

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. 16-31189

Tracy John Clement,

Chapter 11

Debtor.

**NOTICE OF HEARING AND MOTION FOR ENTRY OF ORDERS (I) GRANTING
EXPEDITED HEARING, (II) APPROVING SALE PROCEDURES AND
(III) AUTHORIZING THE SALE OF ABSOLUTE ENERGY, L.L.C. UNITS FREE AND
CLEAR OF LIENS, ENCUMBRANCES, AND OTHER INTERESTS**

TO: The parties specified in Fed. R. Bankr. P. 6004 and Local Rule 2002-1(b).

1. The chapter 11 trustee, Phillip L. Kunkel (the “**Trustee**”), by and through his undersigned attorneys, moves the Court for the relief requested below and gives notice of a hearing.

2. The Court will hold a hearing on this Motion at **9:30 a.m. on February 21, 2018**, in Courtroom 7 West, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

3. Because of the expedited nature of this Motion, the Trustee will not object to any response to this Motion filed and served prior to the hearing pursuant to the applicable Federal Rules of Bankruptcy Procedure and Local Rules. **UNLESS A RESPONSE OPPOSING THIS MOTION IS TIMELY FILED, THE COURT MAY GRANT THIS MOTION WITHOUT A HEARING.**

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005, and Local Rule 1070-1. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M), (N) and (O). Venue is proper in the Court pursuant to 28 U.S.C.

§§ 1408 and 1409.

5. The voluntary petition for relief in this case was filed on April 11, 2016 (the “**Petition Date**”). This case is now pending in the Court.

6. This Motion arises under 11 U.S.C. §§ 363(b) and 363(f), Fed. R. Bankr. P. 6004, and Local Rule 6004-1. This Motion is filed under Fed. R. Bankr. P. 9013 and 9014 and Local Rules 9013-1 through 9013-3.

7. The Trustee requests an order of the Court (i) granting an expedited hearing on this Motion, (ii) approving the sale procedures set forth in this Motion by which the Trustee, through Steffes Group, Inc. (“**Steffes**”), the auctioneer retained by the Trustee, will offer and sell at auction (the “**Auction**”) twenty-three (23) membership capital units (collectively, the “**Units**”) of Absolute Energy, L.L.C., an Iowa limited liability company (“**Absolute**”), and (iii) authorizing the sale of the Units to one or more purchasers free and clear of all liens, encumbrances, and other interests.

8. The liquidation of the Debtor’s nonexempt real property and personal property has been the objective of the creditors, including the Official Committee of Unsecured Creditors (the “**Committee**”), throughout the pendency of this case. Following his appointment and based upon his investigation, the Trustee likewise has concluded that the liquidation of the Debtor’s non-exempt assets, including the Units, is in the best interest of the Debtor’s estate and creditors.

BACKGROUND

9. On the Petition Date, the Debtor filed a voluntary petition under chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) in this Court (the “**Bankruptcy Court**”).

10. On May 3, 2016, the Office of the United States Trustee appointed the

Committee.

11. By order dated September 19, 2017, the appointment of the Trustee as the chapter 11 trustee for the Debtor was approved by this Court [Doc. No. 518].

12. Each of the Units constitutes a membership interest in Absolute and entitles the holder thereof (the “**Unit Holder**”) to the rights and obligations set forth in the Operating Agreement and other organizational documents of Absolute as in effect from time to time (collectively, the “**Absolute Organizational Documents**”). A transfer or assignment of a Unit by the Unit Holder is subject to certain restrictions and requirements as set forth in the Absolute Organizational Documents (collectively, the “**Unit Transfer Requirements**”). The Trustee intends that the proposed sale procedures set forth in this Motion comply with all applicable Unit Transfer Requirements, except as Absolute may otherwise agree.¹

13. The Debtor is the current Unit Holder of record of the Units and the Units are property of the bankruptcy estate. The Trustee anticipates receiving all distributions allocated to the Units for fiscal year 2017 prior to the effective date of the sale(s) of any of the Units and all such distributions shall remain property of the bankruptcy estate notwithstanding the subsequent sale(s) of any of the Units.

14. The Trustee seeks authority to sell the Units free and clear of all liens, encumbrances, and other interests under sections 363(b) and 363(f) of the Bankruptcy Code, but subject to all of the terms and conditions of the Absolute Organizational Documents, including the Unit Transfer Requirements.

15. The Trustee believes that the Units are not subject to any valid, perfected or

¹ Absolute has agreed that any obligation of a transferor set forth in the Unit Transfer Requirements or otherwise to indemnify and hold Absolute harmless for any damages, loss, cost, or liability arising out of or resulting from the transfer of membership capital units from the transferor to the transferee is waived by Absolute with respect to the Trustee’s sales of the Units. Absolute also has agreed that it will expedite the review and approval process for potential bidders that are not currently Unit Holders so as to conform to the sale timeline set forth in this Motion.

enforceable lien as that term is defined in section 101(37) of the Bankruptcy Code, other than an “adequate protection” lien granted in favor of CUSB Bank pursuant to that certain *Order Approving Stipulation Regarding Adequate Protection* [Doc. No. 258]. That *Order* specifically provides that “[s]uch lien shall not attach to the proceeds of the Ethanol Units, including distributions.” *Id.* at paragraph 1. The Trustee further believes that no person or entity other than the bankruptcy estate holds or asserts any right or interest, including any right of first refusal or option to purchase, in or to any of the Units other than as may otherwise be set forth in the Absolute Organizational Documents.

