

**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 THE DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I)
AUTHORIZING THE DEBTORS TO PAY PREPETITION CLAIMS OF CRITICAL
VENDORS 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 (the “Motion”) for entry of interim and final orders, substantially in the form attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order”) and together with the Proposed Interim Order, the “Proposed Orders”), authorizing, but not directing, the Debtors to pay, in the ordinary course of business, the prepetition fixed, liquidated and undisputed claims of certain critical vendors and service providers, subject to the conditions described herein and authorizing financial institutions to receive, process, honor and pay all checks presented for payment and electronic payment requests relating to the foregoing, to the extent directed by the Debtors in accordance with this Motion. In support of this Motion, the Debtors state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* of the United States District

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.

Court for the District of Delaware, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are Sections 105, 363, and 503 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

3. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors consent to the entry of a final order by the Court in connection with this Motion if 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

BACKGROUND

4. On the date hereof (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.

5. The Debtors are authorized to continue to operate their business and manage their properties as debtors-in-possession, pursuant to Bankruptcy Code Sections 1107(a) and 1108. As of the date of this Motion, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

6. Additional information regarding the circumstances leading to the commencement of the Chapter 11 Cases and information regarding the Debtors’ business and capital structure is set forth in detail in the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of*

the Debtors' Chapter 11 Petitions and First Day Pleadings (the "First Day Declaration"), filed contemporaneously with the Motion and incorporated herein by reference.²

RELIEF REQUESTED

7. By this Motion, the Debtors respectfully request entry of the Proposed Orders, pursuant to Sections 105(a), 363, 503(b)(1)(A), and 503(b)(9) of the Bankruptcy Code and Bankruptcy Rules 6003 and 5004, authorizing, but not directing, the Debtors to pay certain prepetition claims held by Critical Vendors (defined below). The Debtors further request that the Court authorize financial institutions to receive, process, honor, and pay all checks presented for payment and electronic payment requests relating to the foregoing to the extent that the Debtors have sufficient funds standing to their credit with such financial institutions, whether such checks were presented or electronic requests were submitted before or after the Petition Date, and that all such financial institutions be authorized to rely on the Debtors' designation of any particular check or electronic payment request as appropriate to this Motion, without any duty of further inquiry, and without liability for following the Debtors' instructions.

CRITICAL VENDORS

A. Critical Vendor Claims

8. As described with more particularity in the First Day Declaration, the Debtors own a 75-megawatt biomass plant (the "Facility") located in Berlin, New Hampshire. The Debtors' business is dependent upon their ability to generate revenue at the Facility, which depends upon the Debtors' access to various essential goods and services provided by certain vendors and service providers.

² The First Day Declaration and other relevant case information are available on the following website maintained by the Debtors' proposed claims and noticing agent, Epiq: <https://dm.epiq11.com/Burgess>

9. The Debtors have reviewed their accounts payable, have estimated accrued costs and expenses, and consulted with the appropriate people responsible for the Debtors' operations³ to identify the vendors and service providers that are essential to the Debtors' ongoing operations (the "Critical Vendors") and corresponding estimated pre-petition amounts due to such Critical Vendors. In particular, the Debtors considered the following criteria, among others, in identifying potential Critical Vendors: (a) whether the vendor or service provider is a "sole source provider; (b) whether the Debtors can find a reasonable vendor or service provider within a reasonable timeframe; (c) whether agreements to which the Debtors are a counterparty permit the Debtors to substitute a vendor or service provider; (d) whether the vendor or service provider is party to an executory contract, and if so, whether any interruption in the goods or services during which the Debtors can seek enforcement of a potential violation of the automatic stay, would have an adverse impact on the Debtors' estates; (e) whether the vendor or service provider may be able to assert a lien against the Debtors' property on account of any unpaid amounts; (f) whether a vendor's prepetition claim is entitled to administrative expense status under Section 503(b)(9) of the Bankruptcy Code; and (g) whether the Debtors have sufficient goods stored in order to continue operations while a replacement vendor is found.

