

1 JASON T. PISKEL, WSBA #35398
Email: jtp@pyklawyers.com
2 BENJAMIN J. MCDONNELL, WSBA #45547
Email: ben@pyklawyers.com
3 PISKEL YAHNE KOVARIK, PLLC
4 522 West Riverside Ave., Suite 700
Spokane, WA 99201
5 Telephone: (509) 321-5930
6 Facsimile: (509) 321-5935

7 *Attorneys for David M. Carlson,*
8 *Enterprise Focus, Inc., and Clever Capital, LLC*

9 UNITED STATES BANKRUPTCY COURT
10 EASTERN DISTRICT OF WASHINGTON

11 In re:) Case No. 18-03197-FPC11
12)
13 GIGA WATT, INC.,) **Adv. No. 19-80012-FPC**
14)
Debtor.) Chapter 11
15)
16) **DEFENDANTS DAVID M.**
17) **CARLSON, ENTERPRISE**
18) **FOCUS, INC. AND CLEVER**
19) **CAPITAL, LLC'S**
20) **MEMORANDUM RE: SHOW**
21) **CAUSE**
22)
23)
24)
25)
v.)
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;)

DEFENDANTS DAVID M. CARLSON - 1



Piskel Yahne Kovarik, PLLC
522 W. Riverside Avenue Ste. 700
Spokane, Wa 99201
P 509.321.5930 / F 509.321.5935

1 ROB TRAVIS; and JANE DOES)
2 2 through 15,)
3 Defendants.)

4 In accordance with the Court's Amended Order to Show Cause for
5 Preliminary Injunction and Temporary Restraining Order (ECF No. 19),
6 Defendants David M. Carlson, Enterprise Focus, Inc. and Clever Capital,
7 LLC, by and through their attorneys of record, respectfully submit their
8 Memorandum Re: Show Cause.
9

10 **I. INTRODUCTION**

11 The injunctive relief Plaintiff requests is an attempted end-run
12 around the Bankruptcy Code's requirements that apply to assumption of
13 executory contracts including, specifically, nonresidential leases of real
14 property. The Trustee made the business decision to not assume any of
15 the TNT Facility leases in which Giga Watt, Inc. had asserted an interest.
16 Not having been assumed within the time required, they are rejected.
17 Nevertheless, to regain the opportunity to control the facility, with Mr.
18 Carlson as his target, Plaintiff commenced this proceeding and obtained
19 a temporary restraining order. The evidence to be presented at the show
20 cause hearing, however, will demonstrate that Plaintiff is not entitled to
21 the extraordinary equitable relief of a preliminary injunction.
22
23
24
25

DEFENDANTS DAVID M. CARLSON - 2



Piskel Yahne Kovarik, PLLC
522 W. Riverside Avenue Ste. 700
Spokane, Wa 99201
P 509.321.5930 / F 509.321.5935

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

II. FACTUAL BACKGROUND

The factual background will be supported by the exhibits and the testimony to be presented at the show cause hearing set for May 23, 2019 (ECF No. 19).

David Carlson and Enterprise Focus Inc.

David Carlson is an East Wenatchee resident who initially created Enterprise Focus, Inc. (“Enterprise Focus”) to start a bitcoin mining business and for investment opportunity. He began this business by securing a data center location to expand bitcoin mining operations. Bitcoin mining is performed by computer boxes that process data for the bitcoin network, and these boxes are referred to as miners. After finding the TNT Facility and meeting the Thompson family, he entered into agreements to lease warehouse property at the facility and to convert the warehouses into data centers. Enterprise Focus was also known as MegaBigPower, the name commonly used in connection with the early bitcoin mining business.

The B and H Commercial Leases |2013.

A Commercial Lease Agreement dated June 21, 2013 provided that Darel E. Thompson and Patricia C. Thompson d/b/a TNT Business and Warehouse Complex, as landlord, leased to Mr. Carlson, as tenant, certain

1 real property, a portion of the TNT Facility at 474 Highline Drive, East
2 Wenatchee, Washington, for a lease term of five years commencing on
3 August 1, 2013 and terminating on the last day of July of 2018.