16. The Trustee seeks expedited relief because concluding the auction of the Units on or before March 23, 2018 allows potential bidders to bid on the Units based upon the most current audited financial information available from Absolute, thereby maximizing the number of potential bidders.

SALE PROCEDURES

17. In order to maximize the sale proceeds to be realized from the sale(s) of the Units, the Trustee requests that this Court approve the following sale procedures (collectively, the “**Sale Procedures**”).

- a. **Sale Notice.** On or before February 23, 2018, the Trustee will provide notice, in the form attached as *Exhibit A* and as approved by the Bankruptcy Court (the “**Sale Notice**”), of the Sale Procedures (i) to the Debtor, (ii) to the Committee, (iii) to all parties that have filed notices of appearance in this case, (iv) to CUSB Bank, (v) to all existing Unit Holders,² (vi) to Absolute, and (vii) to any other party known to the Trustee to have expressed an interest in purchasing any of the Units. Steffes will post the Sale Notice on its website. The Trustee may, in his sole discretion, cause Steffes to publish the Sale Notice in such regional newspapers or other publications as the Trustee and Steffes shall determine.

² Absolute has agreed to provide to the Trustee and Steffes the names and contact information of the existing Unit Holders subject to the terms of a Nondisclosure Agreement.

- b. **Qualified Bidders.** Each person or entity wishing to participate in the Auction must be a qualified bidder (a “**Qualified Bidder**”). The Trustee, in consultation with Steffes and Absolute, will determine whether each person or entity that has registered with Steffes to participate in the Auction as provided under subparagraphs c or d below is a Qualified Bidder and Steffes will notify such person or entity of the Trustee’s decision not later than March 13, 2018. Any disputes regarding whether a person or entity is a Qualified Bidder shall be resolved by the Bankruptcy Court. Qualified Bidders that are not existing Unit Holders as of March 12, 2018 will be entitled to obtain Absolute’s most current audited financial information directly from Absolute after executing a nondisclosure agreement satisfactory to Absolute.
- c. **Existing Unit Holders.** In order for any person or entity that is an existing Unit Holder as of March 12, 2018 to be a Qualified Bidder, it must, by no later than March 12, 2018:
 - i. provide written confirmation to Steffes that it is an existing Unit Holder as of March 12, 2018; and
 - ii. register with Steffes at its website at <https://steffesgroup.com/Home/Auctions> to participate in the Auction.
- d. **Not Existing Unit Holders.** In order for any person or entity that is **not** an existing Unit Holder as of March 12, 2018 to be a Qualified Bidder, it must, by no later than March 12, 2018:
 - i. Provide written confirmation to Steffes that it has been approved by Absolute to acquire not less than four (4) of the Units at the Auction; and
 - ii. register with Steffes at its website at <https://steffesgroup.com/Home/Auctions> to participate in the Auction.
- e. **Auction.** The Auction will be an online auction only. The Auction will be conducted by Steffes at its website at <https://steffesgroup.com/Home/Auctions>. The Auction will commence on March 14, 2018, beginning at 8:00a.m. prevailing Central Time, and will continue until March 23, 2018, at 7:00p.m. prevailing Central Time. Only Qualified Bidders will be eligible to participate in the Auction.
- f. **Auction Process.** The Auction will be conducted subject to the terms and conditions set forth in *Exhibit B* attached to this Motion. Each bid submitted shall include, in addition to the amount of the purchase price for the Unit(s) subject to the bid, (i) a transfer fee payable to the bankruptcy estate in the amount of Three Hundred and 00/100 Dollars (\$300.00) per Unit subject to the bid, and (ii) a buyer’s premium payable to Steffes in the amount of Five Percent (5.0%) of the purchase price for the Unit(s) subject to the bid. Any Qualified Bidder that is not an existing Unit

Holder as of March 12, 2018 must bid on not less than four (4) of the Units with each bid submitted. All bidding will be conducted at the Auction and no bids may be tendered or accepted after the Auction has concluded. At the conclusion of the Auction, the Trustee, in consultation with Steffes, will identify the highest and best bid or bids (the “**Successful Bid(s)**”) submitted by one or more of the Qualified Bidder(s) (the “**Successful Bidder(s)**”). The Trustee will retain full discretion and right to determine which bid or combination of bids constitutes the highest or otherwise best bid or bids based on all of the circumstances, and which bid or combination of bids, if any, should be selected as the Successful Bid(s), all of which are subject to final approval by the Bankruptcy Court.

