

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BAY MARINE BOAT WORKS, INC.,  
Plaintiff,  
v.  
M/V GARDINA, OFFICIAL NO. 1117426  
ITS ENGINES, TACKLE, MACHINERY,  
FURNITURE, APPAREL,  
APPURTENANCES, ETC., IN REM, AND  
DOES 1-10,  
Defendant.

Case No.18-cv-01855-HSG

**ORDER GRANTING MOTION FOR  
INTERLOCUTORY SALE; GRANTING  
MOTION TO STRIKE; DENYING  
MOTION FOR ENTRY OF DEFAULT**

Re: Dkt. No. 21

Pending before the Court is a motion by Plaintiff Bay Marine Boat Works, Inc. (1) for interlocutory sale of the Defendant-Vessel *M/V Gardina* (“the Vessel”); (2) to strike the answer; and (3) for entry of default. Dkt. No. 21. For the reasons set forth below, Plaintiff’s motion for interlocutory sale and motion to strike are **GRANTED**, and its motion for entry of default is **DENIED**.

**I. BACKGROUND**

**A. Factual Allegations**

The Vessel is a yacht owned by Roger N. Carle. Dkt. No. 1 (Complaint, or “Compl.”) ¶¶ 2, 5. On April 13, 2017, Plaintiff and Carle entered a repair and storage contract, under which Plaintiff agreed to repair the Vessel. *Id.* ¶ 6. On June 9, 2017, Plaintiff completed the repairs specified in the contract and prepared a “Change Order” regarding additional work to be done on the Vessel. *Id.* ¶ 10. The Change Order stated: “Please approve or decline within 24 hours of date of change order in order to meet new delivery date shown. The delivery date will be extended one additional day for each day the approval is delayed.” *Id.*

By July 7, 2017, Carle still had not responded to the Change Order. *Id.* ¶ 12. As a result,

1 Plaintiff began charging him for “lay days,” which amounted to “\$208 each lay day the Vessel  
 2 remained on [Plaintiff’s] dock awaiting Carle’s approval of the change order.” *Id.* Although  
 3 Carle did bring his account current in October 2017, he never responded to the Change Order, and  
 4 over time, the lay-day fees—and his balance—increased. *See id.* ¶¶ 13-17. On December 26,  
 5 2017, Carle partially paid off his balance, leaving an outstanding balance of \$438.81. *Id.* ¶ 17.  
 6 That December 26 payment was the final payment Plaintiff received from Carle. *Id.* Lay day fees  
 7 have continued to accrue. As of March 21, 2018—five days before Plaintiff filed the Complaint in  
 8 this action—Carle allegedly owed \$64,963.81. *See id.* at 5. At the time it filed its case  
 9 management statement on July 10, 2018, Plaintiff claimed that Carle owes at least \$90,362.62.  
 10 *See* Dkt. No. 28 at 4.

11 Plaintiff brings suit, in part, under 46 U.S.C. § 31342(a), which confers upon “a person  
 12 providing necessities to a vessel on the order of the owner or a person authorized by the owner” a  
 13 “maritime lien on the vessel,” and permits that person to “bring a civil action in rem to enforce the  
 14 lien.” “[N]ecessaries includes . . . the use of a dry dock.” *Id.* § 31301(5) (internal quotation marks  
 15 omitted). Plaintiff alleges that this Court has admiralty jurisdiction under 28 U.S.C. §§ 1331 and  
 16 1333(1), and contends that it is entitled to sue on the contract and enforce its statutory maritime  
 17 lien for Carle’s use of its dock. Compl. ¶ 23; *see also* 46 U.S.C. § 31342(a). Plaintiff requests, in  
 18 part: (1) “that all persons claiming any interest in the Vessel be cited to appear and answer this  
 19 Verified *in rem* Complaint”; (2) that its maritime lien for at least \$64,963.81 be declared valid,  
 20 “together with all other amounts which have been or are required to be disbursed by or on behalf  
 21 of Plaintiff for the care, insuring, preservation, movement and storage of the Vessel while in  
 22 *custodia legis*, plus all other advances, expenses, attorneys’ fees, costs and disbursements by  
 23 Plaintiff”; and (3) that the Vessel “be condemned and sold to pay the demands and claims of  
 24 Plaintiff . . . and that Plaintiff may become a purchaser permitted to credit bid any amounts  
 25 adjudged to be owing at any sale of the Vessel.” Compl. at 4-5 (prayer for relief).