4 An addendum to the June 21, 2013 lease provided that Mr. Carlson,
5 as tenant, shall move into Building B of the TNT Facility. The addendum
6 further provides that, as of June 21, 2013, Mr. Carlson, as tenant, signed a
7 five (5) year lease on Building H of the TNT Facility, for a lease term
8 beginning on August 1, 2013 through July 31, 2018. The addendum
9 provided for a \$10,000 refundable damage deposit. A Lease Addendum to
10 Building H, dated September 1, 2013, provided that Darel E. and Patricia
11 C. Thompson d/b/a TNT Business Warehouse Complex agreed to lease to
12 Mr. Carlson a fenced and gated lot of approximately 6300 square feet
13 behind Building H, for a lease term to run concurrent with the remainder
14 of the lease for Building H.
15
16
17

18 **Building B Commercial Lease Agreement | 2014.**

19 A Commercial Lease Agreement dated February 7, 2014 between
20 TNT Business Complexes, LLC, as landlord, and Mr. Carlson, as tenant,
21 provided that TNT Business Complexes, LLC leased Building B for a term
22 of four-and-one-half (4.5) years, from February 1, 2014 through the end of
23 July of 2018, for the monthly rent of \$1,400. An Addendum to
24
25

1 Commercial Lease Agreement provided that Mr. Carlson had delivered to
2 TNT Business Complexes, LLC the sum of \$75,000, the anticipated cost to
3 restore the premises were Mr. Carlson to cease operating business at that
4 location; that is, the anticipated cost to return the building to the condition
5 in which it existed prior to tenant structural alterations. The addendum
6 reflects the sum is inclusive of the \$10,000 prior deposit.
7

8 **Building C Commercial Lease Agreement | 2014.**

9 A Commercial Lease Agreement dated November 14, 2014 provided
10 that TNT Business Complexes, LLC, as landlord, leased to Mr. Carlson, as
11 tenant, Building C of the TNT Facility for the term of five (5) years
12 commencing on December of 2014 through November of 2019, with a
13 stated monthly rent of \$1,525 for the first twelve months and \$1,650 per
14 month thereafter.
15
16

17 **Building A Commercial Lease Agreement | 2015.**

18 A Commercial Lease Agreement dated June 24, 2015 provided that
19 TNT Business Complexes, LLC, as landlord, leased to Mr. Carlson,
20 Building A of the TNT Facility for the term of five (5) years commencing on
21 July 1, 2015 through the last day of June of 2020. An addendum to
22 Commercial Lease Agreement reflected that Mr. Carlson must return the
23 warehouse unit to the condition in which it existed prior to tenant
24
25

1 structural alterations. The lease agreement contains a Payment
2 Reimbursement Schedule outlining varying monthly rental rates.

3 **Creation of Giga Watt.**

4 In or about late 2016, Mining King began operations at Rock Island
5 Facility in Rock Island, WA and attempted to begin a large-scale bitcoin
6 mining operation. It never came to fruition, and the operators defaulted
7 with the landlord of the Rock Island Facility, which was property the
8 Thompsons controlled. Subsequently, Mr. Carlson met with a
9 representative of Mining King: Adam West, a pseudonym for this
10 individual. Mr. Carlson learned that Mining King could not move forward
11 with its project and Mr. Carlson was asked to host 1000 miners. Mr.
12 Carlson had room in a facility in Moses Lake, Washington and hosted the
13 miners at that location. This engagement worked and Adam West
14 introduced Mr. Carlson to Leonid Markin, Andrey Kuzenny, and Eduard
15 Khaptakhev, who ultimately become the owners of Giga Watt. These three
16 men ultimately created the entity Giga Watt, Inc. along with another
17 individual named, Nick Evdokimov (who was eventually removed from the
18 company by Mr. Markin) and with Mr. Carlson. Giga Watt was organized
19 to purchase MegaBigPower's assets and move forward with bitcoin mining
20 operations on a larger scale. To accomplish this goal, Mr. Carlson entered a
21
22
23
24
25

1 sale and assignment and assumption agreement.