10. Among the types of Critical Vendors identified by the Debtors are certain providers of consumables used in the operation of the Facility and certain providers of maintenance, operations, and other technical services necessary for the operation of the Facility. These vendors

³ As explained in greater detail in the First Day Declaration, the Debtors have no employees, and, instead contract with non-Debtor affiliated companies which provide the services needed to conduct the Debtors' business. As such, the people who identified the Critical Vendors are employees of the non-Debtor affiliated companies, whose services are provided pursuant to certain Shared Service Agreements (as defined in the First Day Declaration). The Debtors are seeking authority to continue operating under the Shared Service Agreements pursuant to *Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Continue Performing Under Certain Shared Services Agreements and Honor Obligations Related Thereto; and (II) Granting Related Relief* filed contemporaneously herewith.

are critical to the Debtors' business because they, among other things (a) possess unique technical knowledge related to the operation of the Facility, (b) have familiarity with the equipment used in the operation of the Facility, (c) provide unique materials and services to the Debtors that are vital to the Facility and the Debtors' business, (d) are closer in proximity to the Facility than alternative providers, (e) are single source providers, or (f) provide some combination of the foregoing.

11. For example, the Debtors have single source suppliers for fuel, maintenance and operating supplies. Finding alternative suppliers would be challenging during the course of the Chapter 11 Cases and create disruption or cessation of the operations of the Facility.

12. The Debtors estimate that the Critical Vendors may be owed up to \$1 million (the "Critical Vendor Claims") as of the Petition Date. Of this estimate, approximately \$0.5 million is owed to the Debtors' sole supplier of fuel and \$0.4 million is due to providers of maintenance services to the plant. The Facility requires two annual eight-day shutdowns for maintenance and repair which generally occur in the spring and fall of each year. The 2023 fall shut down was delayed until December 2023 and therefore, as of the Petition Date, the prepetition maintenance amounts are higher than the average of approximately \$0.2 million in normal operating months because of the recent maintenance and repair services. This group of vendors are critical to the operations of the plant for both ongoing maintenance, safety, and efficiency. Without the parts and services provided by these Critical Vendors, the Debtors will incur excessive down time at the Facility if an unforeseen equipment breakdown occurs. Furthermore, without these Critical Vendors, the skill, experience and components required to efficiently and safely perform the planned eight-day maintenance shut down in April will not be available causing unnecessary expense, delay and potential safety hazards.

13. Another \$0.3 million of the Critical Vendor Claims are of vendors who supply leased equipment, supply chemicals required to run the Facility, provide disposal of ash/chemicals inherent to the Facility's operations, and provide employee uniforms and safety supplies. The Debtors' remote location poses challenges to sourcing these critical commodities required to run the Facility.

14. The Debtors believe that some of the Critical Vendors will continue to do business with them after the commencement of these Chapter 11 Cases because doing so is a good business decision. However, the Debtors anticipate that certain Critical Vendors may (a) refuse to deliver goods or provide services (a) without payment of their Critical Vendor Claims or (b) on reasonable price or credit terms absent payment of their Critical Vendor Claims, thereby effectively refusing to do business with the Debtors. To ensure that the Critical Vendors continue supplying essential goods and services, the Debtors request authorization to pay up to \$0.9 million in Critical Vendor Claims upon entry of the Proposed Interim Order and up to \$1.2 million in Critical Vendor Claims upon entry of the Proposed Final Order.

B. Proposed Terms and Conditions for Payment of Critical Vendor Claims

15. In an effort to ensure that the payment of a Critical Vendor Claim provides a benefit to the Debtors' estates, the Debtors, in their sole discretion and upon consultation with the Senior Secured Noteholders (as such term is defined in the First Day Declaration), may condition the payment of any Critical Vendor Claim upon the execution by the Critical Vendor of an agreement, substantially in the form attached hereto as **Exhibit C** (each a "Critical Vendor Agreement"), whereby the Critical Vendor agrees to continue supplying goods or providing services to the Debtors on trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date, or, if more favorable, within the 12-month period prior to the Petition

Date (the “Trade Terms”). The Trade Terms shall apply throughout the Debtors’ Chapter 11 Cases and for the 12-month period commencing on the effective date of the Debtors’ plan of reorganization; *provided, however*, that the Debtors (upon consultation with the Senior Secured Noteholders) and the applicable Critical Vendor may agree to a shorter period for the application of the Trade Terms. The Debtors also request authorization to make payments on account of Critical Vendor Claims in the absence of a Critical Vendor Agreement if the Debtors (upon consultation with the Senior Secured Noteholders) determine that failure to pay such Critical Vendor Claims will result in harm to the Debtors’ business and there is no reasonable likelihood that the Debtors will negotiate an acceptable trade agreement with the applicable Critical Vendor.

