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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 GB CAPITAL HOLDINGS, LLC,
12 a California Limited Liability
13 Company,

Plaintiff,

14 v.

15 S/V GLORI B, a 1977 Sailing
16 Vessel of Approximately 27-Foot
17 in Length, U.S.C.G. Official No.
18 598405 and All of Her Engines,
19 Tackle Accessories, Furnishings
and Appurtenances, in rem,

Defendant.
20

Case No.: 18cv312-WQH-AGS

ORDER

21 HAYES, Judge:

22 The matter before the Court is the Motion for Order of Sale filed by Plaintiff GB
23 Capital Holdings, LLC. (ECF No. 26).

24 **I. PROCEDURAL BACKGROUND**

25 On February 2, 2018, Plaintiff GB Capital Holdings, LLC, as the agent of San Diego
26 Mooring Company, initiated this action by filing a verified Complaint. (ECF No. 1).
27 Jeffrey G. Heston, proceeding pro se, filed a Statement of Interested Parties stating “I,
28

1 Jeffrey G. Heston, am the sole owner of the Sailing Vessel ‘Glori B’, document number
2 598405 and herein-named Defendant in this matter before this Court.” (ECF No. 16).

3 On April 10, 2018, an arrest warrant for the Defendant Vessel was issued, and Pier
4 32 Marina was appointed as substitute custodian. (ECF No. 6).

5 On November 29, 2018, the Court denied (ECF No. 25) a motion to dismiss filed by
6 Heston (ECF No. 21).

7 On December 6, 2018, GB Capital filed an ex parte Motion for Order of Sale,
8 moving the Court to order an interlocutory vessel sale and authorize a credit bid. (ECF
9 No. 26). GB Capital requests that the Court enter an Order directing the United States
10 Marshal to sell the Defendant Vessel at public auction. GB Capital further requests that
11 the Court authorize GB Capital to credit bid an amount up to the lien amount attested to
12 under oath in the verified Complaint (\$55,728.51), plus the actual and demonstrable costs
13 of suit, including U.S. Marshal, substitute custodian, and other *custodia legis* expenses, at
14 the auction of the Defendant Vessel.

15 On December 21, 2018, Heston filed an Answer to the Complaint. (ECF No. 28).
16 The Answer “enters a general denial of lack of jurisdiction and . . . submits an affirmative
17 defense of res judicata to all allegations made in the Complaint.” *Id.* at 1. The Answer
18 states that there is no evidence of a maritime lien in this case, and “begs the Court to release
19 the vessel from her bonds, order the Plaintiff to restore her taken value, and return to the
20 contracted status quo prior to the resolution of this controversy.” (ECF No. 28).

21 On December 28, 2018, GB Capital filed a Reply in support of the Motion for Order
22 of Sale, stating that there was no timely response to the Motion for Order of Sale, which
23 the Court should construe as consent to the granting of the motion. (ECF No. 29).

24 On January 4, 2019, the Court held a hearing on the Motion for Order of Sale. (ECF
25 No. 31).

26 **II. FACTUAL BACKGROUND**

27 In the verified Complaint, GB Capital alleges that San Diego Mooring Company
28 (SDMC) supplied the Defendant Vessel, “a 1977 Sailing Vessel of Approximately 27-Feet

1 in Length, U.S.C.G. Official No. 598405,” a berth in San Diego Bay. (ECF No. 1 at 1–2).
2 GB Capital alleges that under the moorage contract, the vessel must undergo an annual
3 safety inspection. *Id.* at 2–3. GB Capital alleges that the owner of the boat, Heston,
4 declined the inspection. *Id.* at 3–4. GB Capital alleges that SDMC ordered Heston to
5 remove the boat, and that Heston refused. *Id.*

