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

8 In re:  
9 GIGA WATT, Inc., a Washington  
10 corporation,  
11 Debtor.

Case No. 18-03197  
The Honorable Frederick P. Corbit  
Chapter 11

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

Adv. P. No. 19-80012

14 vs.

**PRE-HEARING MEMORANDUM  
OF MARK D. WALDRON,  
CHAPTER 11 TRUSTEE, FOR  
ORDER TO SHOW CAUSE FOR  
PRELIMINARY INJUNCTION AND  
TEMPORARY RESTRAINING  
ORDER**

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

20 Mark D. Waldron, in his capacity as the duly appointed Chapter 11 Trustee  
21 (the “Trustee” or “Plaintiff”) for Giga Watt, Inc. (the “Debtor”) in the above-  
22 captioned bankruptcy and as the plaintiff in the above-captioned adversary

23 Chapter 11 Trustee’s Pre-Hearing Memorandum  
24 For Order to Show Cause for Preliminary  
Injunction and Temporary Restraining Order - Page 1.

1 proceeding, by and through his undersigned counsel, hereby files this *Pre-Hearing*  
2 *Memorandum for Order to Show Cause for Preliminary Injunction and*  
3 *Temporary Restraining Order* (the “Pre-Hearing Memorandum”). Unless  
4 otherwise defined herein, capitalized terms used in this Pre-Hearing Memorandum  
5 have the meanings ascribed to them in the *Verified Complaint*, filed on April 22,  
6 2019 [AP Docket No. 1].

### 7 INTRODUCTION

8 The Trustee initiated this adversary proceeding on April 22, 2019 by filing  
9 a *Verified Complaint* [AP Docket No. 1] together with an *Emergency Application*  
10 *for Order to Show Cause for Temporary Restraining Order and Preliminary*  
11 *Injunction* (the “Emergency Application”)<sup>1</sup> [AP Docket No. 2] against Defendants  
12 David M. Carlson and Jane Doe 1, individually and on behalf of the martial estate,  
13 Enterprise Focus, Inc., Clever Capital, LLC (“Clever Capital”), Jeffrey Field, Rob  
14 Tavis and John Does 1 through 15 (collectively, “Defendants”).

15 This memorandum does not repeat the elements for obtaining a preliminary  
16 injunction. The Court is familiar with them and they are set forth in the  
17 Emergency Application. Instead, this memorandum identifies key legal issues that  
18 go to the probability of success on the merits or whether a serious question is  
19 raised with respect to the Trustee’s claims set forth in the Verified Complaint.

20  
21  
22 <sup>1</sup> The Trustee incorporates by reference as if set forth fully herein all of the facts  
23 averred in the Verified Complaint and the Emergency Application.

1 The Verified Complaint sets forth eight claims for relief under title 11 of  
2 the United States Code (the “Bankruptcy Code”) and chapter 19 of Washington  
3 Code, the Washington Uniform Fraudulent Transfer Act (“WUFTA”). All of the  
4 claims except the Fifth Claim of Relief for preference to an insider are implicated  
5 in this hearing. The Trustee has identified the following relevant legal issues with  
6 respect to the seven remaining claims to assist the Court in assessing the Trustee’s  
7 probability of success on the merits or the raising of a serious question with  
8 respect to his claims.

9 **I. First and Second Claims for Relief - Avoid and Recover Intentional**  
10 **Fraudulent Transfers Pursuant to 11 U.S.C. §§ 548(a)(1)(A)-(B) and**  
11 **550(a) Against Defendants Clever Capital and Carlson**

12 **A. Actual Fraudulent Transfer - 11 U.S.C. § 548(a)(1)(A)**

13 The elements of an “actual” fraudulent transfer under Section 548(a)(1)(A)  
14 are: (i) the debtor transferred an interest in property or incurred a debt; (ii) on or  
15 within two years before the petition filing date; (iii) with actual intent to hinder,  
16 delay, or defraud a present or future creditor. 11 U.S.C. § 548. Courts also  
17 routinely look to the traditional badges of fraud. As the Ninth Circuit has stated:

18 [a]mong the more common circumstantial indicia of  
19 fraudulent intent at the time of the transfer are: (1) actual  
20 or threatened litigation against the debtor; (2) a  
21 purported transfer of all or substantially all of the  
22 debtor's property; (3) insolvency or other unmanageable  
23 indebtedness on the part of the debtor; (4) a special  
24 relationship between the debtor and the transferee; and,  
25 after the transfer, (5) retention by the debtor of the  
property involved in the putative transfer.

