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10 *the duly-appointed Chapter 11 Trustee*

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:

GIGA WATT, Inc., a Washington
corporation,

Debtor.

MARK D. WALDRON, in his
capacity as the duly-appointed
Chapter 11 Trustee,

vs.

DAVID M. CARLSON and JANE
DOE 1, individually and on behalf of
the marital estate, ENTERPRISE
FOCUS, INC., a Washington
corporation, CLEVER CAPITAL,
LLC, a Washington LLC, JEFFREY
FIELD, ROB TAVIS, JOHN DOES 1
THROUGH 15

Case No. 18-03197

The Honorable Frederick P. Corbit

Chapter 11

Adv. P. No. 19-80012

**EMERGENCY APPLICATION FOR
ORDER TO SHOW CAUSE FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Emergency Application for Order to
Show Cause for Preliminary Injunction
and Temporary Restraining Order - Page 1

1 Comes now Mark D. Waldron, in his capacity as the duly-appointed
2 Chapter 11 Trustee (the “Trustee”) herein and submits this *Emergency Application*
3 *for Order to Show Cause for Preliminary Injunction and Temporary Restraining*
4 *Order* (the “Emergency Application”) pursuant to Rule 65 of the Civil Rules of
5 Civil Procedures, applicable herein as modified, by Rule 9065 of the Federal
6 Rules of Bankruptcy Procedure. This Emergency Application is based upon the
7 *Verified Complaint for Avoidance and Recovery of Fraudulent Transfers and/or*
8 *Preferential Transfers; Breach of Fiduciary Duty; Turnover; and Injunctive*
9 *Relief; and the Chapter 11 Trustee’s Objections to Claims of David M. Carlson*
10 *(Claims Nos. 318 and 319) and of Clever Capital LLC (Claim No. 320)* (the
11 “Verified Complaint”), which is incorporated herein by reference as though set
12 forth fully herein and upon the points and authorities set forth below. Unless
13 otherwise defined herein, capitalized terms have the meanings ascribed to them in
14 the Verified Complaint.

15 Pursuant to this Emergency Application, the Trustee requests entry of an
16 Order substantially in the form of the *Order to Show Cause for Preliminary*
17 *Injunction and Temporary Restraining Order*, attached hereto as **Exhibit A**,
18 enjoining the above-named Defendants during the pendency of this adversary
19 proceeding from controlling, disposing of, transferring or possessing any of the
20 assets transferred by the Debtor to Defendant Clever Capital pursuant to the TNT
21 Transfer, or occupying the buildings or asserting any interest or control in any of
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23 Emergency Application for Order to
24 Show Cause for Preliminary Injunction
25 and Temporary Restraining Order - Page 2

1 the leases or infrastructure and assets of the Debtor’s crypto-mining facility
2 located in Wenatchee, WA and referred to herein as the “TNT Facility.”
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4 **INTRODUCTION**

5 In a brazen asset grab three days before the Petition Date, one of the
6 Defendants, David M. Carlson, who is a fiduciary of the Debtor, caused the
7 Debtor to transfer the Debtor’s TNT Facility to one of Defendant Carlson’s
8 entities. Defendant Carlson is now occupying one of the buildings and an office at
9 the Debtor’s TNT Facility and is interfering with the Trustee’s efforts to re-open
10 operations at the TNT Facility.

11 **FACTS**

12 The Trustee incorporates by reference as if set forth fully herein all of the
13 facts averred in the Verified Complaint filed herewith.

14 **ARGUMENT**

15 A party seeking preliminary injunctive relief must fulfill one of two
16 standards: the “traditional” or the “alternative.” *Cassim v. Brown*, 824 F.2d 791,
17 795 (9th Cir. 1987). Under the traditional standard, a court may issue preliminary
18 injunctive relief if it finds that: (1) the moving party will suffer irreparable injury
19 if the relief is denied; (2) the moving party will probably prevail on the merits; (3)
20 the balance of potential harm favors the moving party; and (4) the public interest
21 favors granting relief. *Id.* Irreparable injury is harm of such a nature that cannot be
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23 Emergency Application for Order to
24 Show Cause for Preliminary Injunction
and Temporary Restraining Order - Page 3
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1 redressed by a legal or equitable remedy following trial. *Ross-Simons of Warwick,*
2 *Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996).

3 Under the alternative standard, a preliminary injunction is warranted if the
4 moving party can demonstrate either: (1) a combination of probable success on the
5 merits and the possibility of irreparable injury if relief is not granted; or (2) the
6 existence of serious questions going to the merits and the balance of hardships tips
7 sharply in favor of the moving party. *Cassim*, at 795. The moving party must
8 demonstrate immediate threatened harm. *Caribbean Marine Serv. Co. v.*
9 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The traditional and alternative
10 standards are not inconsistent, but represent a single continuum of equitable
11 discretion whereby the greater the relative hardship to the moving party, the less
12 probability of success must be shown. *Benda v. Grand Lodge of Int'l Assoc. of*
13 *Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). In balancing
14 the hardships, the Court must weigh the hardship on the Plaintiff if relief is
15 denied, against the hardship to Defendants if it is granted.