2 **Bill of Sale and Assignment and Assumption Agreement.**

3 Mr. Carlson and his company Enterprise Focus and Giga Watt
4 circulated and discussed a written sale and assignment of assets from Mr.
5 Carlson and Enterprise Focus to Giga Watt, including an assumption of
6 leases at the TNT Facility. Giga Watt began occupying and conducting
7 business from the TNT Business Complex, including Buildings A, B, C, and
8 H, and the Eller Street House/Office. Mr. Carlson, individually, and on
9 behalf of Enterprise Focus, executed an Addendum to the Bill of Sale and
10 Assignment and Assumption agreement, which set forth a change in
11 consideration amount.
12
13

14 **Mr. Carlson Resigns as CEO of Giga Watt.**

15
16 By email, Mr. Carlson formally tendered his resignation as CEO of
17 Giga Watt, effective August 12, 2018. On or before that day, Mr. Carlson
18 lacked management control of Giga Watt and, at that time, Andrey
19 Kuzenny controlled the company. Mr. George Turner managed day-to-day
20 operations. The leases for buildings B and H of the TNT Facility were
21 expiring and TNT Business Complexes, LLC wanted to deal with Mr.
22 Carlson in connection with any new TNT Facility leases.
23
24
25

DEFENDANTS DAVID M. CARLSON - 7



Piskel Yahne Kovarik, PLLC
522 W. Riverside Avenue Ste. 700
Spokane, Wa 99201
P 509.321.5930 / F 509.321.5935

B & H Lease of 2018 to Enterprise Focus | Carlson.

By Commercial Lease signed November 1, 2018, TNT Business Complexes, LLC, as landlord, leased to Enterprise Focus, and Dave Carlson, as tenants, buildings B and H of the TNT Facility. The recitals reflect prior payments by Dave Carlson and/or Enterprise Focus in the amount of \$75,000: \$65,000 for Building H and \$10,000 for Building B. The recitals reflect that the deposit had become insufficient to cover the costs of restoration affected by tenant alterations and that, consequently, TNT Business Complexes, LLC required as a condition to the lease an increase of the alteration deposit in the amount of \$32,000, plus \$15,000 to cover the costs of prior alterations. As further reflected in the recitals, TNT Business Complexes, LLC required an amount equal to four (4) months lease payments in reserve to repair the leased premises in the event the tenants were unable to continue business for the full five years of the lease: the sum of \$29,400.00. Thus, the lease reflected the following calculation: \$32,000, plus \$15,000, plus \$29,400, for the sum of \$76,400. This sum is in addition to the prior \$75,000 deposit.

The lease provided for a five (5) year term beginning August 1, 2018 through July 31, 2023, with rent beginning on August 1, 2018 in the amount of \$7,750 for the first two years and subject to upward adjustment



1 for subsequent years. The lease provided for late charges and interest,
2 together with other obligations. The following, without limitation,
3 constituted an event of default under the lease: transfer by tenant absent
4 landlord's prior written consent; also, abandonment of leased premises,
5 defined as failure by tenant to occupy or use the leased premises for twenty
6 (20) consecutive business days.
7

8 **Giga Watt Proposes an Agreement to Mr. Carlson.**

9 On or about November 15, 2018, Giga Watt, through its Managing
10 Director, informed Mr. Carlson, as follows:
11

12 *As you know, Giga Watt is in trouble. We need to keep*
13 *hosting miners at TNT, but may be unable to come up with*
14 *the cash to keep the bills paid. In order to keep our access to*
15 *the facility, I propose a new agreement under which we*
16 *trade you some of Giga Watt's stock of miners at an*
equivalent value to current market prices, adjusted for use
and condition.

17 *Based on present market values, I believe a fair price to be*
18 *approximately \$280 for an S9i in good condition with PSU.*
19 *We have close to 280 of those available for trade. If this is*
acceptable please let me know.

20 **Sublease to Giga Watt.**

21 In or about November 16, 2018, Clever Capital and Giga Watt
22 entered into a written Commercial Lease of buildings B and H. This
23 sublease also describes the leased premises as including Building A. It
24
25

DEFENDANTS DAVID M. CARLSON - 9



Piskel Yahne Kovarik, PLLC
522 W. Riverside Avenue Ste. 700
Spokane, Wa 99201
P 509.321.5930 / F 509.321.5935

1 provided for a one (1) year term commencing on November 1, 2018
2 through October 31, 2019, for a prorated rental rate of \$28,257.00 for the
3 month of November and with a rental rate in the amount of \$31,056.00
4 beginning December 1, 2018, subject to possible downward adjustment by
5 written agreement. The commercial lease further provided as follows:
6