21 *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 806 (9th Cir.1994)  
22 (emphasis omitted) (quoting *Max Sugarman Funeral Home, Inc. v. A.D.B.*

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23 Chapter 11 Trustee’s Pre-Hearing Memorandum  
24 For Order to Show Cause for Preliminary  
25 Injunction and Temporary Restraining Order - Page 3.

1 *Investors*, 926 F.2d 1248, 1254–55 (1st Cir.1991)). *Accord In re Huber*, 493 B.R.  
2 798, 811–12 (Bankr. W.D. Wash. 2013).

3 Section 548 of the Bankruptcy Code further states in pertinent part:

4 (2) For the purposes of this subsection, a transfer includes a transfer made  
5 in anticipation of any money judgment, settlement, civil penalty, equitable  
6 order, or criminal fine incurred by, or which the debtor believed would be  
7 incurred by—

8 (A) any violation of the securities laws (as defined in section 3(a)(47)  
9 of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any  
10 State securities laws, or any regulation or order issued under Federal  
11 securities laws or State securities laws; or

12 (B) fraud, deceit, or manipulation in a fiduciary capacity or in  
13 connection with the purchase or sale of any security registered under  
14 section 12 or 15(d) of the Securities Exchange Act of 1934 (15  
15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of  
16 1933 (15 U.S.C. 77f).

17 11 U.S.C. 548(e)(2).

18 **B. Constructive Fraudulent Transfer - 11 U.S.C. § 548(a)(1)(B)**

19 The elements of a “constructive” fraudulent transfer under Section  
20 548(a)(1)(B) are that (i) the debtor transferred property or incurred a debt for less  
21 than “reasonably equivalent value;” and (ii) the debtor: (a) was insolvent at the  
22 time or was rendered insolvent by the transfer; or (b) was engaged or about to  
23 engage in a business or transaction for which the debtor's remaining assets were  
24 unreasonably small in relation to the business or transaction; or (c) intended to  
25 incur or believed (or reasonably should have believed) that it would incur debts  
beyond its ability to repay; or (d) made the transfer (or incurred the obligation) to  
or for the benefit of an insider under an employment contract and not in the

1 ordinary course of business. *See, e.g., In re Empire Interiors, Inc.*, 248 B.R. 305  
2 (Bankr. N.D. Ohio 2000) (avoiding transfer of lease four days prepetition as  
3 constructively fraudulent because debtor did not receive “reasonably equivalent  
4 value”).

5 **II. Third and Fourth Claims for Relief - Avoid and Recover Intentional**  
6 **Fraudulent Transfer – the TNT Transfer – Pursuant to RCW 19.40.041**  
7 **and 11 U.S.C. §§ 544(a) and 550 Against Defendants Clever Capital**  
8 **and Carlson**

9 Under Section 544(a)(3) of the Bankruptcy Code, the trustee of a  
10 bankruptcy estate may avoid any transfer of real property or obligation of the  
11 debtor that would be voidable under state law by a bona fide purchaser of real  
12 property from the debtor. *In re Tleel*, 876 F.2d 769 (9th Cir. 1989); *see also In re*  
13 *Nw. Territorial Mint, LLC*, 591 B.R. 852, 868 (Bankr. W.D. Wash. 2018)  
14 (discussing fraudulent transfers under 544 and WUFTA). The Trustee alleges in  
15 the Verified Complaint that the TNT Transfer is a fraudulent transfer under  
16 WUFTA. Two types of fraudulent transfers are provided for by WUFTA: actual  
17 fraud and constructive fraud. RCW § 19.40.041.

