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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

AMERICANWEST BANK, a Washington  
State chartered bank,

Plaintiff,

v.

P/V INDIAN, Official No. 526530, AND  
ALL OF HER ENGINES, TACKLE,  
ACCESSORIES, EQUIPMENT,  
FURNISHINGS AND APPURTENANCES,  
*in rem*, and INDIAN SPORT FISHING, INC.,  
a California corporation, *in personam*,  
Defendants.

Case No. 12cv1786 AJB (BGS)

**IN ADMIRALTY**

**ORDER GRANTING  
PLAINTIFF’S MOTION FOR  
INTERLOCUTORY VESSEL  
SALE; AUTHORIZING USE  
OF VESSEL BROKER; AND  
AUTHORIZING PLAINTIFF  
TO CREDIT BID AT THE  
SALE**

(Doc. No. 14)

F.R.C.P. Supplemental Admiralty  
Rules C and E.

46 U.S.C. Sections 30101-31343

Presently before the Court is Plaintiff AmericanWest Bank’s (“Plaintiff”) Motion for Interlocutory Sale of the Defendant Vessel P/V INDIAN, Official No. 526530 (the “DEFENDANT VESSEL”), and all of her engines, tackle, accessories, equipment, furnishings and appurtenances. (Doc. No. 14.) Should the Court grant Plaintiff’s Motion for Interlocutory Sale, Plaintiff also requests permission to market the vessel in advance of the U.S. Marshal sale and authorization for Plaintiff to credit bid at the sale. (*Id.*) For the reasons discussed below, the Court **GRANTS** the

1 Plaintiff's Motion.

2 **BACKGROUND**

3 Defendant Indian Sport Fishing, Inc. ("Indian Sport Fishing") purchased the  
4 DEFENDANT VESSEL on or about February 22, 2006. (Doc. No. 14, Ex. B.) Indian  
5 Sport Fishing, through Christopher M. Randel ("Mr. Randel"<sup>1</sup>), President of Indian  
6 Sport Fishing, delivered a promissory note and business loan agreement in the amount  
7 of \$296,000 to Point Loma Community Bank on or about January 9, 2009. (Doc. No.  
8 1, Ex. A–Business Loan Agreement, Ex. B–Promissory Note.) Plaintiff  
9 AmericanWest Bank is the successor in merger to Point Loma Community Bank.<sup>2</sup>  
10 (Doc. No. 1.)

11 The promissory note was secured by a preferred ship mortgage on the  
12 DEFENDANT VESSEL. (Doc. No. 1, Ex. E–Preferred Ship Mortgage.) The  
13 business loan agreement and promissory note provide that, upon default, the lender  
14 has the right to demand that the borrower immediately pay any remaining principal  
15 and all accrued interest. (Doc. No. 1, Ex. A–Business Loan Agreement, Ex.  
16 B–Promissory Note.) If Plaintiff was forced to sue to enforce the terms of the  
17 promissory note, the note required that Indian Sport Fishing pay Plaintiff's attorneys'  
18 fees and costs. (*Id.*) Mr. Randel personally guaranteed the full and punctual payment  
19 of the promissory note should Indian Sport Fishing default on its payments. (Compl. ¶  
20 7.<sup>3</sup>)

21 Plaintiff alleges that Indian Sport Fishing breached the Promissory Note and  
22

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23 <sup>1</sup>In Exhibit D (Change in Terms Agreement) of the Plaintiff's Complaint, Mr. Randel's name is  
24 spelled "Christopher M. Randal." In every other document submitted to the Court, Mr. Randel's  
25 name is spelled "Christopher M. Randel." Therefore, the Court will refer to Mr. Randel as "Mr.  
Randel."

26 <sup>2</sup>On January 20, 2012, AmericanWest Bank entered into a change in terms agreement with Indian  
27 Sport Fishing, signed by Mr. Randel. The change in terms agreement altered the payment schedule  
and interest rate of the original note, but still incorporated the previous agreements. (Doc No. 1 ¶ 8,  
Ex. D–Change in Terms Agreement.)

28 <sup>3</sup>All references to the Complaint in this Order refer to Plaintiff's Verified Complaint, filed on July  
19, 2012.

