

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

GOWEN, INC.,

Plaintiff

v.

Civil No. 99-371-P-C

F/V QUALITY ONE,  
Official No. 909122, her equipment,  
Engines, and appurtenances,  
*In Rem*

And

NUNYA, INC.,  
*In personam,*

Defendants

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

This matter is before the Court on Plaintiff's Motion for Order Confirming Sale ("the Motion") (Docket No. 18) following the auction of the fishing vessel QUALITY ONE, Official Number 909122.<sup>1</sup> Defendants oppose the Motion on the grounds that the auction did not realize sufficient value for the QUALITY ONE. The Court conducted an evidentiary hearing regarding the value of the vessel. For the reasons that follow, the Court will grant the Motion.

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<sup>1</sup> The Verified Complaint (Docket No. 1) identifies the QUALITY ONE by Official Number 909122. But all subsequent filings by Plaintiff, and all filings by Defendant, refer to Official Number 919122. The Court believes, based on the photos of the QUALITY ONE, attached as unnumbered exhibits to Defendant's Opposition to Plaintiff's Motion to Confirm Sale (Docket No. 19), that the actual Official Number of the QUALITY ONE is 909122.

Plaintiff brought this action under 46 U.S.C. § 31341 *et. seq.* against the QUALITY ONE and its owner, Nunya, Inc., (“Nunya”) to recover debts for wharfage services and repairs provided by Plaintiff. Verified Complaint (Docket No. 1). Subsequently, an order to arrest the QUALITY ONE was issued. Motion for Arrest of Vessel (Docket No. 2). When Nunya failed to answer, Plaintiff sought and obtained, by order of this Court, a default judgment against Nunya. Motion for Default Judgment (Docket No. 13). Simultaneously, the Court ordered the sale of the QUALITY ONE. Motion for Interlocutory Sale (Docket No. 12). A public auction was conducted, and Plaintiff now seeks an order to confirm the sale. Nunya has come forward to oppose the Motion, on the grounds that the auction failed to achieve a reasonable price for the vessel. After briefing was completed, the Court conducted an evidentiary hearing. Both in its response to the Motion and in an additional filing made the day of the hearing, Defendant contends that the commercial fishing permits maintained by it for the QUALITY ONE are not subject to the Marshal’s arrest of the vessel and will not transfer to the auction purchaser. Following the evidentiary hearing, the Court asked the parties to provide additional briefing with regard to the transferability of the fishing permits.

A public auction of the QUALITY ONE was held on March 15, 2000. The auction was advertised in the *Portland Press Herald* and the *Maine Sunday Telegram*. Plaintiff also distributed fliers advertising the auction at a commercial fishing trade show. Seven or eight bidders, including Plaintiff, signed in at the auction. Dale Doucette, employed by Nunya as the captain of the QUALITY ONE, attended the auction as well. Prior to the bidding, Mr. Doucette announced to all the bidders that the auction was being challenged legally and that the commercial fishing permits maintained for the QUALITY ONE would not transfer to whomever purchased the vessel at auction. Representatives of the United States Marshal Service, who conducted the

auction, asked Mr. Doucette on at least one occasion to be quiet. Following Mr. Doucette's outburst, there were only two bids for the vessel. Plaintiff first bid \$16,000, and then Andrew Todd made the final bid of \$17,000.

Nunya purchased the QUALITY ONE in 1997 for \$49,500. Mr. Doucette testified that repairs worth approximately \$26,000 were made to the QUALITY ONE by Nunya. Nunya listed the QUALITY ONE with a broker on at least two occasions, but a buyer was not found. Sometime in 1998, Nunya listed the QUALITY ONE with an asking price of \$75,000. The following year, the vessel was listed again with an asking price of \$50,000. Obviously, Nunya was never successful in finding a buyer for the QUALITY ONE. Betty Doucette, the president of Nunya, testified that she did not receive any offers higher than \$40,000 to purchase the vessel.<sup>2</sup> Defendant also points to a marine survey prepared in 1997 for the purposes of procuring insurance which determined the market value of the QUALITY ONE to be between \$44,250 and \$52,250. Plaintiff challenges the accuracy of this valuation, suggesting that the survey is the result of a cursory inspection. Finally, there was conflicting testimony regarding the working condition of the vessel. While Mr. Doucette testified that the vessel was in fine working order, Ms. Doucette reluctantly acknowledged that the vessel was not able to participate in the shrimp fishery during the late fall of 1999. Further, Mr. Todd testified that his nephew had inspected the vessel when Nunya had it listed for sale and that the inspection revealed engine trouble.