- g. **Auction Report.** The Trustee will file a report (the “**Auction Report**”) with the Bankruptcy Court on or before March 27, 2018. The Auction Report will set forth, among other things, the name(s) of the Successful Bidder(s), the purchase price(s) for the Units set forth in the Successful Bid(s) and the number of Units subject to the Successful Bid(s).
- h. **Sale Hearing.** The Bankruptcy Court will hold a hearing on TBD to consider approving the Successful Bid(s) and authorizing the Trustee to consummate the sale(s) of all or a portion of the Units to the Successful Bidder(s) in accordance with the terms of the Successful Bid(s) (the “**Sale Hearing**”). Any objection on any basis that any party has to the conduct of the Auction, the Successful Bid(s), the Successful Bidder(s) or the Auction Report must be in writing and must be filed with the Bankruptcy Court no later than 5:00 p.m. prevailing Central Time on the date that is two (2) business days prior to the date of the Sale Hearing (the “**Objection Deadline**”), and must be served on the Trustee’s counsel so as to be received by no later than the Objection Deadline. Any objection must be in writing and set forth with particularity the grounds for such objection or other statements of position and otherwise comply with the Federal Rules of Bankruptcy Procedure and the Local Rules.

SALE

17. At the Sale Hearing, the Trustee will request that this Court approve the Successful Bidder(s) and the Successful Bid(s) and authorize the Trustee to consummate the sale of all or a portion of the Units free and clear of all liens, encumbrances, and other interests except as set forth in this Motion under sections 363(b) and 363(f) of the Bankruptcy Code to the Successful Bidder(s) in accordance with the terms of the Successful Bid(s).

18. If testimony is required, the following parties may be called to testify at the hearing on this Motion and/or at the Sale Hearing: Randy Kath, Steffes Group, Inc., 24400

Minnesota Highway 22 South, Litchfield, MN 55355, and Phillip L. Kunkel, Trustee, 1010 West St. Germain, Suite 500, St. Cloud, MN 56301.

RELIEF REQUESTED

WHEREFORE, the Trustee respectfully moves this Court for the following relief:

- A. the entry of an order authorizing an expedited hearing on this Motion;
- B. the entry of an order approving the Sale Procedures set forth in this Motion;
- C. the entry of an order scheduling the Sale Hearing before this Court for TBD
- D. following the Sale Hearing, the entry of an order authorizing the Trustee to sell free and clear of all liens, encumbrances, and other interests except as set forth in this Motion all or a portion of the Units to the Successful Bidder(s) in accordance with the terms of the Successful Bid(s) and waiving the fourteen (14) day stay of the order otherwise required under Fed. R. Bankr. P. 6004(h) to make the order effective immediately; and
- E. for such other and further relief as the Court deems just and equitable.

Dated:

**GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.**

Phillip Bohl (#0139191)
Abigail M. McGibbon (#0393263)
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: 612-632-3484
Fax: 612-632-4000
phillip.bohl@gpmlaw.com
abigail.mcgibbon@gpmlaw.com

Attorneys for Phillip L. Kunkel, as Trustee

VERIFICATION

I, Phillip L. Kunkel, state that I am the appointed chapter 11 trustee of the Tracy J. Clement bankruptcy estate, and declare under penalty of perjury that the facts and exhibits set forth in the foregoing Motion are true and correct, according to the best of my knowledge, information and belief.

Dated:

Phillip L. Kunkel, Chapter 11 Trustee

EXHIBIT A
SALE NOTICE

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. 16-31189

Tracy John Clement,

Chapter 11

Debtor.

NOTICE OF AUCTION OF MEMBERSHIP UNITS OF ABSOLUTE ENERGY, L.L.C.

PLEASE TAKE NOTICE THAT:

Twenty-Three (23) membership units of Absolute Energy, L.L.C. (collectively, the “**Units**”) will be sold through an online auction conducted by Steffes Group, Inc. (the “**Auction**”).

The Auction will commence on March 14, 2018, at 8:00a.m. prevailing Central Time, and will conclude on March 23, 2018, at 7:00p.m. prevailing Central Time.

Information concerning the Auction, the terms and conditions of the Auction, and the requirements for participation in the Auction is available at the Steffes Group, Inc. website at **<https://steffesgroup.com/Home/Auctions>**.

Parties that have qualified to participate in the Auction that are not currently members of Absolute Energy, L.L.C., may obtain financial and other information concerning Absolute Energy, L.L.C. directly from Absolute Energy, L.L.C. after entering into a nondisclosure agreement acceptable to Absolute Energy, L.L.C.

The Auction of the Units has been authorized by the United States Bankruptcy Court for the District of Minnesota pursuant to its *Order (I) Granting Expedited Hearing, and (II) Approving Sale Procedures for the Sale of Absolute Energy, L.L.C. Units Free And Clear Of Liens, Encumbrances, And Other Interests*, entered in the above-captioned chapter 11 bankruptcy case, a copy of which is available at the Steffes Group, Inc. website.

EXHIBIT B
AUCTION TERMS AND CONDITIONS

GP:4813-9171-5675 v4