#### 26 **B. Procedural Posture**

27 Plaintiff filed the Complaint on March 26, 2018. Dkt. No. 1. The same day, Plaintiff filed  
 28 an *ex parte* application for an order directing the Clerk to issue an arrest warrant for the Vessel,

1 Dkt. No. 3, and for an order appointing Plaintiff as the Vessel’s substitute custodian, Dkt. No. 5.  
 2 The Court granted the applications on March 30, 2018. *See* Dkt. Nos. 13, 15. The Vessel was  
 3 arrested and transferred to Plaintiff as the substitute custodian on April 19, 2018. *See* Dkt. No. 16.  
 4 Carle was served with a notice of the arrest on May 7, 2018. Dkt. No. 19. He filed an answer to  
 5 the Complaint on May 25, 2018. Dkt. No. 20.

6 On June 21, 2018, Plaintiff filed this motion, Dkt. No. 21 (“Mot.”), and concurrently  
 7 moved to shorten time and advance the hearing on the motion from September 13, 2018 to July  
 8 17, 2018, Dkt. No. 22. The Court granted the motion to shorten time. Dkt. No. 23. Carle did not  
 9 file an opposition until 8:41 p.m. on July 16, 2018, the day before the hearing. Dkt. No. 34.

## 10 **II. DISCUSSION**

### 11 **A. Plaintiff’s Motion for Interlocutory Sale Is Granted.**

12 The Federal Rules of Civil Procedure’s Supplemental Rules for Admiralty or Maritime  
 13 Claims and Asset Forfeiture Actions govern, *inter alia*, maritime actions in rem. Fed. R. Civ. P.  
 14 Supp. R. A(1)(A)(ii). Rule E(9)(a) governs interlocutory sales:

15 (i) On application of a party, the marshal, or other person having  
 16 custody of the property, the court may order all or part of the  
 17 property sold—with the sales proceeds, or as much of them as will  
 satisfy the judgment, paid into court to await further orders of the  
 court—if:

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

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

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

23 A plaintiff “need show just one of these criteria to obtain an interlocutory sale.” *Shelter Cove*  
 24 *Marina, Ltd. v. M/Y ISABELLA*, No. 3:17-cv-01578-GPC-BLM, 2017 WL 5906673, at \*2 (S.D.  
 25 Cal. Nov. 30, 2017) (highlighting the disjunctive language of the Rule) (citing *Cal. Yacht*  
 26 *Marina—Chula Vista, LLC v. S/V OPILY*, No. 14-cv-1215-BAS-BGS, 2015 WL 1197540, at \*2  
 27 (S.D. Cal. Mar. 16, 2015)); *see also Bank of Rio Vista v. VESSEL CAPTAIN PETE*, No. C 04-2736  
 28 CW, 2004 WL 2330704, at \*2 (N.D. Cal. Oct. 14, 2004) (“Plaintiff need only satisfy one of the

1 three criteria listed in [Rule E] in order to permit the Court to order the interlocutory sale.”<sup>1</sup>

2 “A motion for interlocutory sale should generally not be granted unless the court has  
3 permitted defendants sufficient time to provide a bond to secure the vessel’s release.” *Vineyard*  
4 *Bank v. M/Y Elizabeth I, U.S.C.G. Official No. 1130283*, No. 08cv2044 BTM (WMC), 2009 WL  
5 799304, at \*2 (S.D. Cal. Mar. 23, 2009) (citing *Bank of Rio Vista*, 2004 WL 23340704, at \*2).

6 “As a general rule, defendants are given at least four months to bond a vessel absent some other  
7 considerations.” *Id.* (citing *Bank of Rio Vista*, 2004 WL 23340704, at \*2). Once such a motion is  
8 granted, Rule E(9)(b) further states that “the proceeds of sale shall be forthwith paid into the  
9 registry of the court to be disposed of according to law.”

10 Plaintiff contends that all three criteria in Rule E(9)(a) are met. *See* Mot. at 6. The Court  
11 finds that Plaintiff has shown that the Vessel is “liable to deterioration” and that “the expense of  
12 keeping the property is excessive or disproportionate” within the meaning of the rule.