7 **2.6 Additional Consideration.** *Under a prior month-to-*
8 *month arrangement regarding the Leased Premises, Tenant*
9 *owes Landlord Eleven Thousand Six Hundred Dollars*
10 *(\$11,600.00) in past-due rent. Tenant also owes Forty-Six*
11 *Thousand Forty-Nine Dollars to (\$46,049.00) to the Douglas*
12 *County Public Utility District (PUD). The Parties understand*
13 *that PUD intends to shut-off power to the Leased Premises*
14 *unless Tenant's account is paid in full by November 16, 2018.*
15 *Having the power shut-off would create significant risk to*
16 *Landlord and the Leased Premises. Therefore, Landlord*
17 *agrees to pay the outstanding debt to PUD on behalf of*
18 *Tenant. Combining the past-due rent, the past-due PUD bill,*
19 *and November's rent, Tenant owes Landlord Eighty-Five*
20 *Thousand Nine Hundred and Six Dollars (\$85,906.00), the*
21 *"Total Amount Due."*

22 *In consideration for Landlord transferring funds in the*
23 *amount of Forty-Six Thousand Forty-Nine Dollars to*
24 *(\$46,049.00) to Tenant for payment of Tenant's PUD*
25 *outstanding bill, and in lieu of cash payment for the past-due*
and November rents, Tenant hereby assigns and transfers to
Landlord Tenant's contract with PUD for all power accounts
associated with the Leased Premises; agrees to promptly
facilitate and fully participate in all necessary notice,
documentation, or other requirements to effectuate the
assignment and transfer; and agrees to immediately
transfer to Landlord:

- 1 a. *Two Hundred Eighty (280) used S9 miners,*
2 *including power supplies, at a valuation of Two*
3 *Hundred Twenty-Five Dollars (\$225.00) per*
4 *system (\$63,000.00 total); and*
- 5 b. *Additional miners to constitute the remaining*
6 *Twenty-Two Thousand Nine Hundred Six Dollars*
7 *(\$22,906.00), the “Remaining Amount Due,” such*
8 *as:*
- 9 i. *Used S9s, including power supplies at a*
10 *valuation of Two Hundred Twenty-Five*
11 *Dollars (\$225.00) per system;*
- 12 ii. *Used L3 units, including power supply, at a*
13 *valuation of Thirty-Five Dollars (\$35.00)*
14 *per system; or*
- 15 iii. *Used Alphaminer GPU units, including*
16 *power supply, at a valuation of Six*
17 *Hundred Dollars (\$600.00) per system.*

18 This lease was negotiated and signed by Mr. George F. Turner III as
19 Managing Director of Giga Watt. From the outset, Giga Watt has failed to
20 fully perform.

21 **Assignment of Lease from Enterprise Focus to Clever Capital.**

22 An assignment of Commercial Lease dated November 29, 2018,
23 provided that Enterprise Focus and Mr. Carlson assigned to Clever Capital,
24 LLC (“Clever Capital”) the Commercial Lease with TNT Business Complex,
25 LLC.

1 **The Bankruptcy Case.**

2 On November 19, 2018, Giga Watt filed its voluntary petition under
3 Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”).
4 (Main Case, ECF No. 1). (Id.). Having resigned as CEO of Giga Watt, Mr.
5 Carlson was not part of Giga Watt’s decision to file a petition for relief, as
6 reflected by the absence of his name in the Minutes and Resolutions of the
7 company. (Id.). Those resolutions were signed by Andrey Kuzenny, Leonid
8 Markin, and Eduard Khaptakhev. (Id.).
9

10
11 On March 19, 2019, the Estate of Giga Watt, Inc., through its counsel,
12 and Clever Capital, caused to be filed a Notice of Stipulation to Extend
13 Deadline to Assume or Reject the Lease with Clever Capital LLC. (Main
14 Case, ECF No. 240). The notice reflected the stipulation to extend the
15 deadline for the Chapter 11 Trustee to assume or reject “*that certain*
16 *Commercial Lease, dated November 16, 2018, between Clever Capital*
17 *LLC, as lessor, and Giga Watt, Inc., as lessee, with respect to 474 Highline*
18 *Dr., East Wenatchee, Washington.*” (Id.). The extended deadline was
19 stated as April 18, 2019. (Id.). The Chapter 11 Trustee, however, elected to
20 not assume the lease within that time.
21
22