16. If a Critical Vendor enters into a Critical Vendor Agreement and/or accepts payment from the Debtors and refuses to supply goods or provide services to the Debtors on the Trade Terms or otherwise fails to comply with the Critical Vendor Agreement, the Debtors reserve their rights to take any and all appropriate steps to cause such Critical Vendor to repay the payments made to it on account of its Critical Vendor Claim. In addition, the Debtors reserve the right to seek damages or other appropriate remedies against a breaching Critical Vendor.

C. Confirmation of Administrative Expense Status for Outstanding Orders

17. As of the Petition Date, the Debtors had outstanding prepetition purchase orders (the “Outstanding Orders”) with certain suppliers (the “Suppliers”) for goods and services that had not yet been delivered or provided as of the Petition Date and which the Debtors believe are integral to the Debtors’ business. Accordingly, the Debtors seek an order confirming that the Debtors’ undisputed obligations to the Suppliers under the Outstanding Orders for (a) shipments of goods delivered to and accepted by the Debtors on and after the Petition Date and (b) the provision of services to the Debtors on and after the Petition Date at the Debtors’ request, in each

case, will be entitled to administrative expense priority status and paid in the ordinary course of business.

BASIS FOR RELIEF REQUESTED

A. Payment of the Critical Vendor Claims is Necessary Under Sections 105(a) and 363(b) of the Bankruptcy Code and the Doctrine of Necessity.

18. Courts recognize that it is appropriate to authorize debtors to pay prepetition obligations, including payment of critical vendors, to protect and preserve the bankruptcy estate. *See, e.g., Czyewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017). Such relief “is not a novel concept” when needed to “facilitate the rehabilitation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (citation omitted). In so doing, courts acknowledge that there are several sources of authority upon which they may rely.

19. The doctrine of necessity is a well-settled doctrine that permits the bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the chapter 11 case where the payment of such claim is necessary to the restructuring efforts. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cr. 1981) (“[T]he ‘necessity of payment doctrine’ [includes] ‘permit[ting] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid.’”); *In re Penn Central Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (same); *In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (where a debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); *In re Columbia Gas Sys., Inc.* 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (noting that a debtor “may pay pre-petition claims that are essential to continued operation of business”).

20. 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.” 11

U.S.C. § 105(a). Accordingly, under Section 105(a), courts may authorize payments of prepetition obligations when essential to the continued operations of a debtor's businesses. *See Just for Feet*, 242 B.R. at 825.

21. Further, pursuant to Section 363(b), "after notice and a hearing, [the debtor] may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under this section, courts may authorize the payment of prepetition obligations when a sound business reasons exist for doing so. *See In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 152 (D. Del. 1999) (to authorize payment of prepetition claims, a debtor must show a "sound business purpose justifies such actions."); *Ionosphere Clubs*, 98 B.R. at 175 (Section 363(b) provides "broad flexibility in tailoring its orders to meet a wide variety of circumstances," such as authorizing payment of prepetition obligations). Courts have relied on Section 363 to authorize payment of prepetition claims held by vendors. *See, e.g., In re Jeans.com, Inc.*, 502 B.R. 250, 257–59 (Bankr. D.P.R. 2013) (granting critical vendor motion citing, among other grounds, Section 363).

22. The Debtors respectfully submit that the requested relief is warranted in these Chapter 11 Cases. As more fully set forth above and in the First Day Declaration, payment of the Critical Vendor Claims is essential to the Debtors' ability to achieve their chapter 11 objectives and to maximize value for the benefit of all of the Debtors' stakeholders. The Debtors further submit that payment of the Critical Vendor Claims is justified by a sound business purpose. Specifically, the failure to pay the Critical Vendor Claims could result in a detriment to the operation of the Facility and the Debtors' business and endanger the success of these Chapter 11 Cases.

23. Finally, the Debtors' cash constitutes cash collateral of the Debtors' secured lenders and the secured lenders have consented to the use of cash collateral to pay the Critical Vendor Claims pursuant to terms of the Debtors' debtor in possession financing agreement and the agreed-to budget. As such, the parties that would be most affected by the relief requested in this Motion have consented to such relief.