The Court begins with Defendant's contention that the fishing permits maintained by Nunya for the QUALITY ONE are not part of the *res* of the vessel but are, instead, the personal property

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<sup>2</sup> The testimony on this point was muddled at best. Ms. Doucette was asked if she ever received an offer of \$40,000 or more to purchase the QUALITY ONE. She testified that she had not. No further questions were asked, such that it is impossible to know if Ms. Doucette received an offer for \$40,000, but rejected it, or if she never received a single offer to purchase the QUALITY ONE.

of Nunya. Accordingly, Defendant contends, the permits were not subject to Plaintiff's maritime liens and not subject to arrest by the United States Marshal Service. Finally, according to Defendant, the permits would not be transferred to any purchaser at a court-ordered auction. Plaintiff counters that the fishing permits are appurtenances to the vessel and, that under the principles of admiralty and maritime law, a maritime lien placed on a vessel applies to any appurtenances of that vessel as well. According to Plaintiff, when the vessel was seized and auctioned, both the seizure and the auction included the fishing permits.

Neither party has cited, nor has the Court uncovered, any authority that directly addresses whether or not a maritime lien reaches commercial fishing permits maintained for that vessel.<sup>3</sup> The absence of case law on this subject may result from the relatively recent development of limited access fisheries in which new permits are unavailable and existing permits are encumbered by ever-increasing limitations.<sup>4</sup> Historically, commercial fishing permits were available without limitation. Today, however, commercial fishing permits in some fisheries are so rare, and so limited, that the permits themselves are quite valuable. Stated another way, a fishing vessel without federal fishing permits is far less valuable than a similar boat with federal fishing permits.<sup>5</sup> Indeed, several of the witnesses at the evidentiary hearing testified that they would

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<sup>3</sup> In *Bank of America v. Pengwin*, 175 F.3d 1109 (9<sup>th</sup> Cir. 1999), a fishing vessel was auctioned with its fishing rights to satisfy maritime liens. The Court of Appeals for the Ninth Circuit affirmed the lower court's confirmation of the sale despite the failure to include in the notice of sale that the fishing rights were being auctioned along with the vessel. *Id.* at 1119. No dispute regarding the propriety of including the fishing rights in the auction – apparently because it was determined that the fishing rights were subject to the liens as well – was generated by that case. Accordingly, the Court does not rely on that case, except to note that its holding is in no way inconsistent with this Court's ultimate conclusion that a fishing permit is an appurtenance subject to a maritime lien.

<sup>4</sup> For example, some federal fishing permits include "days at sea" limitations. A holder of such a permit may only be at sea, fishing a relatively small number of days each year. Otherwise, the vessel must either be fishing for other species or tied up at the dock.

<sup>5</sup> From the testimony at the evidentiary hearing, the Court understands that it is possible to transfer commercial fishing permits from one vessel to another. However, it is apparent that such a process is complicated and costly.

assign little or no value to the QUALITY ONE (aside, presumably, from a scrap value) if it were to be sold without its fishing permits.

The system of maritime liens benefits both creditors and debtors. Businesses may furnish all manner of goods and services to vessels on credit with the knowledge that the maritime lien system provides some protection for their interests. Given the transitory nature of the collateral, vessel owners would be hard pressed to obtain much-needed goods and services on credit in the absence of a maritime lien system,. A fundamental and long-standing principle of the maritime lien system is that all equipment – or appurtenances – aboard a vessel, as well as the vessel itself, are subject to the lien regardless of ownership. *See SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1<sup>st</sup> Cir. 1972) (cement loading, bagging, and unloading equipment appurtenant to bulk cement carrier, and therefore subject to maritime lien). In other words, “equipment installed aboard a vessel, which become[s] an integral part of the vessel and are essential to its navigation and operation, [is] subject to the maritime liens upon the vessel regardless of who the actual owner may be.” *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (D. Me. 1963) (fathometer and radar leased to vessel held subject to maritime lien despite reservation, in lease, of title in lessor).

The logic of the appurtenance rule is straightforward with respect to maritime suppliers who provide goods and services on credit.