1 Preferred Ship Mortgage by failing to pay the amount owed to Plaintiff. (Compl. ¶  
2 12.) Although Plaintiff has not provided the specific date when Indian Sport Fishing  
3 stopped making its payments, Plaintiff states that, as of July 11, 2012, Indian Sport  
4 Fishing owed \$274,453.07 on the note. (Compl. ¶ 13.) On July 16, 2012, Plaintiff  
5 filed the Verified Complaint (“Complaint”) alleging Indian Sport Fishing breached the  
6 promissory note and requesting that DEFENDANT VESSEL be sold to satisfy Indian  
7 Sport Fishing’s debt. (Doc. No. 1.) On July 23, 2012, the Court issued a warrant for  
8 the arrest of the DEFENDANT VESSEL. (Doc. No. 6.) Plaintiff states that the date  
9 of arrest was July 31, 2012. (Doc. No. 14, 5:21-22.) The Court received notice of the  
10 arrest on August 1, 2012. (Doc. No. 8.)

11 Indian Sport Fishing never filed an answer to Plaintiff’s Complaint. On  
12 December 6, 2012, the Clerk of Court filed an Entry of Default as to Defendants.  
13 (Doc. No. 13.) On December 6, 2012, Plaintiff filed the instant Motion for  
14 Interlocutory Sale of Defendant Vessel (“Motion”) pursuant to Supplemental  
15 Admiralty Rule E(9)(a)(i) of the Federal Rules of Civil Procedure (“Rule E(9)(a)(i)”).<sup>4</sup>  
16 Indian Sport Fishing has not opposed Plaintiff’s Motion and has not made any attempt  
17 to secure the DEFENDANT VESSEL.

### 18 DISCUSSION

19 Plaintiff makes three requests in the instant motion: (1) request for interlocutory  
20 sale of DEFENDANT VESSEL; (2) request to hire a vessel broker to market the  
21 vessel in advance of the sale; and (3) request for authorization to credit bid at the sale.  
22 (Doc. No. 14.) The second and third requests are contingent upon the Court granting  
23 Plaintiff’s request for interlocutory sale. Accordingly, the Court addresses first the  
24 request for interlocutory sale, and will then consider Plaintiff’s additional requests in  
25 turn.

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27  
28 <sup>4</sup>Plaintiff cites to Supplemental Admiralty Rule E(9)(B) throughout its brief. However, because Plaintiff relies upon language from Rule E(9)(a)(i), the Court treats Plaintiff’s Motion as properly brought under this provision.

1 **I. Plaintiff’s Request for Interlocutory Sale**

2 Plaintiff argues that the Court should order the DEFENDANT VESSEL be sold  
3 based on all three criteria of Rule E(9)(a)(i).

4 Rule E(9)(a)(i) provides that [o]n application of a party ... the court may  
5 order all or part of the property sold—with the sale proceeds, or as much of  
6 them as will satisfy the judgment, paid into court to await further orders of  
7 the court—if: (A) the attached or arrested property is perishable, or liable to  
8 deterioration, decay, or injury by being detained in custody pending the  
9 action; (B) the expense of keeping the property is excessive or  
10 disproportionate; or (C) there is an unreasonable delay in securing the  
11 release of the property.

12 To justify an interlocutory sale, Plaintiff need only establish the existence of one of  
13 the three provisions listed in Rule E(9)(a)(i). *Bank of Rio Vista v. VESSEL CAPTAIN*  
14 *PETE*, No. C 04-2736CW, 2004 WL 2330704, at \*2 (N.D. Cal. Oct. 14, 2004). The  
15 Court discusses each of the three provisions under Rule E(9)(a)(i) individually below.

16 **A. Deterioration, Decay, or Injury**

17 Plaintiff first argues that the DEFENDANT VESSEL is subject to  
18 “deterioration, decay, or injury” because it is sitting idle in salt water, and thus,  
19 interlocutory sale is warranted under the first provision of Rule E(9)(a)(i)(A). (Doc.  
20 No. 14, 4:6-14.) However, Plaintiff has not provided the Court with any evidence that  
21 the DEFENDANT VESSEL is particularly susceptible to deterioration, decay, or  
22 injury beyond the generalized assertion that unused vessels deteriorate over time. (*Id.*)  
23 Because there is no specific evidence suggesting deterioration, decay, or injury that is  
24 out of the ordinary for a vessel generally, the Court does not find interlocutory sale of  
25 the DEFENDANT VESSEL warranted under Rule E(9)(a)(i)(A). *See Vineyard Bank*  
26 *v. M/Y Elizabeth I*, No. 08CV2044 BTM (WMC), 2009 WL 799304, at \*1 (S.D. Cal.  
27 Mar. 23, 2009) (stating that a general assertion of a vessel’s deterioration without  
28 evidence of specific injury does not satisfy the “deterioration, decay, or injury”  
provision of Rule E(9)(a)(i)); *cf. Merchants Nat. Bank of Mobile v. Dredge General*  
*G.L. Gillespie*, 663 F.2d 1338, 1342 (5th Cir. 1981) (upholding district court’s  
decision to grant interlocutory sale in part due to deterioration of the vessels when

1 district court received expert testimony detailing the deterioration of the defendant  
2 vessels due to corrosion and rust, and thus requiring costly overhaul, because they sat  
3 idle). Accordingly, the Court turns to the second provision under Rule E(9)(a)(i).