B. Payment of Certain Critical Vendor Claims is also Appropriate Pursuant to Section 503(b)(9) of the Bankruptcy Code.

24. Certain of the Critical Vendors may have prepetition claims for goods the Debtors received within twenty (20) days before the Petition Date (the "Prepetition Goods"). Pursuant to Section 503(b)(9) of the Bankruptcy Code, any claims arising from the sale of the Prepetition Goods that a debtor receives twenty (20) days before the commencement of a case will constitute administrative expenses. Specifically, Section 503(b)(9) provides:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title including- ... (9) the value of goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. §503(b)(9). *See also In re World Imports, Ltd.*, 862 F.3d 338, 346 (3d Cir. 2017) (suppliers entitled to administrative expenses for goods that came into the debtors' physical possession within 20 days before the bankruptcy filing).

25. Additionally, bankruptcy courts have held that the timing of the payment of administrative expenses allowed pursuant to Section 503(b)(9) is within the discretion of the court. *See, e.g., In re Tubular Techs., LLC*, 372 B.R. 820, 824 & n.4 (Bankr. D.S.C. 2007) (bankruptcy court may determine when Section 503(b)(9) claim is paid); *In re Bookbinders' Rest., Inc.*, 2006 WL 3858020, at *3-4 (Bankr. E.D. Pa. Dec. 28, 2006) (timing of the payment of Bankruptcy Code Section 503(b)(9) claim "is within the discretion of the bankruptcy court"); *In re Global Home*

Prods., LLC, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (providing that “when a claimant timely files a request for payment of an administrative expense under §503(a), the timing of the payment of that administrative expense claim is left to the discretion of the Court.”) (citing *In re Garden Ridge Corp.*, 323 B.R. 136 (Bankr. D. Del.2005)).

26. Accordingly, to the extent that the Critical Vendor Claims are claims on account of Prepetition Goods entitled to priority under Section 503(b)(9), the Debtors submit that Section 503(b)(9) of the Bankruptcy Code provides an additional basis to pay such claims.

C. Cause Exists to Authorize the Debtors’ Financial Institutions to Honor Checks and Electronic Fund Transfers.

27. The Debtors have sufficient funds to pay the amounts described in this Motion in the ordinary course of business by as provided for by the use of cash collateral and debtor in possession financing.

28. Additionally, under the Debtors’ existing cash management system, the Debtors have made arrangements to readily identify checks and electronic payment requests relating to an authorized payment in respect of the obligations discussed herein. The Debtors believe that checks and electronic payment requests that are not related to the authorized payments will not be honored inadvertently. Accordingly, the Debtors respectfully request that the Court authorize all applicable banks and financial institutions, upon the Debtors’ request, to receive, process, honor, and pay all checks and electronic payment requests in respect of the relief requested herein, to the extent that the Debtors have sufficient funds standing to their credit with such financial institution, and such financial institution may rely on the representations of the Debtors without any duty of further inquiry and without liability for following the Debtors’ instructions. The Debtors also seek authority, but not direction to issue new postpetition checks or effect new postpetition electronic

fund transfers in replacement of any checks or transfer requests on account of Critical Vendor Claims dishonored or rejected as a result of the commencement of the Chapter 11 Cases.

THE DEBTORS SATISFY BANKRUPTCY RULE 6003

29. Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein within the first 21 days after the Petition Date “to the extent necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. As described herein and in the First Day Declaration, the relief requested in this Motion is immediately necessary for the Debtors to be able to continue to operate their businesses in the ordinary course and preserve value for the estates. Such relief is warranted to avoid severe disruptions and irreparable harm to the Debtors’ operations. Based on the foregoing, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

REQUEST FOR WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)

30. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen (14) day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As explained above and in the First Day Declaration, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent such notice requirements and such stay apply.