This rule . . . is predicated upon the principle that one extending credit to a ship has the right to assume that the entire vessel, including all of her equipment essential to her navigation or to the completion of the voyage upon which she is embarked, stands as security for the debt.

*Stewart & Stevenson Services, Inc., v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 562 (N.D. Miss., 1995) (citing *The Hope*, 191 Fed. 243, 245 (D. Mass. 1911) (holding maritime lien applies

to engine, noting that “repairs or supplies must obviously have been furnished upon the security of a complete gas screw launch, not upon the security of a mere hull devoid of motive power.”)).

The question raised by this case – and apparently not previously answered by the courts – is whether fishing permits, like fathometers, radars, and engines, are appurtenances subject to maritime liens. At first blush, there is an obvious distinction, a fishing permit is an intangible right to fish, whereas typical appurtenances, like fishing nets and radar systems, are tangible property. However, there can be no doubt that a commercial fishing permit is as vital as the nets to the mission of a fishing vessel. Indeed, fishing permits are apparently more integral to the QUALITY ONE’s future as a commercial fishing vessel than is the tangible equipment, because the permits, unlike the rest of the appurtenances, are extremely difficult to replace. There is no doubt that, in the era of limited entry fisheries, with respect to the QUALITY ONE, a commercial fishing permit is “an integral part of the vessel and [is] essential to its navigation and operation . . . .” *F/V Sylvester F. Whalen*, 217 F. Supp. at 917.

The Court is also satisfied that marine suppliers, such as Plaintiff, are well aware of the impact of limited entry regulation upon the local commercial fishing industry. Accordingly, suppliers realize that the value of a commercial fishing vessel is tied to the value of the vessel’s permits. For example, in the current regulatory scheme, a marine supplier would be hesitant to extend credit to a fishing vessel that had no permits, given that obtaining permits is extremely difficult. From that, it follows that suppliers would be less likely to extend credit to commercial fishing vessels if the supplier knew that the lien created by the provision of goods or services did not attach to the vessel’s fishing permits, just as the supplier would be hesitant to extend credit if the lien did not attach to the equipment on the vessel. Accordingly, adopting a rule by which a fishing permit is treated like any other appurtenance is consistent with the underlying principle of

the appurtenance rule – that marine suppliers extend credit based on the security of the entire vessel as a going concern, rather than on the hull and cabin alone.<sup>6</sup> *Cf. The Hope*, 191 Fed. at 245. Therefore, the Court finds that commercial fishing permits are appurtenances equivalent to fishing nets and are subject to maritime liens.<sup>7</sup>

Having determined that the QUALITY ONE's fishing permits are appurtenances subject to the maritime liens, the Court turns to the original question raised by the Motion: whether or not to confirm the sale at auction of the QUALITY ONE. Unfortunately, an independent appraisal of the QUALITY ONE was not conducted prior to the auction. It is common practice to order an independent, confidential appraisal prior to sales such as this so that the Court has a benchmark to aide it in determining if the sale should be confirmed.<sup>8</sup> *See, e.g., Munro Drydock, Inc., v. M/V Heron*, 585 F.2d 13, 14 (1<sup>st</sup> Cir. 1978); *Maine Nat. Bank v. F/V Explorer*, 663 F. Supp. 462, 470 (D. Me.) *aff'd* 833 F.2d 375 (1<sup>st</sup> Cir. 1987); *Southern New England Production Credit Ass'n v. O/S My Marie*, 611 F. Supp. 757, 758-59 (D. Me. 1985). In the absence of an appraisal, the Court must look to other evidence in order to establish a fair market value for the QUALITY ONE. Determining a market value for any item is typically a speculative endeavor. Assigning a market value in this instance is particularly difficult given the

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<sup>6</sup> A contrary finding could have a serious impact on those engaged in commercial fishing. If this Court were to hold that fishing permits are not subject to maritime liens, marine suppliers could become hesitant to extend what is presumably much-needed credit in the form of goods and services to commercial fishing vessels, given that the value of such vessels without their permits is far less.

<sup>7</sup> Plaintiff has also offered provisions of the fishery management plan for the Northeastern United States, specifically 50 C.F.R. § 648.4, as authority for the proposition that a fishing permit transfers with the vessel at a court-ordered sale of the vessel to satisfy maritime liens. The Court finds that authority to be of little weight in this particular instance, and the Court, therefore, does not rest its ultimate conclusion on any portion of the management plan.