23 **This Adversary Proceeding.**

24 Four days after expiration of the deadline to assume the November
25



1 16, 2018 Commercial Lease, Plaintiff commenced this adversary
2 proceeding, and filed an Emergency Application for Order to Show Cause
3 for Temporary Restraining Order and Preliminary Injunction. (ECF Nos. 1-
4 2). On April 25, 2019, the Court entered an Order to Show Cause for
5 Preliminary Injunction and Temporary Restraining Order. (ECF No. 11).
6 On April 30, 2019, the Court entered an Amended Order to Show Cause for
7 Preliminary Injunction and Temporary Restraining Order. (ECF No. 19).
8 In it, the Court directs the Defendants to “*show cause . . . why an order
9 should not be issued . . . enjoining the . . . Defendants during the pendency
10 of this adversary proceeding from controlling, disposing of, transferring,
11 encumbering or possessing any of the assets transferred pursuant to the
12 TNT Transfer, or occupying the buildings or asserting any interest or
13 control in any of the TNT Leases or infrastructure and assets of the TNT
14 Facility.*” (ECF No. 19 at 2-3).
15
16
17

18 III. ARGUMENT

19 The issuance of a preliminary injunction is the exception, not the
20 rule. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008)
21 (explaining it is “*an extraordinary remedy never awarded as of right*”).
22 “*In each case, courts must balance the competing claims of injury and
23 consider the effect of granting or withholding the requested relief.*” Id.
24
25

1 (internal quotations omitted). “A plaintiff seeking a preliminary
2 injunction must establish that he [or she] is likely to succeed on the
3 merits, that he [or she] is likely to suffer irreparable harm in the absence
4 of preliminary relief, that the balance of equities tips in his [or her]
5 favor, and that an injunction is in the public interest.” *Id.* at 20. In the
6 Ninth Circuit, the plaintiff may show “serious questions going to the
7 merits were raised and the balance of hardship tips sharply toward the
8 plaintiff’s favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
9 1131 (9th Cir. 2011) (described as “one alternative on a continuum”).

12 Here, Plaintiff cannot satisfy this burden and a preliminary
13 injunction, an extraordinary remedy, should not issue.

14 **A. The Plaintiff is Not Likely to Succeed on the Merits.**

15 **1. The Trustee Elected to Not Assume any Lease at the**
16 **TNT Facility and, as a Matter of Law, They were**
17 **Rejected.**

18 Section 365(d)(4) governs the assumption or rejection of an
19 unexpired nonresidential lease of real property:

20 *[A]n unexpired lease of nonresidential real property under*
21 *which the debtor is the lessee shall be deemed rejected, and*
22 *the trustee shall immediately surrender that nonresidential*
23 *real property to the lessor, if the trustee does not assume or*
24 *reject the unexpired lease by the earlier of –*

- 25 (i) *the date that is 120 days after the date of the*
order for relief; or

1 (ii) *the date of the entry of an order confirming*
2 *a plan.*

3 11 U.S.C. § 365(d)(4)(A). Pending assumption or rejection, the trustee
4 must timely perform post-petition obligations of the debtor under the
5 lease. 11 U.S.C. § 365(d)(3). *“Lease rejection upon the expiration of the §*
6 *365(d)(4) deadline occurs automatically without need for court*
7 *approval, and once statutory rejection has occurred, that rejection is*
8 *conclusive.”* J & M Food Services, LLC v. Camel Investment L.L.C. (In re J
9 & M Food Services, LLC), 2018 WL 1354335 (BAP March 14, 2018)
10 (unpublished) (quoting Arizona Appetito’s Stores, Inc. v. Paradise Village
11 Investment Co. (In re Arizona Appetito’s Stores, Inc.), 893 F.2d 216, 219
12 (9th Cir. 1990)). *“Once the lease is deemed rejected, the debtor must*
13 *immediately surrender the leased property to the lessor.”* Id. (citing Sea
14 Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir. 1989)).
15 Assumption after notice and motion to assume an executory contract in
16 default is subject to cure and adequate assurance. 11 U.S.C. § 365(b).
17
18
19

20 Here, the deadline to assume or reject the Commercial Lease
21 between Clever Capital and Giga Watt expired on April 18, 2019. (Main
22 Case, ECF No. 240). The Chapter 11 Trustee neither moved to assume this
23 lease nor filed a motion to extend the deadline, and did not move to
24
25

1 assume the leases on the other buildings at the TNT Facility. The lapse of
2 the time period within which to assume or reject unexpired nonresidential
3 leases has resulted in rejection. While Plaintiff now disputes that Clever
4 Capital has any interest in the property, such contention does not change
5 the conclusion that any leasehold interest of the debtor in nonresidential
6 real property that was not timely assumed was, consequently, rejected as a
7 matter of law.
8