18 **A. Actual Fraudulent Transfer - RCW § 19.40.041(a)(1)**

19 An actual fraudulent transfer made by a debtor occurs when a transfer is  
20 made with actual intent to hinder, delay, or defraud a creditor of the debtor.  
21 RCW § 19.40.041(a)(1). In determining actual fraudulent transfers, the Court  
22 may consider circumstantial evidence of intent. *United States v. Black*, 725  
23 F.Supp.2d 1279, 1291 (E.D. Wash. 2010). The Court may also consider the

1 eleven specific factors enumerated in the RCW § 19.40.041, as well as other  
2 factors not specifically identified that may impact the Court’s determination of  
3 intent. *Sedwick v. Gwinn*, 73 Wash. App. 879, 873 P.2d 528 (1994)

4 **B. Constructive Fraudulent Transfer - RCW § 19.40.041(a)(2)**

5 Under WUFTA, a constructive fraudulent transfer made by a debtor is  
6 fraudulent to a creditor, whether the creditor’s claim arose before or after the  
7 transfer was made or the obligation was incurred, if the debtor made the transfer  
8 or incurred the obligation: (1) without receiving reasonably equivalent value in  
9 exchange for the transfer or obligation; and (2) the debtor was engaged or was  
10 about to engage in a business or a transaction for which the remaining assets of  
11 the debtor were unreasonably small in relation to the business or transaction or  
12 intended to incur, or believed or reasonably should have believed that he or she  
13 would incur, debts beyond his or her ability to pay as they became due. RCW §  
14 19.40.041(a)(2).

15 **III. Sixth Claim for Relief – Breach of Fiduciary Duty Against Defendant**  
16 **Carlson**

17 Under Washington law, a breach of fiduciary duty requires the plaintiff to  
18 prove (1) the existence of a duty owed, (2) a breach of that duty, (3) resulting  
19 injury, and (4) that the claimed breach proximately caused the injury. *Micro*  
20 *Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wash. App. 412, 433–  
21 34, 40 P.3d 1206, 1217–18 (2002). In Washington, a fiduciary relationship arises  
22 in one of two situations: (a) when the nature of the relationship between the

1 parties has historically been considered fiduciary in character, such as that of  
2 attorney and client, doctor and patient, and partner and partner (fiduciary  
3 relationship as a matter of law), or (b) special circumstances exist in which one  
4 party justifiably relies on another to look after the former's financial interests  
5 (fiduciary relationship arise in fact). *Id.*; see also *Retired Pub. Emps. Council of*  
6 *Washington v. Charles*, 148 Wash.2d 602, 623, 62 P.3d 470, 482 (2003).

7 **IV. Seventh Claim for Relief – Turnover Pursuant to 11 U.S.C. § 542(e)**

8 The Trustee seeks turnover of all the assets transferred pursuant to the TNT  
9 Transfer and of the additional assets, including Building C and the office. Under  
10 the circumstances, a constructive or resulting trust should be imposed on the  
11 bundle off assets and the Trustee’s probability of success on the merits is high.

12 In considering whether an asset constitutes property of the estate, a  
13 Bankruptcy Court is first required to apply state law to determine whether a  
14 constructive or resulting trust exists. See *In re B.I. Financial Services Group,*  
15 *Inc.*, 854 F.2d 351 (9th Cir.1988); *Elliott v. Bumb*, 356 F.2d 749, 753 (1966).

16 Under Washington law, a constructive trust is a remedy imposed by a court  
17 which arises in one of two scenarios. See *Consulting Overseas Management, Ltd.*  
18 *v. Shtikel*, 105 Wash.App. 80, 18 P.3d 1144 (2001). It is a remedy for fraud,  
19 abuse of confidence, gross misrepresentation or other improper or wrongful  
20 conduct which results in a person obtaining something to which he would  
21 otherwise not be entitled and it is a purely equitable remedy. *Id.*

