, Inc. (“AWA”) to comply with Federal Rule of Bankruptcy Procedure 2019 [Docket No. _____] (the “Motion”). A hearing on the Motion was held _____, 2023. Upon consideration thereof, it is ORDERED:

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.

1. The Motion is Granted.

2. On or before [**October 15, 2023**], AWA shall file a verified statement setting forth: (i) the name and address of each creditor or party in interest it represents either as an assignee or representative; (ii) the nature and amount of the claim and the time it was acquired (unless alleged to have been acquired more than one year prior to the bankruptcy filing); (iii) a recital of the pertinent facts and circumstances in connection with the assignment; and (iv) the amounts of claims owned by the entity, the times when acquired, and the amounts paid therefore.

3. In accordance with Rule 2019(c)(4), AWA shall attach copies of the instruments evidencing the assignment of claims to it and proof of its authority to act on behalf of each member of its creditor constituency to the verified statement.

4. In accordance with Rule 2019(e), AWA shall not be permitted to participate in this case after [**October 15, 2023**] until it has complied with the requirements of this Order.

Richard R. Thames, Esq. 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.