RESERVATION OF RIGHTS

31. Nothing herein or any actions taken by the Debtors pursuant to the Interim Order and Final Order is intended or should be construed as: (a) an admission as to the validity, priority, or amount of any particular claim against the Debtors; (b) a waiver of the Debtors’ or any other

party in interest's rights to dispute any particular claim against the Debtors on any grounds; (c) a promise or requirement to pay any particular claim or other obligation; (d) an admission or implication that any particular claim is of a type specified, defined or contemplated in this Motion; (e) a request or authorization to assume or reject any agreement, executory contract, or unexpired lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Motion are valid and the Debtors and all other parties in interest expressly reserve their rights to contest the extend, validity, or perfection, or to seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Interim Order and Final Order is not intended and shall not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party in interest's rights to subsequently dispute such claim.

NOTICE AND NO PRIOR REQUEST

32. Notice of the Motion has been or will be provided to (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 in its capacity as Collateral Agent, Hogan Lovells LLP; (d) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP; (e) Berlin Biopower Investment Fund, LLC, with a copy to Murray Plumb & Murray; (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, with a copy to Hunton Andrews Kurth LLP; (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; (w) the Critical Vendors; and (y) any party that has requested notice pursuant to Bankruptcy Rule 2002. 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 Rule 9013-1(m) of the Local Rules. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

33. No prior request for the relief sought herein has been made to this court or any other court.

[remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that the Court enter the Proposed Orders granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: February 9, 2024

/s/ Chantelle D. McClamb
Chantelle D. McClamb (No. 5978)
GIBBONS P.C.
300 Delaware Avenue, Suite 1015
Wilmington, Delaware 19801
Telephone: (302) 518-6300
E-mail: cmcclamb@gibbonslaw.com

-and-

Robert K. Malone (*pro hac vice* pending)
Kyle P. McEvilly (*pro hac vice* pending)
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
Telephone: (973) 596-4500
E-mail: rmalone@gibbonslaw.com
kmcevilly@gibbsonlaw.com

*Proposed Co-Counsel for Debtors Burgess
BioPower, LLC and Berlin Station, LLC*

Alison D. Bauer (*pro hac vice* pending)
William F. Gray, Jr. (*pro hac vice* pending)
Jiun-Wen Bob Teoh (*pro hac vice* pending)
FOLEY HOAG LLP
1301 Avenue of the Americas, 25th Floor
New York, New York 10019
Telephone: (212) 812-0400
Email: abauer@foleyhoag.com
wgray@foleyhoag.com
jteoh@foleyhoag.com

-and-

Kenneth S. Leonetti (*pro hac vice* pending)
Christian Garcia (*pro hac vice* pending)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
Telephone: (617) 832-1000
Email: ksl@foleyhoag.com
cgarcia@foleyhoag.com

*Proposed Co-Counsel for Debtors Burgess
BioPower, LLC and Berlin Station, LLC*

EXHIBIT A

Interim 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)

Re: D.I.

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO PAY PREPETITION
CLAIMS OF CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF**

Upon consideration of the *Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Claims of Critical Vendors and (II) Granting Related Relief* (the “Motion”)² and upon the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings*; and the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the *Amended Standing Order of Reference* of the United States District Court for the District of Delaware, dated February 29, 2012; (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (d) the Court may enter a final order consistent with Article III of the United States Constitution; and upon the record herein; and after due deliberation thereon; and it appearing that sufficient notice of the Motion has been given and that no further notice is necessary, except as set forth in the Motion and with respect to entry of this Interim Order and notice of the Final Hearing (as defined below); and good cause appearing therefore, it is hereby

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 meaning ascribed to them in the Motion.

ORDERED THAT:

1. The Motion is **GRANTED** on an interim basis, as set forth herein.
2. The Debtors are authorized, but not directed, to pay the Critical Vendor Claims of their Critical Vendors, subject to the terms and conditions of this Interim Order; *provided, however,* that the amount of the Critical Vendor Claims that the Debtors are authorized to pay pursuant to this Interim Order shall not exceed \$0.9 million in the aggregate.
3. Prior to making a payment to any Critical Vendor on account of a Critical Vendor Claim, the Debtors may, upon consultation with the Senior Secured Noteholders, settle all or some of the Critical Vendor Claims of such party for less than their face amount without further notice or hearing.
4. The Debtors are authorized to condition the payment of any Critical Vendor Claim on the Critical Vendor entering into a Critical Vendor Agreement.
5. The form of Critical Vendor Agreement attached as **Exhibit C** to the Motion is approved in its entirety, and the Debtors are authorized to negotiate, modify, or amend the form of Critical Vendor Agreement in their reasonable business judgment.
6. The Debtors are authorized to make payments on account of a Critical Vendor Claim, subject to the other limits set forth herein, even in the absence of a Critical Vendor Agreement, if the Debtors, upon consultation with the Senior Secured Noteholders and any official committee appointed in this case, determine that failure to pay such Critical Vendor Claim will result in harm to the Debtors' business.
7. If a Critical Vendor enters into a Critical Vendor Agreement and/or accepts payment, and subsequently refuses to supply goods or provide services to the Debtors on Trade Terms or otherwise fails to comply with the Critical Vendor Agreement, then the Debtors may