16 Under any application of these tests, a temporary restraining order is
17 necessary and appropriate.

18 Three days before the Petition Date, Defendant Carlson caused his
19 subordinate, Defendant Turner, to transfer the TNT Facility to Defendant
20 Carlson's affiliate, Defendant Clever Capital, and to accept Defendant Clever
21 Capital as the Debtor's "landlord" at the TNT Facility. At the time of the transfer,
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24 Show Cause for Preliminary Injunction
25 and Temporary Restraining Order - Page 4

1 Defendant Carlson was a “governor” of the Debtor, and as such was a fiduciary of
2 the Debtor. He was also a shareholder.

3 This eve-of-bankruptcy agreement is fraudulent. Defendant Clever Capital
4 has gone on the public record since the Petition Date attesting to the fact that it
5 owns no real estate interests of any kind. Therefore, it could not possibly be the
6 Debtor’s “landlord” at the TNT Facility. Furthermore, the consideration recited
7 for the purported transfer was only \$86,000, which by any measure is significantly
8 less than the value of the TNT Facility, by many multiples. The TNT Transfer
9 agreement also tripled the Debtor’s monthly rental obligation while providing
10 fewer buildings – despite the fact that Defendant Carlson had already assigned *all*
11 the TNT buildings to the Debtor.

12 The eve-of-bankruptcy transfer is avoidable as a fraudulent transfer and/or a
13 preference. It constitutes a breach of fiduciary duty. It entitles the Trustee to an
14 immediate order of turnover. The probability of success on the merits is very high
15 given the (1) sworn public admission that Defendant Clever Capital owns no
16 interest in any real estate and therefore cannot be the Debtor’s landlord and (2) the
17 obvious and blatant mismatch between the assets transferred, which includes the
18 Debtor’s 3MW power contract with the Douglas County Public Utility District
19 and the obligations occurred (now running at more than \$260,000 according to
20 Defendant Clever Capital’s claim filed in this case), on the one hand, and the
21 stated consideration of approximately \$86,000, on the other.

1 Undeterred, Defendant Carlson and his affiliate, Defendant Clever Capital,
2 are now interfering with the Trustee's effort to resume the Debtor's operations at
3 the TNT Facility. Defendant Clever Capital is demanding more than \$260,000 in
4 rent and along with Defendant Carlson is causing confusion and doubt regarding
5 the Trustee's right to negotiate with the critical parties in this matter, the TNT
6 Landlord and the Douglas County Public Utility District No. 1 (the "DC PUD"),
7 despite having assigned any and all rights to the TNT Facility to the Debtor and
8 having received more than \$2.3 million in consideration for all of those rights. He
9 is even currently occupying Building C and the office of the TNT Facility.

10 This scheme to carve out the TNT Facility from the bankruptcy estate
11 threatens to irreparably injure the estate. As the Court is aware, the Debtor's
12 operations were moribund when the Trustee took over. The Trustee has succeeded
13 in opening a significant portion of one of the Debtor's two operational and
14 revenue-generating facilities: the Moses Lake Facility.

15 If the requested temporary restraining order and preliminary injunction is
16 not issued, the Trustee will not be able to re-open the TNT Facility and the going
17 concern value of that facility will be irreparably lost to the estate. Defendant
18 Carlson will have succeeded in grabbing one of the Debtor's two operating
19 facilities for himself ahead of all other creditors, many of whom were defrauded
20 by the Debtor while Defendant Carlson was its Chief Executive Officer. The
21 Trustee has a narrow window of opportunity to re-open the TNT Facility and
22 maximize and capture its going concern value for the benefit of the estate. If the

1 TRO is denied, that window will permanently close. This is a classic case of
2 irreparable injury.

3 In contrast, if the temporary restraining order and preliminary injunction is
4 issued, then Defendant Carlson will be able to assert monetary damages.

5 Accordingly, the balance of hardship tips sharply in favor of a temporary
6 restraining and injunction.

7 Finally, enjoining the Defendants is in the public interest. It will uphold the
8 integrity of the bankruptcy process by preventing last minute asset grabs by
9 insiders and fiduciaries.

10 Wherefore, the Trustee respectfully requests entry of the proposed Order to
11 Show Cause for Preliminary Injunction and Temporary Restraining Order in
12 substantially the form attached hereto as **Exhibit A**.