4 ***B. Excessive or Disproportionate Expense***

5 Plaintiff next asserts that sale of the DEFENDANT VESSEL is justified under  
6 Rule E(9)(a)(i)(B) because the expense of maintenance while the vessel is in custody  
7 is excessive and disproportionate. (Doc. No. 14, 5:6-20). Currently, Plaintiff states  
8 that the maintenance expenses include the cost of wharfage services (\$696.00 per  
9 month), daily custodial services (\$29.00 per day/ approximately \$870.00 per month),  
10 and interior inspection services (\$200 per month), totaling approximately \$1,766.00  
11 per month. (Doc. No. 14, 5:13-20.) Since the arrest of the DEFENDANT  
12 VESSEL on July 31, 2012, the *custodia legis* expenses have totaled approximately  
13 \$7,475.22.<sup>5</sup> (Doc. No. 14, 5:23-24.)

14 Under the circumstances and considering the length of time the DEFENDANT  
15 VESSEL has been under Plaintiff's custodianship and the total amount of money  
16 Plaintiff has had to pay in *custodia legis* expenses, the Court finds these costs  
17 excessive and disproportionate under the second provision of Rule E(9)(a)(i)(B). *See*  
18 *Vineyard Bank*, 2009 WL 799304, at \*2 (finding that a total of \$7,473.82 of *custodia*  
19 *legis* expenses since the vessel's arrest was an excessive cost); *Merchants Nat. Bank of*  
20 *Mobile*, 663 F.2d at 1340-43 (holding that \$17,000 total in maintenance and insurance  
21 fees per month for eight defendant vessels was excessive when defendant did not  
22 attempt to secure the vessels for eight months); *Caterpillar Fin. Services Corp. v.*  
23 *Coleman*, 99-03821 CM RZX, 1999 WL 33218595, at \*2 (C.D. Cal. Aug. 19, 1999)  
24 (finding that the "expense of keeping the [Defendant Vessel] in custody, specifically  
25 \$1,400.00 per month, ... appears to be excessive"). Here, Indian Sport Fishing has not  
26 attempted to post bond or otherwise secure the release of the DEFENDANT VESSEL.

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27 <sup>5</sup> Presumably, Plaintiff has incurred an additional two months' worth of charges since the filing of  
28 the instant Motion on December 7, 2012, bringing the approximate total of *custodia legis* expenses  
to \$11,007.22.

1 As such, the Court finds that the maintenance fees of approximately \$1,766.00 per  
2 month are excessive under the circumstances and, thus, the interlocutory sale of  
3 DEFENDANT VESSEL is warranted under Rule E(9)(a)(i)(B).

4 ***C. Unreasonable Delay in Securing the Release of the Property***

5 Lastly, Plaintiff argues that because Indian Sport Fishing has not made any  
6 attempt to secure the release of the DEFENDANT VESSEL, there has been an  
7 unreasonable delay in securing the release of the property, warranting sale. Generally,  
8 courts will only grant a motion for interlocutory sale if the defendant has been  
9 afforded a reasonable amount of time to post a bond to secure the vessel. *Bank of Rio*  
10 *Vista*, 2004 WL 2330704, at \*2. As such, courts should allow defendants “at least  
11 four months to bond a vessel absent some other considerations.” *Id.* When a  
12 defendant has had at least four months to secure the vessel but has not filed any  
13 response or made any attempt to obtain the vessel’s release, courts may grant  
14 interlocutory sale based upon unreasonable delay under Rule E(9)(a)(i)(C). *Vineyard*  
15 *Bank*, 2009 WL 799304, at \*2.

16 Here, Indian Sport Fishing has not answered Plaintiff’s Complaint or filed any  
17 response to this action or the instant Motion. Nor has Indian Sport Fishing made any  
18 attempt to secure the DEFENDANT VESSEL’s release since its arrest on July 31,  
19 2012. At this point, more than five months have passed since the DEFENDANT  
20 VESSEL’s arrest. In light of these circumstances, the Court finds that there has been  
21 unreasonable delay in securing the DEFENDANT VESSEL’s release, which warrants  
22 interlocutory sale under the third provision of Rule E(9)(a)(i).

