

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

In re:

BURGESS BIOPOWER, LLC, *et al.*¹

Debtors.

Chapter 11

Case No. 24-10235 (LSS)

(Joint Administration Requested)

**MOTION OF DEBTORS PURSUANT TO 11 U.S.C. §§ 105 AND 107,
FED. R. BANKR. P. 9018 AND DEL. BANKR. L.R. 9018-1 FOR ENTRY
OF AN ORDER (I) AUTHORIZING DEBTORS TO FILE FEE LETTER
UNDER SEAL AND (II) GRANTING RELATED RELIEF**

Burgess BioPower, LLC (“Burgess”) and Berlin Station, LLC (“Berlin”), the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), hereby submit this *Motion of Debtors Pursuant to 11 U.S.C. §§ 105 and 107, Fed. R. Bankr. P. 9018 and Del. Bankr. L.R. 9018-1 for Entry of an Order (I) Authorizing Debtors to File Fee Letter Under Seal and (II) Granting Related Relief* (the “Motion”). In support of the Motion, the Debtors respectfully state as follows:

Relief Requested

1. By this Motion, pursuant to sections 105 and 107 of title 11 of the United States Code (the “Bankruptcy Code”), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9018-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Bankruptcy Rules”), the Debtors request entry of an order (i) authorizing the Debtors to file under seal and to redact certain portions of the Fee Letter (as defined below), (ii) directing that the Fee Letter shall

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors’ corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

remain under seal and confidential and not be made available to any person without the consent of the Debtors and DBTCA (as defined below), unless otherwise provided by order of the Court, and (iii) granting related relief.

2. A proposed form of order granting the relief requested herein is annexed hereto as **Exhibit A** (the “Proposed Order”).

Background

3. On February 9, 2024 (the “Petition Date”), the Debtors commenced the above-captioned chapter 11 cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date of this Motion, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

4. On the Petition Date, the Debtors filed the *Debtors’ Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection to the Prepetition Secured Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 33] (the “DIP Motion”),² seeking authorization to obtain postpetition financing (the “DIP Financing”) and approval of their entry into a superpriority senior secured debtor-in-possession credit facility (the “DIP Facility”) in an aggregate principal amount of up to \$54 million consisting of: (a) a new money delayed-draw term loan facility in the aggregate principal amount of up to \$18 million including (i) up to \$4.4 million available to the Borrower on

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the DIP Motion.

an interim basis (the “Interim DIP Term Loan”) and (ii) up to \$18 million (inclusive of all amounts funded by the DIP Lenders on account of the Interim DIP Term Loan), on a final basis, and (b) roll-up loans to refinance on a pro rata basis on a 2:1 ratio as more fully set forth in the DIP Motion, provided by the financial institutions or other entities from time to time party thereto.

5. In connection with entry into the DIP Facility, the Debtors entered into that certain *Berlin Station DIP Financing Project Finance Agency Services* fee letter (the “Fee Letter”), by and between Berlin Station, LLC and Deutsche Bank Trust Company Americas (“DBTCA”). The final form of the Fee Letter is annexed as **Exhibit 1** to the *Notice of Filing of Confidential Fee Letter Under Seal* [Docket No. 35].

6. Due to the sensitive and confidential nature of the commercial information contained in the Fee Letter—i.e., those portions of the Fee Letter that set forth certain fee amounts with respect to the proposed DIP Facility (the “Confidential Information”)—the Debtors request authorization to seal the Confidential Information.

Jurisdiction

7. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

8. Pursuant to Local Bankruptcy Rule 9013-1(f), the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Relief Requested Should Be Granted

9. Sections 105(a) and 107(b) of the Bankruptcy Code allow the Court to authorize the parties to file the Confidential Information under seal. Pursuant to section 105(a) of the Bankruptcy Code, bankruptcy courts have the inherent equitable power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). In addition, section 107(b) provides bankruptcy courts with the power to protect parties in interest from potentially harmful disclosures:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may—

- (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information. . . .

11 U.S.C. § 107(b).

10. Bankruptcy Rule 9018 sets forth the procedure by which a party in interest may obtain a protective order authorizing the filing of a document under seal. Bankruptcy Rule 9018 provides, in relevant part:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information

Fed. R. Bankr. P. 9018.

11. Further, Local Bankruptcy Rule 9018-1(d) provides, in relevant part, that “[a]ny party who seeks to file documents under seal must file a motion to that effect.” Del. Bankr. L.R. 9018-1(d). Once the court determines that a party in interest is seeking protection of information that falls within one of the categories enumerated in section 107(b) of the Bankruptcy Code, “the court is required to protect a requesting interested party and has no discretion to deny the

application.” *Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994).