13 **WAIVER OF SECURITY REQUIREMENT**

14 Pursuant to Rule 7065, the Trustee is not obligated to provide or otherwise
15 post any form of security before the issuance of a TRO or the preliminary
16 injunction.

17 **CONCLUSION**

18 Wherefore, the Trustee prays for entry of the Order to Show Cause for
19 Preliminary Injunction and Temporary Restraining Order in substantially the form
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23 Emergency Application for Order to
24 Show Cause for Preliminary Injunction
25 and Temporary Restraining Order - Page 7

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attached hereto as **Exhibit A**, attorneys fees, costs and such other and further relief as the Court deems appropriate and just.

Dated: April 22, 2019

CKR LAW LLP

/s/ Pamela M. Egan
Pamela M. Egan (WSBA No. 54736)

*Attorneys for Mark D. Waldron, Chapter 11
Trustee*

Exhibit A
Proposed Order

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

GIGA WATT, Inc., a Washington
corporation,

Debtor.

Case No. 18-03197

The Honorable Frederick P. Corbit

Chapter 11

MARK D. WALDRON, in his
capacity as the duly-appointed
Chapter 11 Trustee,

vs.

DAVID M. CARLSON and JANE
DOE 1, individually and on behalf of
the marital estate, ENTERPRISE
FOCUS, INC., a Washington
corporation, CLEVER CAPITAL,
LLC, a Washington limited liability
company, JEFFREY FIELD, ROB
TAVIS, and JANE DOES 2
THROUGH 15

Adv. Pro. No. 19-80012

**ORDER TO SHOW CAUSE FOR
PRELIMINARY INJUNCTION AND
TEMPORARY RESTRAINING
ORDER**

1 This matter came before this Court on the (i) *Motion of the Chapter 11*
2 *Trustee for Order to Show Cause for Preliminary Injunction and Temporary*
3 *Restraining Order*, filed on April __, 2019, and (2) the *Verified Complaint for*
4 *Avoidance and Recovery of Fraudulent Transfers and/or Preferential Transfers;*
5 *Breach of Fiduciary Duty; Turnover; and Injunctive Relief; and the Chapter 11*
6 *Trustee’s Objections to Claims of David M. Carlson (Claims Nos. 318 and 319)*
7 *and of Clever Capital LLC (Claim No. 320)* (the “Verified Complaint”), filed on
8 April 22, 2019. Unless otherwise defined herein, capitalized terms used in this
9 Order have the meanings ascribed to them in the Verified Complaint attached here
10 as **Exhibit A**. Accordingly, it is hereby:

11 **ORDERED** that the above-named defendants show cause before this Court
12 at 904 West Riverside Avenue, Spokane, WA 99201, Courtroom ____, on April __,
13 2019 at __:__.m. or as soon thereafter as counsel may be heard, why an order
14 should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure,
15 as modified and applicable herein pursuant to Rule 7065 of the Federal Rules of
16 Bankruptcy Procedure (the “Bankruptcy Rules), enjoining the above-named
17 Defendants during the pendency of this adversary proceeding from controlling,
18 disposing of, transferring or possessing any of the assets transferred pursuant to
19 the TNT Transfer, or occupying the buildings or asserting any interest or control
20 in any of the TNT Leases or infrastructure and assets of the TNT Facility; and it is
21 further

22 **ORDERED** that, sufficient reason having been shown pending the hearing
23 of the Plaintiff’s application for a preliminary injunction, but in no event beyond

24 Order to Show Cause for Preliminary
25 Injunction and Temporary Restraining Order - Page 2

1 14 days from the entry of this Order, unless extended by the Court, the Defendants
2 are temporarily restrained and enjoined from controlling, disposing of, transferring
3 or possessing any of the assets transferred pursuant to the TNT Transfer, or
4 occupying the buildings or asserting any interest or control in any of the TNT
5 Leases or assets of the TNT Facility; and it is further

6 **ORDERED** that pursuant to Bankruptcy Rule 7065(c), the Trustee is not
7 required to post any security and such required is waived; and it is further

8 **ORDERED** that the parties shall immediately confer regarding the scope
9 and scheduling of discovery; and it is further

10 **ORDERED** that on or before April __, 2019, the Trustee shall serve a copy
11 of this order by email and first-class mail upon counsel for Defendant Carlson,
12 Defendant Clever Capital and by first class mail upon the remaining Defendants
13 and such service shall be deemed good and sufficient service thereof; and it is
14 further

15 **ORDERED** that opposing papers, if any, shall be filed with the Court and
16 served upon Pamela M. Egan, by email at pegan@ckrlaw.com, attorney for the
17 Plaintiff, and by first-class mail upon James Perkins, Office of the United States
18 Trustee, Office of The United States Trustee, 920 West Riverside Avenue, Suite
19 593, Spokane, WA 99201-1012, on or before _____, __, 2019; and it is further
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