9
10 Nevertheless, as an attempted end-run around the requirements of
11 U.S.C. § 365, Plaintiff, by this adversary proceeding, demands
12 injunctive and other equitable relief to achieve the same objective:
13 possession of real property subject to leases that were not assumed. In
14 doing so, Plaintiff has attempted to characterize the sublease as a transfer,
15 but this characterization ignores the nature of the lease. By virtue of the
16 lease between TNT Business Complexes, LLC and Enterprise Focus,
17 Enterprise Focus and Mr. Carlson agreed to pay: an additional alteration
18 deposit in the amount of \$32,000, estimated costs for prior tenant
19 alterations in the amount of \$15,000, and an amount equal to four
20 months rent in the amount of \$29,400. In the sublease to Giga Watt,
21 Clever Capital agreed to pay outstanding debt to the Douglas County PUD
22 on behalf of Giga Watt; this amount, coupled with rent in the amount of
23
24
25

1 \$11,600 and rent for November of 2018, equaled the sum of \$85,906.00.

2 In lieu of a cash payment, it was proposed that Giga Watt pay by way of
3 miners having a fair market value equal to this sum. The transfer of the
4 leasehold interest in buildings B and H of the TNT Facility was to from
5 Clever Capital to Giga Watt, not the reverse.
6

7 Furthermore, irrespective of any transfer, assignment, or
8 assumption of leases by or from Mr. Carlson of buildings A and C to Giga
9 Watt, TNT Business Complexes, LLC ultimately looks to Mr. Carlson to
10 satisfy past and ongoing obligations under the original leases. While
11 Plaintiff argues that these Defendants are “*interfering with the Trustee’s*
12 *efforts to re-open operations at the TNT Facility,*” these Defendants are
13 not to blame for any difficulty of the Chapter 11 Trustee to reach a deal
14 that includes TNT Business Complexes, LLC. (ECF No. 2 at 3).
15
16

17 **2. Mr. Carlson Resigned as CEO.**

18 Plaintiff portrays Mr. Carlson as a fiduciary that controlled Giga Watt
19 at all material times. Mr. Carlson, however, resigned in writing as CEO of
20 Giga Watt, effective on or before August 12, 2018. The lease of buildings B
21 and H to Giga Watt was executed after this date. Giga Watt control rested
22 in Andrey Kuzenny, Leonid Markin, and/or Eduard Khaptekhev. The
23 petition itself underscores this fact and Mr. Carlson was not involved in
24
25

1 filing of the petition commencing the underlying case. (Main Case, ECF
2 No. 1).

3 **3. The Power Contract Was Not Effectively Transferred.**

4 To obtain the temporary restraining order, Plaintiff argued there
5 was an “*obvious and blatant mismatch between the assets transferred,*
6 *which includes the Debtor’s 3MW power contract with the Douglas*
7 *County Public Utility District and the obligations occurred*” (sic). (ECF
8 No. 2 at 5). As the Plaintiff is aware, however, the contract with the
9 Douglas County PUD was not effectively transferred and Enterprise
10 Focus, Mr. Carlson, and Clever Capital have not interfered with any power
11 contract. Any rights of the Debtor in and to the power contract is an issue
12 between it and the PUD.
13
14

15
16 **4. Mr. Carlson Owns Personal Property Located at the
TNT Facility.**

17 The Order to Show cause enjoins Defendants from, without
18 limitation, “*asserting any interest or control in . . . infrastructure and*
19 *assets of the TNT Facility.*” (ECF No. 9 at 2-3). However, Mr. Carlson has
20 personal property located at the TNT Facility and Plaintiff has not
21 adequately identified the property subject to ongoing injunctive relief,
22 generally, or what “*assets of the TNT Facility*” include.
23
24
25

1 **B. Irreparable injury is Not Likely and an Adequate Remedy**
2 **at Law Exists.**

3 Plaintiff has not and cannot “*demonstrate that irreparable harm is*
4 *likely in the absence of an injunction.*” Winter, 555 U.S. at 22 (emphasis
5 added). Plaintiff will not suffer irreparable injury were a preliminary
6 injunction to not issue. Plaintiff’s argument to the contrary presupposes it
7 will be able to negotiate some deal with not only the TNT Business
8 Complex, LLC/Thompsons but also with the Douglas County PUD,
9 something it has not attempted to demonstrate is likely or even possible.
10 Consequently, it has not made any showing that it has the ability and
11 cooperation of third parties to continue operations at this location.
12 Accordingly, any contention of irreparable injury does not rise above mere
13 speculation. Further, it has an adequate remedy at law: damages.