6 GB Capital alleges that the boat was towed to an impound location on March 25,
7 2016 and has not been retrieved. *Id.* at 4, 8. GB Capital alleges that Heston “has repeated
8 and consistently refused to submit his claims for resolution in binding arbitration,” as
9 ordered in the prior litigation. *Id.* at 7–8. GB Capital alleges that Heston has declined GB
10 Capital’s repeated offers to waive its claims against Heston and the vessel if Heston
11 “simply retrieves and relocates his vessel.” *Id.* GB Capital seeks in rem relief against the
12 vessel for breach of maritime contract, trespass, and quantum meruit. GB Capital alleges
13 damages of \$55,728.51 in accrued wharfage fees and other costs as of February 7, 2018.
14 *Id.* at 9.

15 GB Capital provides the declaration of Ray Jones, President of Long Beach Yacht
16 Sales, stating,

17 [I]f [the Defendant Vessel] is permitted to lay idle without routine
18 maintenance and without proper lay-up preparations, the vessel’s engines
19 might (even if now operational) rust and freeze up, necessitating costly
20 overhaul. I understand the engines were not, as I believe is usual in vessel
21 arrest cases, conditioned for lay-up. . . . [I]t is unavoidable that the Defendant
22 Vessel will deteriorate in condition and value as she sits idle in salt water, and
23 that the longer the vessel remains under arrest and therefore idle the greater
24 the deterioration will be, and that therefore, in the interest of preserving the
25 value of the Defendant Vessel, she should be sold as soon as possible.

26 (Decl. of Ray Jones ¶ 3, ECF No. 26-2). The declaration further states that Jones estimates
27 the fair market value of the Defendant Vessel to be approximately \$6,000, based on
28 “photographs taken by the Substitute Custodian” after the arrest of the Defendant Vessel,
comparisons to other vessels, and “other information and evidence available to [him].” *Id.*

¶ 4. GB Capital submits the declaration of Jimi Laughery, Assistant Marina Manager at

1 Pier 32 Marina, filed in support of GB Capital’s Application for Appointment of Substitute
2 Custodian. (Decl. of Jimi Laughery, ECF No. 3-1). The declaration states that the
3 substitute custodian “provide[s] ongoing wharfage and custodial services at the rate of
4 \$3.00 per foot of vessel length per day (i.e., 27 ft. x \$3.00 = \$81.00 per day).” *Id.* ¶ 4.

5 **III. THE PRIOR LITIGATION**

6 On April 15, 2016, Heston sued GB Capital under admiralty and maritime
7 jurisdiction to recover possession of the vessel and damages. *Heston v. GB Capital*
8 *Holdings, LLC*, Civ. No. 16cv912.

9 On July 1, 2016, GB Capital filed a motion to compel arbitration. Heston did not
10 file a response. On August 23, 2016, the Court ordered arbitration as to the moorage
11 contract.

12 On September 13, 2016, Heston filed a motion for relief from the Court’s August
13 23, 2016 Order, pursuant to Federal Rule of Civil Procedure 60(b)(1)–(3). On December
14 15, 2016, the Court denied Heston’s motion for relief from judgment.

15 On October 23, 2017, Heston filed a second motion for relief from the Court’s
16 August 23, 2016 Order, on various grounds, including that the “Maritime Contract for
17 Private Wharfage” is not cognizable in admiralty. On January 5, 2018, the Court denied
18 Heston’s motion for relief.

19 On January 26, 2018, Heston filed a notice of appeal. On August 21, 2018, the Court
20 of Appeals for the Ninth Circuit concluded this Court did not abuse discretion by denying
21 relief from the August 23, 2016 Order. On September 4, 2018, Heston filed a petition for
22 panel rehearing and petition for rehearing en banc with the Court of Appeals. On January
23 3, 2019, the Court of Appeals denied the petition for rehearing en banc.