1 A resulting trust is the judicial imposition of a duty upon the person found  
2 to act as trustee and that duty typically is the duty to convey title to the intended  
3 beneficiary. *Thor v. McDearmid*, 63 Wash.App. 193, 205, 817 P.2d 1380 (1991).  
4 It is imposed when the facts and circumstances of the relationship or transaction  
5 indicate an intent of the parties to create a trust. *Id.* If the facts and circumstances  
6 indicate that some other intention could be inferred, no resulting trust is imposed.  
7 *Id.*

8 In constructive trust situations, the courts do not create an actual trust but  
9 effectuate relief as though a trust had been created at the time of the transaction.  
10 *See In re Catholic Bishop of Spokane*, 329 B.R. 304, 316 (Bankr. E.D. Wash.  
11 2005), aff'd in part sub nom. *Comm. of Tort Litigants v. Catholic Diocese of*  
12 *Spokane*, No. CV-05-0274-JLQ, 2006 WL 211792 (E.D. Wash. Jan. 24, 2006),  
13 and rev'd in part sub nom. *Comm. of Tort Litigants v. Catholic Diocese of*  
14 *Spokane*, 364 B.R. 81 (E.D. Wash. 2006). Absent allegations of wrongdoing, the  
15 basis for the corrective action is that it would be “unfair” or “inequitable” or just  
16 “not right” to allow the situation to continue. *Id.* In a resulting trust situation, the  
17 court creates a trust as that was the parties’ intention at the time of the transaction.  
18 The trust is created to convey the beneficial interest to the person who was  
19 intended to receive it. *Id.* (citing Restatement of Restitution § 160, cmt. b at p.  
20 642).

21 The essence of both constructive and resulting trusts requires that the  
22 underlying facts and circumstances regarding the relationship and course of

1 dealing between the parties must demonstrate that it would be inequitable to allow  
2 the titleholder to retain the beneficial interest in the property. *Catholic Diocese of*  
3 *Spokane*, supra, 364 B.R. “[W]hile state law must be the starting point in  
4 determining whether constructive trust may arise in a federal bankruptcy case,  
5 that law must be applied in a manner not inconsistent with federal bankruptcy  
6 law.” *Unicom Comput. Corp. v. Mitsui Mfrs. Bank (In re Unicom Comput.*  
7 *Corp.)*, 13 F.3d 321, 325 n.6 (9th Cir.1994); see also *In re Pettit Oil Co.*, No. 13-  
8 47285, 2016 WL 3034753, at \*3 (Bankr. W.D. Wash. May 19, 2016).

9 **V. Eighth Claim for Relief – Injunctive Relief Pursuant to 11 U.S.C. §§**  
10 **105(a) and RCW 19.40.071**

11 As part of the Trustee’s claim for injunctive relief, the Trustee requests that  
12 Defendant Clever Capital be estopped from claiming that the “lease” (in which it  
13 holds no interest, according to the Washington Secretary of State) has been  
14 rejected and that it is in control of the TNT Facility. Equitable estoppel requires:

15 (1) The party to be estopped must know the facts; (2) he must intend  
16 that his conduct shall be acted on or must so act that the party asserting  
the estoppel has a right to believe it is so intended; (3) the latter must  
be ignorant of the true facts; and (4) he must rely on the former's  
conduct to his injury.

17 *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir.1989).

18 A finding of estoppel must rest on consideration of several factors. Actual  
19 and reasonable reliance on the defendant's conduct or representations is important.  
20 See *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir.1981). Also  
21 important is evidence of improper purpose on the part of the defendant, or of the  
22

1 defendant's actual or constructive knowledge of the deceptive nature of its  
2 conduct. *Id.*

3 **CONCLUSION**

4 WHEREFORE, the Trustee prays for entry of the Order to Show Cause for  
5 Preliminary Injunction and Temporary Restraining Order in substantially the form  
6 attached to the Trustee's Emergency Application together with attorneys fees,  
7 costs and such other relief as the Court deems appropriate and just.

8 Dated: May 22, 2019

CKR LAW LLP

9 /s/ Pamela M. Egan

10 Pamela M. Egan (WSBA No. 54736)

William R. Firth, III (*pro hac vice*)

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