13 **1. The Vessel is “liable to deterioration.”**

14 First, in support of its assertion that the Vessel is “liable to deterioration,” Plaintiff submits  
15 a declaration by its operations manager, Gregory Goshay. *See* Dkt. No. 21-2 (Declaration of  
16 Gregory Goshay, or “Goshay Decl.”). Goshay testifies that the Vessel’s “hull is currently in an  
17 extremely deteriorated condition,” in large part due to “galvanic corrosion.” *Id.* ¶ 3. As a result,  
18 the boat cannot float. *See id.* “The boat is further suffering from general neglect inside and out,”  
19 including “numerous signs of dry rot,” leaks, and a strong mildew odor. *Id.* Moreover, the  
20 Vessel’s “mechanical systems have . . . been completely dormant since it was hauled out on June  
21 1, 2017.” *Id.*<sup>2</sup> Accordingly, the Court finds that the Vessel is liable to deterioration under Rule E.

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24 <sup>1</sup> The citation to Rule E in *Bank of Rio Vista* referred to an earlier version of the rule.

25 <sup>2</sup> In his late-filed opposition, Carle contends that “the mere fact that the Vessel is being stored  
26 out of water, thereby exposed to the elements and not being maintained or used, is insufficient to  
27 warrant an interlocutory sale.” Dkt. No. 34 at 3. The only case Carle cites is *American West Bank*  
28 *v. P/V Indian*, No. 12cv1786 AJB (BGS), 2013 WL 784756 (S.D. Cal. Mar. 1, 2013), which is  
inapposite to this particular assertion. There, the court found only that the vessel did not satisfy  
the deterioration criterion because there was “no specific evidence suggesting deterioration, decay,  
or injury that [was] out of the ordinary for a vessel generally.” *Id.* at \*2. Moreover, Plaintiff *has*  
provided specific evidence of deterioration here, in the form of a declaration—which Carle  
altogether fails to address.

1                   **2. The cost maintaining the Vessel is “excessive or disproportionate.”**

2                   Plaintiff also contends that the cost of maintaining the Vessel is “excessive or  
3 disproportionate.” Specifically, Plaintiff filed declarations asserting that the cost of maintaining  
4 the Vessel far exceeds the cost of the Vessel itself. According to Goshay, the fair market value of  
5 the Vessel is an estimated \$7,500. *See* Goshay Decl. ¶ 5. And, according to Sean Svendsen,  
6 Plaintiff’s general counsel, Plaintiff’s “daily custodial charges for the safe-keeping of the Vessel  
7 while it is maintained under arrest is \$200/day.” Dkt. No. 37 (Declaration of Sean Svendsen, or  
8 “Svendsen Decl.”) ¶ 5.<sup>3</sup> Plaintiff began charging custodial fees the day after the Vessel was  
9 arrested, April 20, 2018. *Id.* ¶ 6. As of July 19, 2018, “the total amount of custodial fees incurred  
10 and charged by Bay Marine is \$18,200,” an amount which increases by the day. *See id.* More  
11 than \$18,000 in maintenance costs plainly exceeds the Vessel’s estimated \$7,500 fair market value  
12 within the meaning of Rule E(9), and the case law supports that conclusion. *See, e.g., Shelter*  
13 *Cove*, 2017 WL 5906673, at \*3 (finding that maintenance costs amounting to 30 percent of the  
14 vessel’s total value were excessive and disproportionate). Accordingly, the Vessel’s maintenance  
15 costs are excessive and disproportionate within the meaning of Rule E.<sup>4</sup>

16                   **3. The interlocutory sale should take place no earlier than 30 days from**  
17 **the date of this order.**

18                   “[E]ven if one [Rule E(9)] criterion is met *it is nevertheless inappropriate* to order a sale  
19 before [the defendants] have been given a reasonable amount of time to release their property.”  
20 *Bank of Rio Vista*, 2004 WL 2330704, at \*2 (emphasis added). Thus, what remains is the question  
21 of whether Carle has received such a reasonable amount of time. A number of courts have  
22 recognized four months as presumptively reasonable. *See Vineyard Bank*, 2009 WL 799304, at \*2  
23 (citation omitted). The Vessel was arrested on April 19, 2018, which puts the four-month mark at  
24 August 19, 2018. *See Shelter Cove*, 2017 WL 5906673, at \*2 (using vessel’s arrest date as

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27 <sup>3</sup> At the hearing on this motion, the Court directed Plaintiff to submit evidence supporting its  
28 assertions regarding maintenance costs. Plaintiff submitted the Svendsen Declaration in response.

<sup>4</sup> Because the criteria set forth in Rule E(9)(a)(i)(A) and (B) are satisfied, the Court need not reach  
the question of whether Rule E(9)(a)(i)(C) is satisfied, as Plaintiff only has to satisfy one criterion  
to justify an interlocutory sale. *See Shelter Cove*, 2017 WL 5906673, at \*2.