14 **C. Balance of Equities Tips Sharply in Defendants’ Favor.**

15 Here, the balance of the equities tips sharply in these Defendants’
16 favor. Issuance of a preliminary injunction would be fundamentally
17 unfair. Clever Capital has ongoing obligations that it owes to TNT
18 Business Complex, LLC under the commercial lease. TNT Business
19 Complex, LLC/Thompsons look to Enterprise Focus, Mr. Carlson, and/or
20 Clever Capital to satisfy obligations in connection with the lease
21
22
23
24
25

1 agreements. Contemporaneously, the Trustee elected to not assume the
2 leases—irrespective of whom Plaintiff contends is the landlord—and,
3 nevertheless, demands possession of the property without paying for it.

4 Additionally, a preliminary injunction may force Clever Capital to
5 breach the lease with TNT Business Complexes, LLC. For example,
6 abandonment is an event of default under that lease:
7

8 **13.1.3 Abandonment of Leased Premises.**
9 *Tenant fails to occupy or use the Leased Premises for the*
10 *purpose permitted by this Lease for a total of twenty (20)*
11 *consecutive business days or more during the Lease Term,*
12 *unless such failure is excused under other provisions of this*
13 *lease.*

14 It is fundamentally inequitable for Clever Capital to be deprived of the
15 right of possession under the lease with TNT Business Complexes, LLC
16 while it has a concurrent obligation to perform, including to pay, under
17 the lease. While the Plaintiff has contended that “*Defendant Carlson will*
18 *be able to assert monetary damages*” such that “*the balance of hardship*
19 *tips sharply in*” Plaintiff’s “*favor*” (ECF No. 2 at 7), such contention
20 presupposes that the estate will have funds sufficient to satisfy the full
21 amount of damages.
22
23
24
25

1 **D. Preliminary Injunction would not Further any Public**
2 **Interest.**

3 To obtain the temporary restraining order, Plaintiff contended that
4 “enjoining the Defendants is in the public interest” because “[i]t will
5 uphold the integrity of the bankruptcy process by preventing last minute
6 asset grabs.” (ECF No. 2 at 7). This contention, however, ignores the
7 nature of the sublease agreement. Rather than making some “asset grab,”
8 after resigning as CEO from Giga Watt, Mr. Carlson assisted and, indeed,
9 enabled Giga Watt to maintain its ongoing operations at the TNT Facility
10 and, further, to keep the power on at that location by, for example,
11 providing the funds to satisfy certain financial obligations of Giga Watt to
12 the Douglas County PUD. Furthermore, the “integrity of the bankruptcy
13 process” is not upheld and, rather, equity is disserved when used as an
14 end-run around 11 U.S.C. § 365. Therefore, the preliminary injunction
15 would not further any public interest, and should not issue.
16
17
18

19 **IV. CONCLUSION**

20 For the reasons set forth above, and based on evidence and
21 argument to be presented at the show cause hearing set for May 23, 2019,
22 Defendants David M. Carlson, Enterprise Focus, Inc., and Clever Capital,
23 LLC respectfully request that a preliminary injunction not be issued and
24
25

1 that, rather, the Court grant these Defendants such relief as may be
2 deemed just and equitable under the circumstances including, without
3 limitation, attorney's fees and cost.

4 DATED this 16th day of May 2019.

5 PISKEL YAHNE KOVARIK, PLLC
6

7
8 /s/ Benjamin J. McDonnell _____
9 JASON T. PISKEL, WSBA #35398
10 jtp@pyklawyers.com
11 BENJAMIN J. MCDONNELL, WSBA #45547
12 ben@pyklawyers.com
13 PISKEL YAHNE KOVARIK, PLLC
14 522 West Riverside Ave., Suite 700
15 Spokane, WA 99201
16 Telephone: (509) 321-5930
17 Facsimile: (509) 321-5935

18
19 *Attorneys for David M. Carlson, Enterprise*
20 *Focus, Inc., and Clever Capital, LLC*
21
22
23
24
25