<sup>8</sup> At the evidentiary hearing, the Court inquired of Plaintiff's counsel why an appraisal had not been requested. The response was unsatisfactory. Obviously, the Court would prefer to have an independent appraisal in this instance – and in all future cases. An appraisal would have provided the Court with a much stronger foundation upon which to decide the Motion, and it likely would have obviated the need for an evidentiary hearing. But see *Maine Nat'l Bank v. F/V Explorer*, 663 F. Supp. at 470 (evidentiary hearing on motion to confirm sale required despite existence of court-ordered appraisal).

conflicting evidence presented, as well as the fragile condition of the local commercial fishing industry. Based on the limited evidence provided, the Court determines the fair market value of the QUALITY ONE to be between \$35,000 and \$40,000. The Court bases this conclusion on Nunya's previous failed efforts to sell the QUALITY ONE for \$75,000 and \$50,000 and Nunya's failure to procure an offer to purchase the vessel in excess of \$40,000. Furthermore, the Court is satisfied that, despite the repairs and improvements made by Nunya, the QUALITY ONE is not in full working order.<sup>9</sup> Having established a fair market value, the Court must now determine if the sale at auction for \$17,000 should be confirmed.

In deciding whether or not to confirm a sale, the Court must balance the need to instill confidence in court-ordered sales with the need to protect the interests of the creditors and the debtors. *Munro Drydock, Inc.*, 585 F.2d at 14. In other words, the Court must not unnecessarily disturb the results of a fairly conducted auction unless the rights of the creditors and debtor are significantly infringed. To that end, a fairly conducted sale should be confirmed unless the sale price is grossly inadequate. *See id.* at 15. Stated another way, a fairly conducted auction should be confirmed unless "there is a substantial disparity between the highest bid and the appraised or fair market value, and there is a reasonable degree of probability that a substantially better price will be obtained by a resale." *See id.* (internal quotations omitted). Aside from simply comparing the fair market value with the highest bid, another often-used tool to demonstrate the gross inadequacy of a highest bid is to supply an upset bid – essentially, a promise by a third party to bid up to a certain amount above the existing highest bid if a new sale is conducted.

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<sup>9</sup>The Court bases this conclusion in large part on Ms. Doucette's testimony, albeit reluctant testimony, that the QUALITY ONE was not prepared to participate in the shrimp fishery during the late fall of 1999.

The highest bid at the auction was \$17,000. The Court has determined the fair market value of the QUALITY ONE to be between \$35,000 and \$40,000. Accordingly, the fair market value of the QUALITY ONE is approximately between two and two-and-one-half times the highest bid at auction. There is no magic formula for determining whether or not an auction bid is grossly inadequate. The case law on this subject reveals much disparity as to what is grossly inadequate. *See, e.g., Munro Drydock, Inc.*, 585 F.2d at 15-16 (district court abused discretion by confirming sale, without a requested hearing, where highest auction bid for vessel was \$7,500, vessel appraised at \$25,000 for scrap and \$100,000 as drill ship, and upset bid of \$50,000 proffered); *Wong Shing v. M/V Mardina Trader*, 564 F.2d 1183, 1188-89 (5<sup>th</sup> cir. 1977) (district court properly confirmed auction bid of \$610,000 despite evidence of an upset bid of twice that amount, and evidence of a fair market value three times the auction bid); *Ghezzi v. Foss Launch & Tug Co.*, 321 F.2d 421, 425 (9<sup>th</sup> Cir. 1963) (district court did not abuse discretion by confirming auction bid of \$41,000 despite upset bid of \$50,000 in the absence of evidence concerning fair market value); *Maine Nat'l Bank*, 663 F. Supp. at 470 (evidentiary hearing required before confirmation of sale where court-ordered appraisal is more than twice the amount of the highest auction bid); *Southern New England Production Credit Ass'n*, 611 F. Supp. at 759-60 (motion to confirm sale denied where court ordered appraisal was "significantly more than twice the amount" of the highest auction bid and where only two bidders attended auction); *C.I.T. Corp. v. Oil Screw Frank T. Shearman*, 343 F. Supp. 1283 (E.D. Va. 1971) (given the circumstances, \$1,000 bid on vessel valued at \$50,000 not grossly inadequate) *aff'd sub nom Golden v. Oil Screw Frank T. Shearman*, 455 F.2d 133 (4<sup>th</sup> Cir. 1972). An appraised value of between two and two-and-one-half times the highest bid may demonstrate that this bid is inadequate, but the Court should order a new auction only if the bid is *grossly* inadequate. Further, it is well established that, given the

inherent circumstances of a forced sale, a foreclosure sale is not expected to generate a price equal to or even near the market value of a piece of property. *Cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38, 114 S. Ct. 1757 (1994).

Consideration of factors beyond merely the fair market value and the highest bid reveals further support for the conclusion that the bid, while perhaps inadequate, is not grossly inadequate. First, Defendant has not produced an upset bid, or otherwise offered evidence to indicate that a new sale will produce a higher bid. Producing an upset bid is a common means to prove an auction has produced a grossly inadequate price. *See, e.g., Munro Drydock, Inc.*, 585 F.2d at 14-15. The failure of Defendant to procure an upset bid supports a finding that the auction bid is not grossly inadequate.<sup>10</sup> Second, the auction was apparently well publicized and well attended. *Cf., Southern New England Production Credit Ass'n*, 611 F. Supp. at 759-60 (motion to confirm sale denied in part because only two bidders – one being the creditor – were present at auction). Finally, to the extent that potential buyers were reluctant to bid as a result of Mr. Doucette's comments at the auction, the Court is unwilling to consider that a basis to order a new sale. To the extent that Mr. Doucette, plainly an agent of Defendant Nunya,<sup>11</sup> may have reduced the amount of the final bid, Defendant will not benefit from its agent's misconduct by achieving a second auction that may generate a higher bid.<sup>12</sup>

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<sup>10</sup> The standard speaks of a gross inadequacy, rather than a simply inadequacy. The Court takes the modifier gross to be meaningful in this context. If a bid of \$17,000 were grossly inadequate for the QUALITY ONE, it would follow that Defendant should be able to find a buyer willing to offer an upset bid.

<sup>11</sup> Although Mr. Doucette is apparently neither an officer nor a shareholder of Nunya, the record is replete with evidence demonstrating that Mr. Doucette acted as Nunya's agent with respect to the QUALITY ONE. In addition to being the vessel's captain, Mr. Doucette testified that he conducted and supervised numerous repairs to the vessel. The verified complaint reveals that Mr. Doucette procured supplies for the vessel on credit. Complaint at ¶ 11. Finally, a review of the marine survey for the QUALITY ONE prepared by an insurance company reveals that it was requested by, and prepared for, Mr. Doucette.

<sup>12</sup> To the extent that Mr. Doucette's actions may have undermined confidence in court-ordered auctions, the Court cannot allow Mr. Doucette or Nunya to benefit in any way from this inexcusable conduct. "It is important, in the ordinary case, to honor the expectations of those bidding at the sale." *Munro Drydock, Inc.*, 585 F.2d at 16.

Taking all of these factors into consideration, the Court finds that the \$17,000 bid is not grossly inadequate. Additionally the Court is not satisfied that “there is a reasonable degree of probability that a substantially better price will be obtained by a resale.” *Munro Drydock, Inc.*, 585 F.2d at 15. Balancing the need to instill confidence in court-ordered auctions with the need to protect the interests of the creditors and the debtor, the Court believes the best course of action is to confirm the sale without further delay.<sup>13</sup>

Accordingly, the Court **ORDERS** that Plaintiff’s Motion for Order Confirming Sale be, and it is hereby, **GRANTED**. Further, the Court **ORDERS** that the Sale of the F/V QUALITY ONE be, and it is hereby, **CONFIRMED**.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 14<sup>th</sup> day of June, 2000.

GOWEN INC  
plaintiff

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v.

F/V QUALITY ONE, In Rem

WILLIAM H. WELTE

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<sup>13</sup> By the terms of the auction, the high bidder was required to pay the full price to the Court on the day of the auction. As a result the bidder has had \$17,000 of capital tied up for approximately three months, without having access to the vessel. The Court has no doubt that such a delay has the potential to decrease the confidence with which bidders will participate in future court auctions. The Court wishes to minimize any such damage by confirming this sale as soon as possible. Cf. *Munro Drydock, Inc.*, 585 F.2d at 16 (“It is important, in the ordinary case, to honor the expectations of those bidding at the sale.”).

defendant

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