23 ***D. Conclusion***

24 In sum, two of the three provisions under Rule E(9)(a)(i) weigh in favor of the  
25 interlocutory sale. Therefore, in light of the excessive monthly expense of the  
26 DEFENDANT VESSEL’s maintenance and Indian Sport Fishing’s unreasonable  
27 delay in posting a bond to secure the DEFENDANT VESSEL, the Court GRANTS  
28 Plaintiff’s Motion for Interlocutory Sale under Rule E(9)(a)(i). Having granted

1 Plaintiff's request for interlocutory sale, the Court now turns to Plaintiff's additional  
2 requests for retention of a vessel broker and authorization to credit bid at the sale.

3 **II. Plaintiff's Request to Use a Vessel Broker to Market Vessel Prior to Sale**

4 Under Rule E(9), the Court has the authority to order the sale of an arrested  
5 vessel and has done so here for the reasons set forth above. Accordingly, Plaintiff  
6 asks that the Court allow a professional yacht brokerage, specifically Long Beach  
7 Yacht Sales, Inc. ("Long Beach Yacht Sales"), to market the DEFENDANT VESSEL  
8 in advance of the auction by the United States Marshal. Plaintiff suggests that the  
9 advanced marketing of a vessel increases the interest in the vessel and thus,  
10 potentially, may maximize the vessel's value at auction. (Doc. No. 14, 8:10-12.) As  
11 such, this process may increase the chances that the creditor will be able to recover the  
12 full amount currently due under the promissory note. (*See* Doc. No. 14, 8:10-20.)

13 Having reviewed the Plaintiff's plan to market the vessel in advance of the  
14 vessel sale, the Court finds Plaintiff's arguments in favor of marking the  
15 DEFENDANT VESSEL persuasive. The Court finds Plaintiff's request is reasonable  
16 under the circumstances and narrowly tailored to accomplish the task at hand. Thus,  
17 the Court GRANTS Plaintiff's request to allow Long Beach Yacht Sales to undertake  
18 marketing measures for 45 to 60 days following the date of this order in a best faith  
19 attempt to generate as much interest by potential buyers as possible in the  
20 DEFENDANT VESSEL prior to the U.S. Marshal auction.

21 **III. Plaintiff's Request for Authorization to Credit Bid**

22 Plaintiff has also requested that the Court allow it to credit bid at the auction of  
23 the DEFENDANT VESSEL in an amount not exceeding \$274,453.07, the amount  
24 which Plaintiff asserts Indian Sport Fishing owes on the note. (Doc. No. 14, 12:4-11.)  
25 Plaintiff currently holds a preferred ship mortgage on the DEFENDANT VESSEL.  
26 (Doc. No. 1, Ex. E-Preferred Ship Mortgage.) When the court orders an interlocutory  
27 vessel sale in a civil action in rem brought to enforce a preferred mortgage lien, the  
28 preferred mortgage lien "has priority over all other claims against the vessel, except





1 Interlocutory Vessel Sale and Authorization to Credit Bid. (Doc. No. 14.)

2 Accordingly, **IT IS HEREBY ORDERED:**

3 (1) Consistent with Supplemental Admiralty Rule (E)(9) and Civil Local Rule  
4 E.1.e.2, the United States Marshal will conduct an auction to sell the DEFENDANT  
5 VESSEL and the proceeds distributed in the manner detailed in this Order; and

6 (2) In an effort to maximize the value of the *res* and hence the potential for  
7 satisfaction of PLAINTIFF's maritime lien, Long Beach Yacht Sales, Inc. is  
8 permitted, on the below terms and for a period of at least 45 days but not more than 60  
9 days following entry of this Order, to market the DEFENDANT VESSEL in advance  
10 of the U.S. Marshal auction of the DEFENDANT VESSEL. The auction will occur  
11 pursuant to this Order no earlier than the first Friday following expiration of a 45 day  
12 period following entry of this Order, and no later than the first Friday following  
13 expiration of a 60 day period following entry of this Order. In the event such Friday  
14 falls on a national holiday, then the auction will occur the following Friday. The  
15 DEFENDANT VESSEL may be marketed in accordance with the following terms:

16 (a) Long Beach Yacht Sales will engage in marketing measures in a  
17 best faith attempt to generate as much interest by potential buyers as possible in the  
18 DEFENDANT VESSEL, in advance of the U.S. Marshal auction;