take any and all appropriate steps to cause such Critical Vendor to repay payments made to it on account of its Critical Vendor Claim. Nothing herein shall constitute a waiver of the Debtors' rights to seek damages or other appropriate remedies against any breaching Critical Vendor.

8. The Debtors' undisputed obligation to the Suppliers under Outstanding Orders arising from (a) shipments of goods delivered to and accepted by the Debtors on or after the Petition Date and (b) provision of services to the Debtors on or after the Petition Date at the Debtors' request are hereby granted administrative expense priority status pursuant to Section 503(b)(1)(A) of the Bankruptcy Code.

9. In accordance with this Interim Order, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the obligations described in the Motion are authorized to (a) receive, process, honor, and pay all checks presented for payment and to honor all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in those accounts and (b) accept and rely on all representations made by the Debtors with respect to which checks, drafts, wires, or automated clearing house transfers should be honored or dishonored in accordance with this or any other order of the Court, whether such checks, drafts, wires, or transfers are dated prior to, on, or subsequent to the Petition Date, without any duty to inquire otherwise.

10. The Debtors are authorized, but not directed, to issue new postpetition checks, or effect new electronic funds transfers, on account of prepetition obligations and claims as set forth herein, and to replace any prepetition checks or electronic fund transfer requests that may be lost or dishonored or rejected as a result of the commencement of the Debtors' Chapter 11 Cases.

11. Nothing contained in the Motion or this Interim Order, nor any payment made pursuant to the authority granted by this Interim Order is intended to be or shall be construed as

(i) an admission as to the validity of any claim against the Debtors, (ii) a waiver of any of the Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors, (iii) a waiver of any claims or causes of action which may exist against any creditor or interest holder, or (iv) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between any Debtor and any third party under Section 365 of the Bankruptcy Code.

12. Notwithstanding entry of this Interim Order, nothing herein shall create, nor is intended to create, any rights in favor of or enhance the status of any claim held by any party.

13. The requirements set forth in Bankruptcy Rule 6003 have been satisfied.

14. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

15. Notwithstanding Bankruptcy Rule 6004(h), this Interim Order shall be effective and enforceable immediately upon its entry.

16. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

17. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis (the "Final Hearing") shall be held on _____, 2024 at _____ (**prevailing Eastern Time**). Any objections or responses to the entry of a final order on the Motion shall be filed on or **before 4:00 p.m. (prevailing Eastern Time)** on _____, 2024 and shall be served on: (a) the Debtors, c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408, Attn: Dean Vomero; (b) Foley Hoag, 1301 Avenue of the Americas, 25th Floor, New York, New York 10019, Attn: Alison Bauer, Esq. (abauer@foleyhoag.com) and Jiun-Wen

Bob Teoh, Esq. (jteoh@foleyhoag.com), and 155 Seaport Boulevard, Boston, Massachusetts 02210, Attn: Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com); (c) Gibbons, P.C., 300 Delaware Ave., Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (cmclamb@gibbonslaw.com), and One Gateway Plaza, Newark, New Jersey, 07102, Attn: Robert K. Malone, Esq. (rmalone@gibbonslaw.com); (d) the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware; 19801, Attn: Jane M. Leamy, Esq. (jane.m.leafy@usdoj.gov); (e) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP, One International Place, Suite 2000, Boston, MA 02110, Attn: Julia Frost-Davies (julia.frostdavies@gtlaw.com), and 222 Delaware Avenue, Suite 1600, Wilmington, Delaware 19801, Attn: Dennis Meloro (melorod@gtlaw.com); and (f) counsel to any statutory committee appointed in these chapter 11 cases. In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

18. The Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation and enforcement of this Interim Order.

EXHIBIT B

Final 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)

Re: D.I.