12. Courts have held that protection under section 107(b) of the Bankruptcy Code must be granted if the information sought to be protected is “commercial information,” and, significantly, such commercial information need not rise to the level of a trade secret to be entitled to protection. *See id.* at 28 (finding that the use of the disjunctive in section 107(b)(1) “neither equates ‘trade secret’ with ‘commercial information’ nor requires the latter to reflect the same level of confidentiality as the former”). Furthermore, in contrast with Rule 26(c) of the Federal Rules of Civil Procedure, section 107(b) of the Bankruptcy Code does not require an entity seeking such protection to demonstrate “good cause.” *Id.* Nor does section 107(b) of the Bankruptcy Code require a finding of “extraordinary circumstances or compelling need.” *Id.* at 27.

13. Rather, a party seeking the protection of section 107(b) need only demonstrate that the information is “confidential” and “commercial” in nature. *Id.*; *see also In re Glob. Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (recognizing that the purpose of Bankruptcy Rule 9018 is to “protect business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury”). Once the moving party establishes that the subject information qualifies as “commercial information” under section 107(b)(1), the Bankruptcy Code mandates this information be protected from disclosure. *See id.*

14. Cause exists to redact the Confidential Information contained in the Fee Letter, because such information constitutes “commercial information” within the meaning of section 107(b) of the Bankruptcy Code, insofar as it concerns the terms of a private, confidential commercial contract between the Debtors and DBTCA that contains sensitive information relating to pricing. Indeed, by its own terms, the Fee Letter is confidential in nature. Further, in accordance

with industry-wide customs, DBTCA treats information such as the Commercial Information as highly sensitive and generally does not make information such as the Commercial Information available to competitor financial institutions, much less to the public.

15. If the Confidential Information were disclosed, the disclosure would cause harm to the Debtors and DBTCA. In fact, disclosure of the Confidential Information could heavily constrain the ability of DBTCA and its affiliates to negotiate fees in future transactions, putting them at a strategic disadvantage relative to their competitors and causing commercial injury.

16. Based on the foregoing, absent protection of its Confidential Information, DBTCA would be placed at a competitive disadvantage, and the Debtors' ability to obtain postpetition financing could be undermined. Maintaining the confidentiality of the Confidential Information set forth in the Fee Letter enables DBTCA to remain competitive and willing to act in certain capacities in connection with postpetition financing for these and other chapter 11 debtors.

17. To balance the need for confidentiality with disclosure, the Debtors' proposed redactions are limited in scope. The Debtors propose to redact only those portions of the Fee Letter that contain highly sensitive, commercial information regarding DBTCA's fees.

18. Courts in this district have granted similar requests to seal or redact portions of post-petition or exit financing documents—such as fee letters in connection with debtor in possession financing—and the commercial information contained therein. *See, e.g., In re Mallinckrodt PLC*, Case No. 23-11258 (JTD) (Bankr. D. Del. Sept. 20, 2023) [Docket No. 302] (authorizing debtors to file under seal debtor-in-possession and receivables financing fee letters); *In re FB Debt Financing Guarantor, LLC*, No. 23-10025 (KBO) (Bankr. D. Del. Jan. 13, 2023) [Docket No. 92] (authorizing debtors to file under seal debtor-in-possession financing fee letters); *In re Vesta Holdings, LLC*, No. 22-11019 (LSS) (Bankr. D. Del. Nov. 18, 2022) [Docket No. 141]

(same); *In re TPC Group Inc.*, No. 22-10493 (CTG) (Bankr. D. Del. July 29, 2022) [Docket No. 541] (same); *In re Secure Home Holdings LLC*, No. 21- 10745 (JKS) (Bankr. D. Del. Apr. 28, 2021) [Docket No. 70] (same); *In re Bumble Bee Parent, Inc.*, No. 19-12502 (LSS) (Bankr. D. Del. Nov. 25, 2019) [Docket No. 71] (same).

19. Accordingly, the Debtors submit good cause exists for the Court to grant them leave to file under seal and to redact those portions of the Fee Letter containing the Confidential Information. Contemporaneously herewith, the Debtors have filed a proposed redacted version of the Fee Letter, annexed as **Exhibit 1**, to the *Notice of Proposed Redacted Version of the Debtor in Possession Financing Fee Letter* [Docket No. 36].

20. The Debtors will provide an un-redacted version of the Fee Letter to the Court pursuant to Local Bankruptcy Rule 9018-1 and will provide an un-redacted version of the Fee Letter on a confidential, professionals' eyes only basis, to (a) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") and (b) counsel to any statutory committee appointed in these Chapter 11 Cases (collectively, the "Receiving Parties").

Compliance with Local Bankruptcy Rule 9018-1(d)(ii)

21. To the best of the knowledge, information, and belief of the undersigned proposed counsel to the Debtors, the Fee Letter contains commercial information subject to the Confidentiality Rights (as defined in Local Bankruptcy Rule 9018-1(d)(iii)) of DBTCA. The undersigned proposed counsel to the Debtors and counsel to DBTCA have conferred in good faith and reached an agreement concerning what information contained in the Fee Letter must remain sealed.

Notice

13. Notice of this Motion will be provided to the following parties: (a) the U.S. Trustee (Attn: Jane M. Leamy); (b) the holders of the twenty (20) largest unsecured claims against each

Debtor; (c) counsel to Deutsche Bank Trust Company Americas, Hogan Lovells US LLP and Richards, Layton & Fingers PA; (d) counsel to the Prepetition Noteholders and DIP Lenders, Greenberg Traurig, LLP; (e) Berlin Bio Investment Fund LLC; (f) Greenline CDF Subfund XVIII LLC, with a copy to Kutak Rock LLP, U.S. Bancorp Community Development Corporation and Leverage Law Group, LLC; (g) Public Service of New Hampshire d/b/a Eversource Energy; (h) the United States Attorney's Office for the District of Delaware; (i) the United States Attorney's Office for the District of New Hampshire; (j) the United States Environmental Protection Agency; (k) the Nuclear Regulatory Commission; (l) the United States Department of Energy; (m) the Federal Energy Regulatory Commission; (n) New Hampshire Department of Environmental Services; (o) New Hampshire Public Utilities Commission; (p) New Hampshire Site Evaluation Committee; (q) New Hampshire Department of Energy; (r) City of Berlin; (s) ISO New England, Inc.; (t) the United States Securities and Exchange Commission; (u) the Internal Revenue Service; and (v) any party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "Notice Parties"). As this Motion is seeking "first day" relief, the Debtors will serve copies of this Motion and any order entered in response of this Motion as required by Local Bankruptcy Rule 9013-1(m). The Debtors submit that, under the circumstances, no other or further notice is required.

22. No previous request for the relief sought herein has been made by the Debtors to this or any other Court.

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WHEREFORE the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: February 11, 2024

/s/ Katharina Earle

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Exhibit A

Proposed Order

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

In re

BURGESS BIOPOWER, LLC, *et al.*¹

Debtors.

Chapter 11

Case No. 24-10235 (LSS)

(Joint Administration Requested)

**ORDER (I) AUTHORIZING DEBTORS TO FILE FEE LETTER
UNDER SEAL AND (II) GRANTING RELATED RELIEF**

Upon the motion, dated February 11, 2024 (the “Motion”)² of Burgess BioPower, LLC (“Burgess”) and Berlin Station, LLC (“Berlin”), as debtors and debtors in possession (collectively, the “Debtors”), in the above-captioned Chapter 11 Cases, pursuant to sections 105 and 107 of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Bankruptcy Rule 9018-1, for entry of an order (this “Order”) (i) authorizing the Debtors to file under seal and redact certain confidential information in connection with the Fee Letter, (ii) directing that the Fee Letter shall remain under seal and confidential and not be made available to any person without the consent of the Debtors and DBTCA, unless otherwise provided by order of the Court, and (iii) granting related relief, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157(a)–(b) and §1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors’ corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Motion.

28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and all objections, if any, to the Motion having been withdrawn, resolved, or overruled; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing the relief requested in the Motion is in the best interests of the Debtors, their estates, creditors, and all parties in interest; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted to the extent set forth herein.
2. The Debtors are authorized, pursuant to sections 105 and 107 of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Bankruptcy Rule 9018-1, to file those certain portions of the Fee Letter containing Confidential Information under seal and to redact such Confidential Information in the Fee Letter. The Confidential Information shall be filed under seal, shall remain confidential, and shall not be made available to anyone, other than as provided in Paragraph 3 of this Order, without further order of this Court.
3. In accordance with Local Bankruptcy Rule 9018-1, the Debtors shall provide an un-redacted version of the Fee Letter to the Court and shall provide an un-redacted version of the Fee Letter to the Receiving Parties on a confidential, “professionals’ eyes only” basis.
4. Any party authorized, pursuant to this Order, to receive a copy of the un-redacted Fee Letter, other than the Court or the Office of the United States Trustee for the District of Delaware, (a) shall confirm to the Debtors (which confirmation may be made via electronic email), prior to receiving a copy of the un-redacted Fee Letter, that such party is bound by the terms of

this Order and shall at all times keep the Confidential Information strictly confidential and shall not disclose the un-redacted Fee Letter or the Confidential Information (or the contents thereof) to any party whatsoever or (b) in the alternative, shall abide by any applicable non-disclosure or confidentiality agreement.

5. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

6. The Debtors are authorized to take all actions necessary or appropriate to effectuate the relief granted in this Order.

7. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.