19 (b) Plaintiff will provide Long Beach Yacht Sales with an advertising  
20 budget to cover the expected actual costs (without markup) of placing advertisements  
21 in printed media;

22 (c) Long Beach Yacht Sales will stage showings aboard the  
23 DEFENDANT VESSEL at least twice monthly (provided prospective buyers wish to  
24 inspect her), and also on the day preceding the auction date;

25 (d) Long Beach Yacht sales will, in its sole discretion (as long as it  
26 deems the DEFENDANT VESSEL sufficiently seaworthy), schedule one or more sea  
27 trials for the benefit of such prospective buyers. Any such sea trial is restricted to the  
28 immediate confines of San Diego Bay and will not exceed one hour. In addition,

1 representatives of the Substitute Custodian and Long Beach Yacht Sales must be  
2 aboard at all times during sea trials, the DEFENDANT VESSEL must be commanded  
3 by a Master holding a current 100 Ton (or greater) U.S. Coast Guard License, and  
4 vessel insurance must be effective for such sea trial(s).

5 (e) If at the U.S. Marshal auction PLAINTIFF determines that the  
6 highest other bid is unreasonably low and it therefore places a credit bid, and the  
7 credit bid becomes the highest and successful bid, then Long Beach Yacht Sales will  
8 not receive a commission; otherwise, it will receive a commission out of the proceeds  
9 in an amount equal to three percent (3%) of the final auction selling price, with a  
10 minimum of \$5,000.00.

11 (3) During the 45 to 60 day period Long Beach Yacht Sales will be permitted  
12 to show the DEFENDANT VESSEL, where she lies in custody, to those who have  
13 expressed an interest in purchasing the vessel, provided that at all times when they are  
14 aboard a representative of the Substitute Custodian and Long Beach Yacht Sales is  
15 also aboard; and

16 (4) During said 45 to 60 day period in no event (during sea trials or otherwise)  
17 will the DEFENDANT VESSEL leave the confines of San Diego Bay; and

18 (5) The U.S. Marshal will cause notice of the sale of the arrested vessel to be  
19 published for at least seven days immediately before the date of the sale, pursuant to  
20 Civil Local Rule E.1(e)(1) and in accordance with 28 U.S.C. sections 2001-2004; and


21 (6) Consistent with Civil Local Rule E.1(e)(2), such public notice will specify  
22 that the last and highest bidder at the sale will be required to deposit with the U.S.  
23 Marshal, certified check or a cashier's check in the amount of the full purchase price  
24 not to exceed \$500, and otherwise \$500 or ten percent (10%) of the bid, whichever is  
25 greater, and that the balance, if any, of the purchase price will be paid by certified  
26 check or cashier's check before confirmation of the sale or within three days of  
27 dismissal of any opposition which may have been filed, exclusive of Saturdays,  
28 Sundays and legal holidays; and

1 (7) The sale of the DEFENDANT VESSEL by the U.S. Marshal will "stand  
2 confirmed as of course, without the necessity of any affirmative action thereby by a  
3 judge, except that no sale will stand confirmed until the buyer has complied fully with  
4 the terms of the purchase," as provided for by Civil Local Rule E.1(e)(2); and

5 (8) Plaintiff, having demonstrated it maintains a secured preferred maritime  
6 mortgage lien interest in the DEFENDANT VESSEL pursuant to the Commercial  
7 Instruments and Federal Maritime Lien Act (46 U.S.C. section 31301, *et seq.*), and  
8 being the only claimant in this action asserting a maritime claim against her, Plaintiff  
9 is entitled as the senior maritime lien claimant, pursuant to Civil Local Rule E.1(e)(2),  
10 to credit bid at the auction of the DEFENDANT VESSEL, without payment of cash, a  
11 sum equal to its secured interest in the DEFENDANT VESSEL, as specified in  
12 Plaintiff's Points and Authorities in Support of the instant Motion and the supporting  
13 Declaration of Mike Churchwell, including principal, contractually recoverable  
14 interest, late fees, attorneys' fees, expenses of recovery, and *custodia legis* and other  
15 costs of suit in the total amount of \$274,453.07(as averred in the Complaint,  
16 calculated through July 11, 2012), plus further *custodia legis* expenses, attorneys' fees  
17 and additional costs of suit accruing between July 11, 2012 and the date of the U.S.  
18 Marshal sale.

19 **IT IS SO ORDERED.**

20  
21 DATED: March 1, 2013

22   
23 Hon. Anthony J. Battaglia  
24 U.S. District Judge  
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