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO PAY PREPETITION CLAIMS
OF CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF**

Upon consideration of the *Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Claims of Critical Vendors and (II) Granting Related Relief* (the “Motion”)² and upon the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings*; and the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the *Amended Standing Order of Reference* of the United States District Court for the District of Delaware, dated February 29, 2012; (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (d) the Court may enter a final order consistent with Article III of the United States Constitution; and upon the record herein; and after due deliberation thereon; and it appearing that sufficient notice of the Motion has been given and that no further notice is necessary; and good cause appearing therefore, it is hereby

ORDERED THAT:

1. The Motion is **GRANTED** on a final basis, as set forth herein.

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 meaning ascribed to them in the Motion.

2. The Debtors are authorized, but not directed, to pay the Critical Vendor Claims of their Critical Vendors, subject to the terms and conditions of this Final Order; *provided, however*, that the amount of the Critical Vendor Claims that the Debtors are authorized to pay pursuant to this Final Order shall not exceed \$1.2 million in the aggregate.

3. Prior to making a payment to any Critical Vendor on account of a Critical Vendor Claim, the Debtors may, upon consultation with the Senior Secured Noteholders, settle all or some of the Critical Vendor Claims of such party for less than their face amount without further notice or hearing.

4. The Debtors are authorized to condition the payment of any Critical Vendor Claim on the Critical Vendor entering into a Critical Vendor Agreement.

5. The form of Critical Vendor Agreement attached as **Exhibit C** to the Motion is approved in its entirety, and the Debtors are authorized to negotiate, modify, or amend the form of Critical Vendor Agreement in their reasonable business judgment.

6. The Debtors are authorized to make payments on account of a Critical Vendor Claim, subject to the other limits set forth herein, even in the absence of a Critical Vendor Agreement, if the Debtors, upon consultation with the Senior Secured Noteholders and any official committee appointed in this case, determine that failure to pay such Critical Vendor Claim will result in harm to the Debtors' business.

7. If a Critical Vendor enters into a Critical Vendor Agreement and/or accepts payment, and subsequently refuses to supply goods or provide services to the Debtors on Trade Terms or otherwise fails to comply with the Critical Vendor Agreement, then the Debtors may take any and all appropriate steps to cause such Critical Vendor to repay payments made to it on

account of its Critical Vendor Claim. Nothing herein shall constitute a waiver of the Debtors' rights to seek damages or other appropriate remedies against any breaching Critical Vendor.

8. The Debtors' undisputed obligation to the Suppliers under Outstanding Orders arising from (a) shipments of goods delivered to and accepted by the Debtors on or after the Petition Date and (b) provision of services to the Debtors on or after the Petition Date at the Debtors' request are hereby granted administrative expense priority status pursuant to Section 503(b)(1)(A) of the Bankruptcy Code.

9. In accordance with this Final Order, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of the obligations described in the Motion are authorized to (a) receive, process, honor, and pay all checks presented for payment and to honor all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in those accounts and (b) accept and rely on all representations made by the Debtors with respect to which checks, drafts, wires, or automated clearing house transfers should be honored or dishonored in accordance with this or any other order of the Court, whether such checks, drafts, wires, or transfers are dated prior to, on, or subsequent to the Petition Date, without any duty to inquire otherwise.

10. The Debtors are authorized, but not directed, to issue new postpetition checks, or effect new electronic funds transfers, on account of prepetition obligations and claims as set forth herein, and to replace any prepetition checks or electronic fund transfer requests that may be lost or dishonored or rejected as a result of the commencement of the Debtors' Chapter 11 Cases.

11. Nothing contained in the Motion or this Final Order, nor any payment made pursuant to the authority granted by this Interim Order is intended to be or shall be construed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver of any of the

Debtors' or any appropriate party in interest's rights to dispute the amount of, basis for, or validity of any claim against the Debtors, (iii) a waiver of any claims or causes of action which may exist against any creditor or interest holder, or (iv) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between any Debtor and any third party under section 365 of the Bankruptcy Code.