1 beginning of four-month period); *Cal. Yacht Marina*, 2015 WL 1197540, at \*4 (same); *Vineyard*  
2 *Bank*, 2009 WL 799304, at \*2 (same); *Bank of Rio Vista*, 2004 WL 2330704, at \*2 (same).

3 Here, the interlocutory sale should be postponed until *at least* August 19, 2018, when four  
4 months since the Vessel’s arrest will have elapsed. *See Bank of Rio Vista*, 2004 WL 2330704, at  
5 \*2 (granting motion for interlocutory sale but setting it to take place after the four-month period  
6 had passed). Moreover, the parties agreed at oral argument that the interlocutory sale could take  
7 place even later—namely, 30 days from the date of this order. Accordingly, the Court orders that  
8 the interlocutory sale take place no earlier than 30 days from the date of this order, in order to  
9 provide Carle with “a reasonable amount of time to release [his] property.” *See id.* If, however,  
10 Carle “do[es] successfully secure release of the vessel prior to its sale, the execution of that sale  
11 shall be stayed.” *See id.*

12 **B. Plaintiff’s Motion to Strike Is Granted, and Its Motion for Entry of Default is**  
13 **Denied.**

14 Plaintiff also contends that the Court should strike Carle’s untimely and defective answer,  
15 Mot. at 9, and on those grounds seeks entry of default, *id.* at 11-12. Specifically, Plaintiff  
16 contends that Carle failed to “comply with the procedural requirements of Rule C(6)” because he  
17 filed an answer before filing a verified statement of interest. *See id.* at 9. It is true that the plain  
18 language of Rule C(6) contemplates that a person who answers a complaint in a maritime lien  
19 action has already filed the verified statement of interest. *See Fed. R. Civ. P. Supp. R. C(6)(a)(iv)*  
20 (stating that a person “who asserts a right of possession or any ownership interest must serve an  
21 answer within 21 days after filing the statement of interest or right”) (emphasis added). Because  
22 Carle failed to file a verified statement of right or interest, and instead skipped straight to filing an  
23 answer, he appears to be out of compliance with the filing requirements of Rule C(6)—which the  
24 Ninth Circuit has made clear are to be strictly construed. *See U.S. v. Real Property*, 135 F.3d  
25 1312, 1317 (9th Cir. 1998) (observing that “circuit courts consistently have held claimants to strict  
26 compliance with the provisions of Rule C(6)”). Accordingly, the Court grants Plaintiff’s motion  
27 to strike Carle’s answer, for non-compliance with the Federal Rules of Civil Procedure. *See Fed.*  
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1 R. Civ. P. 12(f) (permitting court to strike “immaterial” or “impertinent” matter from the record).<sup>5</sup>


2 Plaintiff also moves for entry of default on this basis. But regardless of whether entry of  
3 default is warranted, the Court finds that if Carle later moved to set aside the default there would  
4 be good cause to do so under Rule 55(c), particularly in light of the Court’s approval of the  
5 interlocutory sale. Carle has also made clear that he wishes to participate in this action, the gross  
6 tardiness of his opposition to Plaintiff’s motion notwithstanding. Thus, in the interest of judicial  
7 economy and deciding this matter on the merits, the Court denies Plaintiff’s motion for entry of  
8 default. The Court exercises its discretion under Rule C(6)(a)(i)(B) and directs Carle to file a  
9 verified statement of interest and an answer no later than July 27, 2018, and to ensure that the  
10 filings are compliant with the relevant local and federal rules.

11 **III. CONCLUSION**

12 For the reasons set forth above, the Court **GRANTS** Plaintiff’s motion for interlocutory  
13 sale, which may take place no earlier than 30 days from the date of this order. Further, the Court  
14 **GRANTS** Plaintiff’s motion to strike Carle’s answer and **DENIES** Plaintiff’s motion for entry of  
15 default. Carle is directed to file a verified statement of interest and an answer no later than July  
16 27, 2018, and to ensure that the filings are compliant with the relevant local and federal rules.

17 **IT IS SO ORDERED.**

18 Dated: 7/23/2018

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21 HAYWOOD S. GILLIAM, JR.  
22 United States District Judge  
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27 <sup>5</sup> The Court also notes that Carle’s answer does not comply with the Admiralty and Maritime  
28 Local Rules, which require that “every pleading, statement of right or interest, or other paper as  
required by Fed. R. Civ. P. Supp. B, C, D, and G shall be upon oath or solemn affirmation, or in  
the form provided by 28 U.S.C. § 1746.” Admir. L.R. 2-1.