24 **IV. DISCUSSION**

25 **A. Interlocutory Sale**

26 GB Capital contends that the Court should authorize sale of the Defendant Vessel
27 on the grounds that the statutory conditions for sale are met. GB Capital asserts that the
28 Defendant Vessel is deteriorating in condition and value while detained in custody. GB

1 Capital asserts that there is an unreasonable delay in this case because no person or entity
2 has posted or sought to post security for the release of the Defendant Vessel or requested a
3 hearing pursuant to Supplemental Admiralty Rule E(9)(b). GB Capital asserts that that
4 there is no realistic prospect of an attempt to secure release of the vessel in this action. GB
5 Capital asserts that the expense of keeping the Defendant Vessel is excessive and
6 disproportionate because at least \$18,792 in substitute custodian fees has accrued, over
7 three times the presumed value of the Defendant Vessel.

8 The Answer filed by Heston contends that the contract at issue in this case is not a
9 maritime lien, and that jurisdiction does not exist absent evidence of a maritime lien.¹ The
10 Answer asserts that GB Capital has stripped the Defendant Vessel “of any and all of the
11 gear that makes her seaworthy and navigable” and “all the comforts that gave her character
12 and value.” (ECF No. 28 at 3). The Answer asserts that GB Capital “has repeatedly refused
13 to honor its obligations,” “has evaded every effort to settle this matter equitably,” “refuses
14 to mediate, and agrees to arbitrate only after profiting greatly though the unlawful
15 application of brute force and when threaten by legal action.” *Id.* at 3–4. The Answer
16 asserts that the issue of whether the Defendant Vessel violated the wharfage contract has
17 only been raised in proceedings before this Court, and “was never raised in a matter
18 consistent with either the (unapproved) mooring contract or Port District procedure.” *Id.*
19 at 3. The Answer asserts that “[t]he Defendant has repeatedly demonstrated the willingness
20 to resolve this matter in accordance with the law and the contractual rights of all parties.”
21 *Id.* at 3–4. The Answer asserts that “nothing has been decided, yet GB Capital always
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25 ¹ The Court assesses the Motion for Order of Sale on the merits and does not construe any failure to file a
26 timely response as consent to granting the Motion. *See Narog v. Certegy Check Servs., Inc.*, 759 F. Supp.
27 2d 1189, 1193 n.1 (N.D. Cal. 2011) (addressing motion to dismiss on the merits “[c]onsidering the Court’s
28 obligation to afford pro se plaintiffs the benefit of any doubt” and in light of “the Ninth Circuit’s
unequivocal pronouncement that a court may not grant a motion for summary judgment merely because
the nonmoving party failed to file opposition papers” (first citing *Bretz v. Kelman*, 773 F.2d 1026, 1027
n.1 (9th Cir. 1985), then citing *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003)).

1 proceeds as if it is already the recipient of a favorable judgment from a competent tribunal.”
2 *Id.* at 4.

3 Supplemental Admiralty and Maritime Claims Rule E(9)(a) of the Federal Rules of
4 Civil Procedure states,

5 On application of a party, the marshal, or other person having custody of the
6 property, the court may order all or part of the property sold--with the sales
7 proceeds, or as much of them as will satisfy the judgment, paid into court to
8 await further orders of the court--if:

9 (A) the attached or arrested property is perishable, or liable to deterioration,
10 decay, or injury by being detained in custody pending the action;

11 (B) the expense of keeping the property is excessive or disproportionate; or

12 (C) there is an unreasonable delay in securing release of the property.

13 Fed. R. Civ. P., Supp. Adm. R. E(9)(a)(i). The applicant is required to satisfy one of the
14 three listed criteria to justify an interlocutory sale. *See, e.g., Cal. Yacht Marina--Chula*
15 *Vista, LLC v. S/V OPILY*, No. 14-CV-01215-BAS BGS, 2015 WL 1197540, at *2 (S.D.
16 Cal. Mar. 16, 2015) (citing *Merchants Nat. Bank of Mobile v. Dredge Gen. G. L. Gillespie*,
17 663 F.2d 1338, 1341 (5th Cir. 1981)). “The interlocutory sale of a vessel is not a
18 deprivation of property but rather a necessary substitution of the proceeds of the sale, with
19 all of the constitutional safeguards necessitated by the in rem process.” *Ferrous Fin. Servs.*
20 *Co. v. O/S Arctic Producer*, 567 F. Supp. 400, 401 (W.D. Wash. 1983).

21 GB Capital has presented evidence that Defendant Vessel was not conditioned for
22 lay-up, “as usual in vessel arrest cases.” There are no facts in the record to the contrary.
23 The Court finds the Defendant Vessel is liable to deterioration within the meaning of
24 Supplemental Admiralty Rule E(9)(A)(i)(a). *Compare Cal. Yacht*, 2015 WL 1197540, at
25 *3 (finding defendant vessel liable to deterioration or injury based on expert evidence of
26 possible costly overhaul, and electric equipment susceptibility to corrosion, rust, and
27 general deterioration) (citing *Merchants*, 663 F.2d at 1342 (“The engines were not properly
28 conditioned for lay-up The court’s assessment that each of the vessels was ‘liable to
deterioration . . . or injury by being detained in custody’ was not clearly erroneous.”)), *with*
Vineyard Bank v. M/Y Elizabeth I, U.S.C.G. Official No. 1130283, No. 08CV2044 BTM

1 WMC, 2009 WL 799304, at *1 (S.D. Cal. Mar. 23, 2009) (concluding that “a generalized
2 assertion that idle vessels will deteriorate,” absent “other evidence that the Defendant
3 Vessel is liable to decay,” did not satisfy Rule E(9)(a)(i)).

4 Courts generally allow at least four months for the provision of a bond to secure the
5 release of a vessel before granting an interlocutory sale on grounds of unreasonable delay.
6 *See Vineyard Bank*, 2009 WL 799304, at *2 (citing *Bank of Rio Vista v. Vessel Captain*
7 *Pete*, 2004 WL 2330704, at *2 (N.D. Cal. Oct.14, 2004)). In this case, the record shows
8 no attempts to secure the Defendant Vessel after the April 2018 arrest. There are no facts
9 in the record to the contrary. The Court finds an unreasonable delay has occurred within
10 the meaning of Supplemental Admiralty Rule E(9)(A)(i)(c). *See Ferrous*, 567 F. Supp. at
11 401 (concluding, when defendants had appeared in the action, that no attempt to secure
12 release of vessel within four months since arrest was unreasonable delay); *Merchants*, 663
13 F.2d at 1341–42 (failing to secure the release of the vessel eight months after arrest is
14 unreasonable delay); *Vineyard Bank*, 2009 WL 799304, at *2 (concluding four-month
15 delay was unreasonable when no person had attempted to secure the release of the vessel).

16 Maintenance expenses of several thousand dollars per month are excessive and
17 disproportionate when a defendant has made no attempt to secure the vessel’s release. In
18 this case, GB Capital has presented evidence \$18,792 in accrued fees, which will increase
19 \$2,430 each month. GB Capital has presented evidence that the estimated fair market value
20 of the Defendant Vessel is \$6,000. There are no facts in the record to the contrary. The
21 Court finds that the accrued costs excessive and disproportionate to the estimated fair
22 market value of the Defendant Vessel. *See Cal. Yacht*, 2015 WL 1197540, at *4
23 (concluding \$6,000 in custodial fees, which would continue accruing, was excessive and
24 disproportionate to the vessel’s maximum fair market value of \$12,000); *Merchants*, 663
25 F.2d at 1342 (concluding interlocutory sale justified based on \$17,000 in monthly costs
26 and an eight-month delay in attempting to secure release); *Ferrous*, 567 F. Supp. at 401
27 (concluding \$166,000 in annual maintenance costs was excessive when there was no
28 attempt to secure the vessel’s release for four months).

1 Taking into account the disproportionate cost of maintaining the Defendant Vessel,
2 the unreasonable delay in securing its release, and the likelihood of deterioration, the Court
3 finds interlocutory sale warranted under Rule E(9)(a)(i) and grants Plaintiff’s motion for
4 interlocutory sale of the Defendant Vessel.

5 **B. Credit Bid**

6 GB Capital asserts that it is the only party who has asserted a maritime lien claim
7 against the Defendant Vessel, and is by definition senior to all other claims in this action.
8 GB Capital contends that the Court should authorize GB Capital to bid up to the lien
9 amount in the verified Complaint (\$55,728.51), plus the actual and demonstrable costs of
10 suit, including U.S. Marshal, substitute custodian, and other *custodia legis* expenses,
11 pursuant to the Local Admiralty rules. GB Capital asserts it will establish the lien amount
12 by affidavit as required by Local Admiralty Rule E.1(e)(2).

13 As detailed above, the Answer “enters a general denial of lack of jurisdiction,
14 “submits an affirmative defense of res judicata to all allegations made in the Complaint,”
15 states that there is no evidence of a maritime lien in this case, and “begs the Court to release
16 the vessel from her bonds, order the Plaintiff to restore her taken value, and return to the
17 contracted status quo prior to the resolution of this controversy.” (ECF No. 28 at 1–4).

18 “When a vessel is sold by order of a district court in a civil action in rem brought to
19 enforce a preferred mortgage lien or a maritime lien,” a “preferred mortgage lien . . . has
20 priority over all claims against the vessel (except for expenses and fees allowed by the
21 court, costs imposed by the court, and preferred maritime liens).” 46 U.S.C. § 31326(a),
22 (b)(1). A preferred maritime lien is defined as “a maritime lien on a vessel[,] (A) arising
23 before a preferred mortgage was filed . . . ; (B) for damage arising out of maritime tort; (C)
24 for wages of a stevedore . . . ; (D) for wages of the crew of the vessel; (E) for general
25 average; or (F) for salvage, including contract salvage.” § 31301(5). According to the
26 local rules for admiralty actions,

27 When the court determines on the merits that a plaintiff or plaintiff in
28 intervention has a valid claim senior in priority to all other parties, that

1 plaintiff in intervention foreclosing a properly recorded and endorsed
2 preferred mortgage on, or other valid security interest in the vessel may bid,
3 without payment of cash, certified check or cashier's check, up to the total
4 amount of the secured indebtedness as established by affidavit filed and
served on all other parties no later than seven (7) days prior to the date of sale.

5 S.D. Cal. Civ. R. E.1(e)(2). After process has been executed, parties have fourteen days,
6 or the time allowed by the court, to file a verified statement of right or interest. Fed. R.
7 Civ. P., Supp. Adm. R. C(6)(a).

8 In this matter, Heston disputes the wharfage contract at issue in this case on multiple
9 grounds. However, Heston provides no evidence that GB Capital does not hold a preferred
10 maritime lien on the Defendant Vessel. Heston does not oppose the request to credit bid.
11 The evidence in the record shows that GB Capital holds a preferred maritime lien on the
12 Defendant Vessel. (Wharfage Contract, Ex. A to Compl., ECF No. 1-2). No party other
13 than GB Capital has asserted a maritime lien claim within the time allowed by Fed. R. Civ.
14 P., Supp. Adm. R. C(6)(a). The Court finds that GB Capital has a preferred maritime lien
15 claim with priority over all other claims against the Defendant Vessel, except for the
16 expenses and fees allowed by the Court and costs imposed by the Court in this action. *See*
17 *Vineyard Bank*, 2009 WL 799304, at *3. Provided GB Capital complies with Local Rule
18 E.1(e)(1)–(2), the Court grants GB Capital's request to authorize a credit bid up to the
19 amount of secured indebtedness at the sale of the Defendant Vessel. *See id.*; *Bank of Rio*
20 *Vista*, 2004 WL 2330704, at *2–3 (authorizing credit bid when defendants did not oppose
21 the request to credit bid and argued only that interlocutory vessel sale was premature).

22 V. CONCLUSION

23 IT IS HEREBY ORDERED that the Motion for Order of Sale filed by Plaintiff GB
24 Capital Holdings, LLC (ECF No. 26) is granted.

25 IT IS FURTHER ORDERED that, consistent with Supplemental Admiralty Rule
26 E(9)(B) and Local Admiralty Rule E.1(e) the United States Marshal be and hereby is
27 directed and empowered to sell said DEFENDANT VESSEL and her engines, tackle,
28 accessories, equipment, furnishings and appurtenances, as is, where is, at public sale at the

1 first available time and date, after having first caused notice of said sale to be published
2 daily in a newspaper of general circulation within the City of San Diego, California for at
3 least seven days immediately before the date of sale; and

4 IT IS FURTHER ORDERED that such public notice specify the date, time and
5 location for the sale of the DEFENDANT VESSEL; and

6 IT IS FURTHER ORDERED that, consistent with Local Admiralty Rule E.1(e)(2),
7 such public notice specify that the last and highest bidder at the sale will be required to
8 deposit with the U.S. Marshal a certified check or a cashier's check in the amount of the
9 full purchase price not to exceed \$500, and otherwise \$500 or ten percent (10%) of the bid,
10 whichever is greater, and that the balance, if any, of the purchase price shall be paid by
11 certified check or cashier's check before confirmation of the sale or within three days of
12 dismissal of any opposition which may have been filed, exclusive of Saturdays, Sundays
13 and legal holidays; and

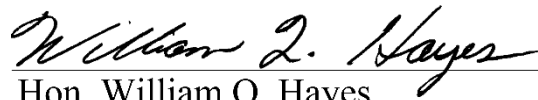
14 IT IS FURTHER ORDERED that any proceeds of said sale shall be held by it or
15 deposited by the United States Marshal in the Registry of this Court, pending further Order
16 of this Court; and

17 IT IS FURTHER ORDERED that PLAINTIFF, having a secured maritime lien
18 interest in the DEFENDANT VESSEL pursuant to the Commercial Instruments and
19 Federal Maritime Lien Act (46 U.S.C. § 31301, et seq.) and being the only claimant in this
20 action asserting a maritime claim against her, is authorized pursuant to Local Admiralty
21 Rule E.1(e)(2) to credit bid at the auction of the DEFENDANT VESSEL, without payment
22 of cash, a sum equal to its secured interest in the DEFENDANT VESSEL as established
23 by affidavit filed and served on all other parties no later than seven (7) days prior to sale
24 pursuant to Local Admiralty Rule E.1(e)(2), consisting of the lien amounts specified in
25 PLAINTIFF's Verified Complaint, totaling \$55,728.51 (calculated through February 7,
26 2018), plus its actual costs of suit through the date of the sale, including U.S. Marshal and
27 other custodia legis expenses, with such costs and expenses to be calculated at the rates
28 specified and authorized in the Order appointing the Substitute Custodian. However, as

1 PLAINTIFF's maritime necessities lien interest in the DEFENDANT VESSEL does not,
2 as a matter of law, include attorneys' fees, such fees are not to be included in any credit
3 bid Plaintiff makes;

4 IT IS FURTHER ORDERED, pursuant to Local Supplemental Admiralty Rule
5 E.1(e)(2), that if within three days of the auction date, exclusive of Saturdays, Sundays,
6 and legal holidays, no written objection is filed, the sale shall stand confirmed as of course,
7 without the necessity of any affirmative action thereon by a judge, except that no sale shall
8 stand confirmed until the buyer has complied fully with the terms of the purchase.

9 Dated: January 22, 2019

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11 Hon. William Q. Hayes
12 United States District Court
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