12. Notwithstanding entry of this Final Order, nothing herein shall create, nor is intended to create, any rights in favor of or enhance the status of any claim held by any party.

13. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon its entry.

14. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

15. The Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation and enforcement of this Final Order.

EXHIBIT C

Critical Vendor Agreement

_____, 2024

TO: [Critical Vendor]
[Name]
[Address]

Critical Vendor Agreement

As you may be aware, on February 9, 2024 (the "Petition Date"), Burgess BioPower, LLC ("Burgess") and Berlin Station, LLC ("Berlin") (collectively, the "Debtors"), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") commencing the chapter 11 cases jointly administered under Case No. 24-10235 (LSS) (the "Bankruptcy Cases").

On February 9, 2024, we requested the Bankruptcy Court's authority to pay certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers. On [_____] , 2024, the Bankruptcy Court entered an order (the "Order") authorizing us, under certain conditions, to pay in the ordinary course prepetition claims of certain vendors and service providers that agree to be bound by the terms of the Order and to the terms set forth below. A copy of the Order is enclosed.

To receive payment in the ordinary course on pre-bankruptcy claims, we require you to agree to supply goods and/or services to the Debtors based on "Customary Trade Terms." Customary Trade Terms are trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date or, if more favorable, that existed within the 12-month period prior to the Petition Date.

For purposes of administration of this critical vendor program as authorized by the Bankruptcy Court (the "Critical Vendor Program"), the Debtors and you agree as follows:

1. For purposes of this Trade Agreement, the estimated balance of your prepetition claim (accounting for any setoffs, credits or discounts) (the "Prepetition Claim") is \$[_____]. The Prepetition Claim will be paid as follows: [_____].

2. The open trade balance or credit line you will extend shall be on normal and customary terms on an historical basis for the period prior to the Petition Date or, if more favorable, within the 12-month period prior to the Petition Date.

3. If you receive payment, in part or in full, on account of a Prepetition Claim you are not permitted to, with respect to such Prepetition Claim, file or perfect a Lien (a "Lien") on account of such claim, assert a claim for reclamation (a "Reclamation Claim"), and/or assert a claim under section 503(b)(9) of the Bankruptcy Code (a "503(b)(9) Claim"), and you shall take all necessary action, at your expense, to remove any existing Lien relating to such claim, and to withdraw any Reclamation Claim or 503(b)(9) Claim, on account of such claim.

4. You will hereafter extend to the Debtors all Customary Trade Terms, which are: [ADD INDIVIDUALIZED SET OF CUSTOMARY TRADE/SERVICE TERMS OR

ATTACH/CROSS-REFERENCE TERM FROM EXISTING AGREEMENT]

Payment of your Prepetition Claim in the manner set forth in the Order may occur upon execution of this Critical Vendor Agreement by a duly authorized representative of your company and the return of this Critical Vendor Agreement to the Debtors. Your execution of this Critical Vendor Agreement and the return of the same to the Debtors constitute an agreement by you and the Debtors:

- a) to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Prepetition Claim set forth above;
- b) that, for at least during the pendency of the Bankruptcy Cases and for the 12-month period commencing on the effective date of the Debtors' plan of reorganization, you will continue to supply the Debtors with goods and/or services under the Customary Trade Terms and any terms set forth herein and that the Debtors will pay for such goods and/or services in accordance with the terms hereof;
- c) that you have reviewed the terms and provisions of the Order and acknowledge that you are bound by such terms;
- d) that if either the Critical Vendor Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Prepetition Claim will be deemed to have been in payment of postpetition obligations owed to you, and the Debtors may take any and all appropriate steps to cause you to repay payments made to you on account of your Prepetition Claim to the extent that such payments exceed the postpetition amounts then owing to you, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense; and
- e) that the Debtors reserve all of their rights with respect to such claims.

The Debtors and you also hereby agree that any dispute with respect to this Critical Vendor Agreement, the Order and/or your participation in the Critical Vendor Program shall be determined exclusively by the Bankruptcy Court. Please indicate your agreement to the terms hereof by returning a signed copy of this letter to:

[Name] at (____)_____ or [Name] (____)_____.

Sincerely,

[Debtor]

By:
Its:

Agreed and Accepted by:
[Name of Critical Vendor/Service Provider]
By:

Its:

Dated: