



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

Catalina Sea Ranch, LLC,

Debtor(s)

Case No.: 2:19-bk-24467-NB

Chapter: 11

**MEMORANDUM DECISION GRANTING
MOTION SELL ASSETS FREE AND
CLEAR OF ALL INTERESTS, INCLUDING
SUCCESSOR LIABILITY**

Hearings:

Date: March 24, 2020 and
April 7, 2020

Time: 2:00 p.m.

Place: Courtroom 1545
255 E. Temple Street
Los Angeles, CA 90012

Debtor has filed a motion to sell substantially all of its assets free and clear of all claims and interests, including any successor liability, under §§ 363(b) and (f) (the “Sale Motion,” dkt. 96).¹ The proposed purchaser, Pacific Mariculture, LLC (“Mariculture”), is an insider with multiple connections to Debtor. But the sale process has been highly

¹ Unless the context suggests otherwise, a “chapter” or “section” (“§”) refers to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the “Code”), a “Rule” means the Federal Rules of Bankruptcy Procedure or other federal or local rule, and other terms have the meanings provided in the Code, Rules, and the parties’ filed papers.

1 scrutinized and structured to obtain the highest and best bid for the assets. For the
2 reasons set forth below, and on the record at the above-captioned hearings, the Sale
3 Motion will be granted by a separate order.

4 **1. OVERVIEW**

5 Debtor initially attempted to sell its assets through a general assignment for the
6 benefit of creditors (an “ABC”). That effort was blocked by an involuntary bankruptcy
7 petition.

8 Debtor resisted the involuntary petition, arguing that the bankruptcy process
9 would be more expensive and time consuming than an ABC. But the creditors who filed
10 the involuntary bankruptcy petition believed that any disadvantages would be
11 outweighed by the advantages, and Debtor eventually acceded to bankruptcy relief.

12 The advantages of bankruptcy include: supervision by the Bankruptcy Court; the
13 disclosures and transparency required in bankruptcy; the ability to order a sale process
14 that is more responsive to creditors’ objections than what has been proposed outside of
15 bankruptcy; and, perhaps most importantly, the fact that § 363(f) authorizes a sale free
16 and clear of all claims and interests. A free and clear sale maximizes the potential sales
17 price, by assuring that prospective purchasers do not discount their bids, or decline to
18 bid at all, based on concerns about exposure to any claims and interests, including
19 potential successor liability.

20 **2. BACKGROUND**

21 **a. Debtor’s business, and its attempts to arrange an asset sale**

22 Debtor is a limited liability company formed in November 2012 with the goal of
23 developing a sustainable, locally grown seafood supply chain. See Status Report (dkt.
24 39), Continuation Pages, p. 1 (PDF p. 13). Debtor’s initial strategy was to develop a
25 commercially sustainable offshore mussel farm, but Debtor ran into financial difficulties,
26 which it attributes in part to a failed attempt to expand production beyond mussels. See
27 *id.* at p. 4 (PDF p. 16).

28

1 Debtor ran out of cash around June 2019, and subsequently pursued a sale of all
2 or substantially all of its assets pursuant to an ABC because, it alleges, its governing
3 board believed that an ABC would be the most expedient and cost-effective process
4 that would yield the highest distribution to general unsecured creditors. See *id.* at pp. 4-
5 5 (PDF pp. 16-17). The proposed assignee intended to retain an entity known as Valcor
6 Advisors, Inc. (“Valcor”) as its agent to market and sell Debtor’s assets at an auction.
7 *Id.* at p. 5 (PDF p. 17).

8 In response to Debtor’s attempted ABC, one creditor, later joined by others, filed
9 an involuntary chapter 7 petition (dkt. 1 & 2) against Debtor in the Southern District of
10 Florida on September 15, 2019. See dkt. 1, 17. Debtor filed a motion to dismiss the
11 involuntary petition (the “MTD,” dkt. 16) that, among other things, asserted an improper
12 venue. Debtor and the petitioning creditors resolved Debtor’s MTD and, by agreement
13 of the parties, an “order for relief” was entered, venue was transferred to this Court, and
14 this case was converted to chapter 11. See dkt. 22, 23, 26, 28, 29.

15 Debtor then filed several motions to preserve its assets and arrange for their sale
16 in this bankruptcy forum. This Court heard those motions on January 28, 2020.

17 **(i) DIP Financing Motion**

18 Debtor sought approval of \$500,000 in postpetition “debtor in possession”
19 financing to be provided by Mariculture (the “DIP Financing Motion,” dkt. 47). The DIP
20 Financing Motion states that the mussels are perishable and “need to be actively
21 managed” or the mussels will die, and the United States Arm Corps of Engineers (the
22 “Corps”) could “rescind the Debtor’s permit at any time” for noncompliance, which would
23 “diminish if not destroy the value” of Debtor’s assets. Dkt. 47, p. 5:19-26; see *also*
24 pp. 39:22-40:3.

25 The proposed DIP financing does not include any of the types of provisions that
26 bankruptcy courts typically question. See Rule 4001(c)(1)(B) (Fed. R. Bankr. P.); LBR
27 4001-2(b). To the contrary, the terms are well within the range of what this Bankruptcy
28 Court has seen and approved. For example, the interest rate is one percent above

1 LIBOR – *i.e.*, 2.834% as of the time the motion was prepared. Dkt. 47, p. 18:18-20.
2 There is a “carve-out” of up to \$350,000.00 if necessary to pay Debtor’s professional
3 fees. Dkt. 47, pp. 18:6-20 & 24:4-25.

4 As disclosed in the DIP Financing Motion, the proposed DIP lender, Mariculture,
5 has several prepetition connections with Debtor. First, Mariculture is owned and/or
6 controlled by Mr. John C. Molina and Mr. Robert Gordon, who are members of the
7 Board of Directors and insiders of the Debtor – Mr. Molina in particular is Debtor’s Chief
8 Executive Officer (“CEO”). Dkt. 47, p. 5:4-7.

9 Second, Mariculture is also a prepetition lender, having loaned Debtor in excess
10 of \$1.2 million since June 28, 2019, secured by a lien against all of Debtor’s assets. *Id.*
11 at p. 6:1-6. Debtor believes that Mariculture is its only secured creditor. *Id.*, p. 13:5-9.

12 Third, services to maintain the mussel farm have been provided by Mariculture
13 (which took over from another entity known as 6 Founders, LLC), allegedly because
14 Debtor no longer has any employees. *See id.* at p. 10:23-26; dkt. 99, p. 9:26-27.

15 **(ii) CRO Motion**

16 Debtor sought approval of (1) the engagement of Joel B. Weinberg as Chief
17 Restructuring Officer (“CRO”) of Debtor and (2) employment of Mr. Weinberg’s wholly
18 owned entity, Management Pro Tem, LLC (“Weinberg Affiliate 1”), to assist him (the
19 “CRO Motion,” dkt. 48). The CRO Motion discloses that the proposed assignee for the
20 contemplated ABC, an entity known as Insolvency Services Group, Inc. (“Weinberg
21 Affiliate 2”), is also an entity wholly owned by Mr. Weinberg.

22 **(iii) Counsel Employment Application**

23 Debtor filed an application to employ Winthrop Golubow Hollander, LLP as
24 Debtor’s general bankruptcy counsel (the “Counsel Employment Application,” dkt. 49).
25 The Counsel Employment Application disclosed that proposed counsel had previously
26 worked and currently is working on numerous cases with Weinberg Affiliates 1 and 2.
27 Dkt. 49, p. 7:13-19.

28

1 **(iv) Valcor Employment Application**

2 Debtor filed an application to employ Valcor as Debtor’s financial advisor to help
3 market and sell Debtor’s assets (the “Valcor Employment Application,” dkt. 50). As
4 noted above, Weinberg Affiliate 1 had intended to retain Valcor as its financial advisor in
5 connection with the proposed ABC. Dkt. 50, pp. 4:26-5:1. In addition, Valcor frequently
6 works with Weinberg Affiliates 1 and 2. *Id.* at p. 10:11-15.

7 In sum, there are many direct and indirect connections between Debtor and
8 proposed purchaser Mariculture.

9 **(v) Sale Procedures Motion**

10 The last of the initial motions (the “Sale Procedures Motion,” dkt. 51) requested
11 that this Court schedule the auction and a hearing on the forthcoming Sale Motion in
12 early-to-mid March, 2020. Dkt. 51, p. 1-2. Any prospective bidder – including
13 Mariculture – would have to agree to pay cash to Debtor’s estate of not less than
14 \$1,250,000 (the approximate amount of Mariculture’s secured debt) and assume and/or
15 pay all of Debtor’s outstanding postpetition debt, other than any professional
16 fees/expenses that would be owing by Debtor at the time of the sale closing, estimated
17 to be \$500,000. Dkt. 51, p. 2:14-19. In addition, each prospective bidder would be
18 required to provide Debtor with a \$250,000 cash deposit at least five business days
19 prior to the auction, which would have bidding increments set at \$25,000 (or higher
20 figures which are wholly divisible by \$25,000). *Id.* at p. 3:1-22. In connection with the
21 auction, Valcor would prepare a data room and embark on a “comprehensive sale
22 process” to market Debtor’s assets. *See id.* at p. 6:9-15.

23 **b. Objections to the Sale Procedures Motion**

24 Two objections were filed to the Sale Procedures Motion. Those objections were
25 fully resolved and are no longer at issue; but the objections are relevant to the fairness
26 and effectiveness of the sale procedures that ultimately were implemented.

27 On January 17, 2020, creditor Primary Ocean Producers Holdings, LLC
28 (“Producers”) filed a limited opposition (the “Producers Opposition,” dkt. 63). Producers

1 expressed concern that the purpose of the contemplated ABC might have been to
2 deprive potential competitive bidders the access to necessary information to formulate
3 their bids, while permitting Mariculture to acquire Debtor's assets at a less than fair
4 value price. Dkt. 63, p. 2:12-19. In addition, Producers states that Mr. Weinberg had
5 "actively participated" by agreeing to Mariculture's/Mr. Molina's "egregious terms." *Id.* at
6 p. 2:19-20.

7 With that background, Producers explained that it did not want this bankruptcy
8 case to be used to allow Debtor's insiders to acquire the company's assets other than
9 through a fair and open bidding procedure. *Id.* at p. 4:7-10. While Producers stated
10 that the proposed procedures in the Sale Procedures Motion "appear to be reasonable,"
11 the process would only be fair and in the best interest of the bankruptcy estate if all
12 interested buyers were provided with the same information that Mariculture or Mr.
13 Molina would be given. *Id.* at p. 4:9-12. Producers also raised issues with Debtor's
14 other filed motions.

15 On January 17, 2020, one of the petitioning creditors who filed the involuntary
16 petition for Debtor, Mr. G. Hall Martin, filed his opposition to the Sale Procedures Motion
17 (the "Martin Opposition," dkt. 64). The Martin Opposition raised several concerns with
18 Debtor's motions, among them the short timeline Debtor proposed to sell its assets.
19 See dkt. 64, p. 7:12-18; p. 8:5-21.

20 On January 22, 2020, Mr. Weinberg filed a supplemental declaration (dkt. 65) to
21 address informal comments raised by the United States Trustee ("UST") in response to
22 the CRO Motion. In addition, on January 24, 2020, Debtor filed its omnibus reply (dkt.
23 66) to the two oppositions referenced above. The reply provided additional details on
24 Valcor's proposed marketing efforts and a detailed timeline for the auction of Debtor's
25 assets. See dkt. 66, pp. 5:6-6:23.

26 At the hearing on January 28, 2020 this Bankruptcy Court granted much of the
27 relief requested in Debtor's motions, but with various modifications as reflected by the
28 parties' agreements on the record, this Court's oral rulings, and this Court's subsequent

1 orders. Those modifications included: (i) a longer period to market the assets, (ii) an
2 opportunity for creditors to vet certain marketing materials before distribution to potential
3 purchasers, (iii) assurances about the data room and other procedures, (iv) an
4 opportunity for creditors to conduct expedited and broad examinations of Debtor's
5 principal(s), books, and records pursuant to Rule 2004 (Fed. R. Bankr. P.),
6 (v) expedited procedures to resolve any discovery disputes, and (vii) several future
7 status conferences at which parties could seek orders shortening time or other
8 procedures to address any problems that might arise in connection with the sale
9 process. *See generally* dkt. 72, 74, 75, 76, 77, 79.

10 One of those status conferences was later vacated, by stipulation among Debtor,
11 Producers, and Mr. Martin, on the ground that it was unnecessary – *i.e.*, there were no
12 further disputes among those parties that needed to be resolved by this Bankruptcy
13 Court. Dkt. 91, 92. Neither Producers nor Mr. Martin filed any objection to the Sale
14 Motion. To the contrary, at several hearings the parties who have attended have
15 expressed satisfaction with the steps that have been taken to attempt to address their
16 concerns and market Debtor's assets.

17 **c. Debtor's Sale Motion**

18 Meanwhile, on February 28, 2020, Debtor filed the Sale Motion (dkt. 96, 101).
19 The Sale Motion detailed the extensive efforts that Valcor and Debtor were making in
20 marketing Debtor's assets. *See* dkt. 96, pp. 18:12-20:19. The Sale Motion requests
21 that (i) Debtor be permitted to sell its assets pursuant to § 363(b) (dkt. 96, pp. 21:10 *et*
22 *seq.*), (ii) Debtor's assets be sold free and clear of any and all claims and interests
23 pursuant to § 363(f) (*id.* at pp. 27:16 *et seq.*), (iii) the winning bidder be found to be a
24 good faith purchaser pursuant to § 363(m) (*id.* at pp. 25:26 *et seq.*), and (iv) Debtor be
25 authorized to assume and assign to the winning bidder any contracts that the winning
26 bidder wishes to assume (*id.* at pp. 32:12 *et seq.*). Filed concurrently with the Sale
27 Motion were the declarations of Mr. Weinberg (the CRO) (dkt. 99) and Mr. Raymond L.

28

1 Clark (managing director of Valcor) (dkt. 100) which provide evidence of Valcor's
2 marketing efforts. See dkt. 99, p. 12:8-26; dkt. 100 pp. 3:16-6:2 *and* exhibits.

3 The Sale Motion excludes certain assets. Most importantly it excludes any
4 claims Debtor might have, including any claims against insiders for any alleged
5 wrongdoing. See dkt. 51, PDF p. 44, paras. 1.2(e) & 1.4(e). Mariculture's proposed
6 edits to the Asset Purchase Agreement do not alter this language. See dkt. 111, at PDF
7 pp. 11-12, paras. 1.2(e) & 1.4(e). In the Sale Procedures Motion, Debtor also states
8 that "like all other prospective bidders, [Mariculture] should be required to pay cash and
9 not be permitted to credit bid all or any portion of its asserted secured debt towards any
10 purchase price it decides to submit" for Debtor's assets. Dkt. 51, p. 2 n.4.
11 Mariculture's Bid Letter states that it "offers a proposed cash purchase price of up to
12 \$1,750,000" – *i.e.*, the base price of \$1,250,000 plus up to \$500,000 for Debtor's
13 postpetition expenses. Dkt. 111 at PDF p. 6.

14 **d. The Poynters' Objection**

15 One objection was filed. On March 10, 2020 the Estate of Maynard Poynter,
16 Patricia Poynter, Leah Poynter, Adam Poynter, Sean pointer and Melissa O'Donnel
17 (collectively, the "Poynters") filed their objection to selling the assets free and clear of
18 their claim (the "Poynters Objection," dkt. 104).

19 The Poynters assert that, with an estimated \$10 million claim, they are Debtor's
20 largest unsecured creditors. Dkt. 104, p. 2:11-13. The Poynters state that Maynard
21 Poynter was fishing with friends when their boat got caught on a line belonging to
22 Debtor that allegedly was too close to the surface and, as a result, Maynard Poynter's
23 boat flooded and capsized, which ultimately and tragically resulted in Maynard Poynter's
24 hypothermia and death. *Id.* at p. 2:2-10.

25 The Poynters raise three issues, broadly speaking. First, they argue that Debtor
26 has not provided a sufficient business justification for a sale pursuant to § 363(b). See
27 *id.* at p. 4:1-15. Second, they argue that the proposed sale should not be free and clear
28 of their successor liability claim. See *id.* at pp. 7:1-8:19. Lastly, the Poynters question

1 whether a sale to one of Debtor’s insiders is in good faith pursuant to § 363(m). *See id.*
2 at pp. 5:22-6:12.

3 On March 17, 2020 Debtor filed its reply papers (dkt. 110-12). A supplemental
4 declaration of Mr. Clark states that there were a few parties who had “expressed a
5 serious interest in pursuing a purchase” of Debtor’s assets (dkt. 112, p. 3:5-6); one
6 prospective purchaser visited Debtor’s sea farm; and Mr. Clark had four separate due
7 diligence phone calls with that prospective purchaser, one of which was on the morning
8 of March 10, 2020, the deadline established by this Court for any qualifying bids. *See*
9 *id.* at p. 3:6-8. But ultimately Mariculture was the only bidder. Dkt. 111, p. 2:19-20.

10 **3. JURISDICTION, VENUE, AND AUTHORITY**

11 This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C.
12 §§ 1334 and 1408. This Bankruptcy Court has the authority to enter a final judgment or
13 order under 28 U.S.C. § 157(b)(2)(A), (M), (N), and (O). *See generally Stern v.*
14 *Marshall*, 131 S. Ct. 2594 (2011); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr.
15 C.D. Cal. 2016) (discussing *Stern*); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (same).
16 Alternatively, the parties have expressly or implicitly consented to this Bankruptcy
17 Court’s entry of final judgments or orders on the issues presented. *See Wellness*
18 *Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); and see *In re Pringle*, 495 B.R.
19 447 (9th Cir. BAP 2013). *See also* Rules 7008 & 7012(b) (Fed. R. Bankr. P.); LBR
20 9013-1(c)(5)&(f)(3).

21 **4. DISCUSSION**

22 **a. Statutory provisions**

23 **(i) Sale other than in the ordinary course pursuant to § 363(b)**

24 § 363(b) provides in relevant part:

25 (1) The trustee [or debtor in possession per §§ 1101(1) and 1107
26 (“DIP”)], after notice and a hearing, may use, sell, or lease, other than in
the ordinary course of business, property of the estate ... [§ 363(b)(1)]

27 **(ii) Sales free and clear pursuant to § 363(f)**

28 § 363(f) provides:

1 The trustee [or DIP] may sell property under subsection (b) or (c) of this
2 section free and clear of any interest in such property of an entity other
than the estate, only if –

3 (1) applicable nonbankruptcy law permits sale of such property free
and clear of such interest;

4 (2) such entity consents;

5 (3) such interest is a lien and the price at which such property is to
be sold is greater than the aggregate value of all liens on such property;

6 (4) such interest is in bona fide dispute; or

7 (5) such entity could be compelled, in a legal or equitable
proceeding, to accept a money satisfaction of such interest. [§ 363(f)
(emphasis added)]

8 **(iii) Good faith finding pursuant to § 363(m)**

9 § 363(m) provides:

10 The reversal or modification on appeal of an authorization under
11 subsection (b) or (c) of this section of a sale or lease of property does
not affect the validity of a sale or lease under such authorization to an
12 entity that purchased or leased such property in good faith, whether or
not such entity knew of the pendency of the appeal, unless such
13 authorization and such sale or lease were stayed pending appeal.
[§ 363(m)]

14 No party in interest has raised any objection under § 365 (governing the
15 assumption and assignment of unexpired leases and executory contracts), or any other
16 statutory provision. Any such objections have been waived and forfeited. *Hamer v.*
17 *Neighborhood Housing Svcs.*, 138 S.Ct. 13, 17 n.1 (2017) (distinguishing waiver and
18 forfeiture).

19 **b. Debtor has provided sufficient justification for a sale of most of its**
20 **assets under § 363(b)**

21 A sale of “all or substantially all the property of the estate” can be accomplished
22 by a Chapter 11 plan (§ 1123(b)(4)) or a motion (§ 363). In the latter instance, there
23 must be “some articulated business justification, other than the appeasement of major
24 creditors, for using, selling or leasing property out of the ordinary course of business
25” *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2nd Cir. 1983). The Bankruptcy Appellate
26 Panel for the Ninth Circuit (the “BAP”) has held:

27 Whether the proffered business justification is sufficient depends on the
28 case. As the Second Circuit held in *Lionel*, the bankruptcy judge should
consider all salient factors pertaining to the proceeding and,

1 accordingly, act to further the diverse interests of the debtor, creditors
2 and equity holders, alike. He might, for example, look to such relevant
3 factors as the proportionate value of the asset to the estate as a whole,
4 the amount of elapsed time since the filing, the likelihood that a plan of
5 reorganization will be proposed and confirmed in the near future, the
6 effect of the proposed disposition on future plans of reorganization, the
7 proceeds to be obtained from the disposition vis-à-vis any appraisals of
8 the property, which of the alternatives of use, sale or lease the proposal
9 envisions and, most important perhaps, whether the asset is increasing
10 or decreasing in value. This list is not intended to be exclusive, but
11 merely to provide guidance to the bankruptcy judge. [*In re Walter*, 83
12 B.R. 14, 19-20 (9th Cir. BAP 1988) (citing in *In re Continental Air Lines,*
13 *Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (emphasis added, internal
14 quotation marks omitted)]

15 In addition, as the Poynters point out, any sale involving insiders such as
16 Mariculture is subject to heightened scrutiny. As this Court has summarized above,
17 Mariculture is a prepetition lender, a postpetition DIP lender, an operator of Debtor's
18 mussel farm, the only bidder for Debtor's assets, and an insider of Debtor through Mr.
19 Molina (Debtor's CEO and one of the owners of Mariculture). See § 101(31) (definition
20 of "insider"), and, e.g., *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr.
21 D. Alaska, 2018) ("Sales to an insider are subject to heightened scrutiny"); *In re*
22 *Roussos*, 541 B.R. 721, 730 (Bankr. C.D. Cal. 2015) ("... insider sales are subject to
23 heightened scrutiny to the fairness of the value provided by the sale and the good faith
24 of the parties in executing the transactions") (internal citation and quotation omitted).

25 (i) The effect of insiders' involvement

26 As noted above, the involvement of insiders means that the proposed sale is
27 subject to greater scrutiny; but that itself does not mean the proposed sale is improper.
28 To the contrary, for a variety of perfectly legitimate reasons insiders often are willing to
bid more than other prospective buyers for assets or equity interests.

To be clear, there is no evidence of any specific reasons why Mariculture is
willing to bid more than other prospective buyers in this case, and the reasons might be
unknowable without reading the minds of both Mariculture and other prospective
bidders. But it is still helpful to review some typical motivations for insiders, to illustrate
that there is nothing inherently suspicious about an insider being the high bidder.

1 Sometimes insiders can avoid tax liabilities or gain tax benefits, as noted by the
2 Supreme Court in an analogous context. See *Bank of Am. Nat. Trust and Sav. Assn. v.*
3 *203 North LaSalle St. P'ship*, 526 U.S. 434, 438, 440 n.11, 455, and *passim* (1999)
4 (noting tax motivations for existing equity owners to attempt to have at least 60% equity
5 ownership of reorganized debtor).

6 Sometimes insiders are exposed to joint liability with the debtor, under written
7 guarantees or under tort law or other principles. In that situation, a higher sales price
8 may mean a lower deficiency that can be collected from the insider.

9 Sometimes insiders have skills and knowledge that can only be gained by
10 actually having run the business, so they are best qualified to purchase the assets and
11 maximize the value of those assets in future. Or they might simply have more
12 confidence than others – warranted or not – in their ability to realize future growth and
13 profits from the assets.

14 The point is that there is nothing inherently suspicious in the fact that Mariculture
15 has offered to purchase Debtor's assets at a price that no other prospective purchaser
16 is willing to compete against. The Poynters have not established that the mere fact of
17 insiders' involvement is a sufficient basis to disapprove the proposed sale.

18 **(ii) No evidence of alleged “bargain basement price,” and no basis to**
19 **require insiders to invest more in Debtor than they already have**

20 The Poynters object:

21 During this bankruptcy [case] funding for continued operations and
22 maintenance has been provided by [Mr.] Molina through [Mariculture].
23 Presumably, if a Molina controlled company purchases the assets,
24 operational capital will continue to be provided by [Mr.] Molina himself
25 or through one of his companies. Why would he not be willing to
26 provide additional working capital on the terms of the existing DIP
27 financing? Is [Mr.] Molina only willing to provide additional working
28 capital if he is able to purchase the business assets of [Debtor] at a
bargain basement price? That is not a sufficient business justification
for selling to him [sic] at a bargain price. [Poynters' Objection
(dkt. 104), p. 4:8-15 (emphasis added).]

First, this Bankruptcy Court rejects the Poynters' premise that Mariculture is
purchasing the assets at a “bargain basement price.” As Debtor points out, there is no

1 evidence in support of this assertion – in fact, there is no evidence in support of any of
2 the allegations in the Poynters’ objection. In contrast, Debtor has presented
3 considerable evidence that its assets have been extensively marketed and are being
4 sold for the highest price that the market will offer.

5 Second, this Bankruptcy Court rejects the Poynters’ premise that Mr. Molina
6 should be equated with Mariculture, of which he is a part owner. There are neither
7 factual nor legal grounds in the record to disregard the separateness of Mr. Molina and
8 Mariculture (as distinguished from recognizing, as this Court has done, the numerous
9 connections between the two).

10 Third, the uncontested evidence is that Debtor is only able to preserve the
11 existing value of its assets because of the DIP financing, and Debtor’s funds are about
12 to run out. That means the proposed § 363 sale is the only viable option to maximize
13 the value of Debtor’s bankruptcy estate (or, perhaps, to preserve any value at all). No
14 party in interest, including any of the Poynters, has suggested at any stage of this
15 bankruptcy case that a chapter 11 plan is possible within the short time frame available
16 before Debtor runs out of funds. The evidence is that the value of Debtor’s assets is
17 decreasing, not increasing – which is potentially the “most important” issue. See
18 *Walter*, 83 B.R. 14, 29.

19 Fourth, this Court rejects the Poynters’ premise that there is anything improper if
20 Mariculture or Mr. Molina decline to provide additional DIP financing. Mr. Molina and
21 Mariculture have made direct or indirect investments in Debtor through equity
22 contributions, provisions of services on credit, lending, and their own labor. But the fact
23 that they have made substantial investments in Debtor in the past is not a factual or
24 legal basis on which this Court could or should insist that they must invest additional
25 dollars now.

26 In sum, the Poynters’ specific objections to any sale under § 363(b) are not
27 persuasive. But implicit in their arguments is a more general complaint: namely that,
28 because the proposed sale price will not result in any dividend to them or other

1 nonpriority unsecured creditors, the sale allegedly is not the best means to “further the
2 diverse interests of the debtor, creditors and equity holders, alike.” *Walter*, 83 B.R. 14,
3 19-20. That is incorrect.

4 **(iii) The lack of any dividend to general unsecured creditors is an**
5 **insufficient ground to disapprove the sale**

6 The involuntary petitioners and Producers achieved many benefits by pursuing
7 involuntary bankruptcy relief in lieu of the ABC, including:

8 (A) supervision by this Bankruptcy Court;

9 (B) disclosures and transparency required throughout the case, from (x) the
10 bankruptcy schedules and statement of financial affairs, to (y) the expedited
11 and extensive discovery approved by this Court, and (z) the disclosure of all
12 relevant connections of proposed professionals under Rule 2014(a);

13 (C) sale procedures that maximized assurances of a fair and comprehensive
14 marketing process, including (x) a longer period of marketing the assets than
15 Debtor proposed, (y) vetting by creditors of the marketing materials and data
16 room, and (z) status conferences to assure that any disputes could be
17 resolved quickly and fairly; and, perhaps most importantly,

18 (D) maximizing value by virtue of § 363(f), which is a statutory provision not
19 available in an ABC.

20 If there were any evidence of favoritism to insiders or other suspicious
21 circumstances then any party in interest could have sought relief from this Bankruptcy
22 Court. There is no such evidence, and to the contrary there is ample evidence of a fair
23 and open sale process that has been diligently pursued by Debtor and its professionals.

24 The marketing process was approved by this Bankruptcy Court, subject to
25 enhancements noted above. The Poynters did not object to these procedures. Those
26 creditors who had objected – Producers and Mr. Martin – have not interposed any
27 further objections to the sale process, or to the Sale Motion itself.

28

1 In addition, as Debtor points out, it is not just insiders who are benefitting from
2 the sale: parties to the lease, contracts, and licenses that are being assumed and
3 assigned have benefitted from the § 363 sale process, which includes the cure
4 requirements of § 365. Nor is there any evidence that anyone, including the Poynters,
5 would be in a better position if this Bankruptcy Court were to deny the Sale Motion.

6 If the proposed sale were rejected, Mariculture could simply abandon its
7 investments to date and let Debtor fail, or it could foreclose on its pre- or postpetition
8 security interest and credit bid some or all of its claims. Either one of these scenarios
9 would create its own considerable obstacles to any successor liability so, again, there is
10 no evidence that the Poynters necessarily would be in any better position if the
11 proposed sale were rejected.

12 More importantly, there would be fundamental unfairness if this Bankruptcy Court
13 were to deny the Sale Motion at this point. The Poynters and all other creditors would
14 have received all the benefits of the bankruptcy process described above, without
15 paying the costs. In addition, the proposed purchaser would have the rules changed on
16 it: having been enticed to invest time and resources in making a bid (and in funding
17 Debtor through the DIP financing), the sale would be called off at the last minute, not
18 because there is any evidence of chilling the bidding or other wrongdoing, but instead
19 because it turns out that the value of Debtor's assets is not as high as creditors had
20 hoped.

21 This unfairness would taint not only this one bankruptcy case. It would be a red
22 flag to any prospective purchaser in future bankruptcy cases. Instead of a reliable,
23 open process, they could face a last-minute change in the rules. That would be
24 immensely harmful to the bankruptcy system, by chilling the bidding in future bankruptcy
25 cases. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 292-93 (3d Cir. 2003)
26 (“Absent entry of the Bankruptcy Court's order providing for a sale of TWA's assets free
27 and clear of the successor liability claims at issue, American [the purchaser] may have
28 offered a discounted bid”).

1 Chilling bankruptcy sales in future bankruptcy cases would harm all creditors,
2 including personal injury claimants like the Poynters. This Court takes judicial notice
3 that vigorous bidding can transform a bankruptcy estate that appears at first glance to
4 be fully encumbered into an estate that can pay dividends to all claimants, as well as
5 providing all the other benefits that the Bankruptcy Code was enacted to provide, such
6 as saving jobs, protecting the local community from the blight of a shuttered business,
7 and preserving the local tax base. See *id.* at 293 (agreeing with the Bankruptcy Court
8 “that a sale of the assets of TWA at the expense of preserving successor liability claims
9 was necessary in order to preserve some 20,000 jobs ... and to provide funding for
10 employee-related liabilities, including retirement benefits.”)

11 If the bidding is chilled, all those benefits will be lost. In sum, although this Court
12 is certainly empathetic to the suffering and death of Mr. Maynard Poynter, and the grief
13 and damage to his family, there is no showing that Debtor is overlooking some
14 alternative that would miraculously produce a better outcome for them, and
15 disapproving the proposed sale at this point would be fundamentally unfair and chill
16 future bankruptcy sales, to the detriment of all future claimants like the Poynters. The
17 evidence before this Court is that Debtor’s assets were fully and properly marketed, and
18 that the sale price is the best that can be achieved under the circumstances.

19 For all of these reasons, the lack of any dividend to general unsecured creditors
20 is an insufficient ground to disapprove the sale.

21 **(iv) Conclusion under § 363(b)**

22 Based on the evidence before this Court, Debtor has established more than
23 sufficient justification for a sale of substantially all of its assets (excluding claims against
24 insiders or others). Debtor has also established that the sale process, and proposed
25 sale to Mariculture, withstand the heightened scrutiny applicable to sales to insiders.

26 The next issue raised by the Poynters is whether the sale can be free and clear
27 of successor liability.

28

1 **c. Defining the question: what does it mean to sell assets free and clear of**
2 **claims and interests, including any successor liability, under § 363(f)?**

3 Before addressing the successor liability issues themselves, it is helpful to
4 distinguish them from other types of liability that are not at issue.

5 **(i) What is not at issue: any liability on grounds other than**
6 **successor liability**

7 As Debtor confirmed at the hearings on the Sale Motion, the proposed sale free
8 and clear of successor liability would not cut off any otherwise applicable liability that
9 insiders or anyone else might have. For example, none of the relief requested in the
10 motion would shield Mr. Molina if, hypothetically, he personally had negligently installed
11 the cable that allegedly caused the injuries and death asserted by the Poynters.

12 More realistically (because it is doubtful that Mr. Molina personally installed any
13 cable), none of the relief requested in the motion would shield Mr. Molina if,
14 hypothetically, he failed to meet his duties as a director or officer. For example, the sale
15 free and clear does not shield any liability that Mr. Molina might have if he had a duty to,
16 but did not, take appropriate steps to assure that Debtor had systems or officers in
17 place to ensure that Debtor operated safely. See *In re AWTR Liquidation Inc.*, 548 B.R.
18 300 (Bankr. C.D. Cal. 2016).

19 Likewise, none of the relief requested in the motion would shield Mr. Molina if,
20 hypothetically, he (i) had used Debtor (pre-petition) as his personal “piggy bank,” (ii) had
21 disregarded all corporate formalities (no meetings of the board of directors etc.), or
22 (iii) had engaged in any other acts or omissions that might establish alter ego liability, or
23 other grounds for claims against him under applicable nonbankruptcy law. If any such
24 claims against Mr. Molina exist, they will survive the sale and can be pursued by the
25 bankruptcy estate, or by the Poynters if those claims can only be pursued by them
26 instead of the estate. See *generally Ahcom Ltd. v. Smeding*, 623 F.3d 1248 (9th Cir.
27 2010).

28

1 Of course, this Court does not mean to suggest that any such claims do exist,
2 either against Mr. Molina or against any other person. The point is just to illustrate that
3 the Sale Motion only requests, and this Court is only granting, a sale free and clear of
4 claims and interests against Debtor and its assets that are being sold. This Court is not
5 purporting to discharge any claims that might be asserted against anyone else. See
6 § 524(e) (any discharge does not affect liability of third parties or their property).

7 **(ii) What is also not at issue: Debtor's own liability, and any**
8 **insurance claims**

9 Debtor's own liability is not at issue. In some bankruptcy cases a debtor remains
10 liable for claims (*see, e.g.*, §§ 727(a)(1), 1141(d)(3)), and in other cases the debtor is
11 discharged (*see id. and* § 525). Either way, creditors can file claims against the
12 bankruptcy estate, and if there are any recoveries from the claims or other assets that
13 Debtor is not selling then creditors can share in those recoveries.

14 Nor is this Bankruptcy Court deciding any insurance claims as part of the sale
15 proceedings. In some cases there is insurance coverage, and in other cases there is
16 not. See *dk. 104*, p. 2:3-16 ("Debtor appears to have an insurance policy with a limit of
17 \$3,000,000.00 that should at least partially cover that claim, but thus far, the insurance
18 company has refused to agree to pay the [Poynters'] policy limits demand.") (citation
19 omitted). These things are not being decided now.

20 At oral argument the Poynters suggested that the asset sale would prejudice
21 their ability to persuade the insurance company to pay the policy limits, out of fear of
22 potential excess liability exposure. First, as already noted, the sale does not include
23 claims held by Debtor, so it appears that the insurer is still exposed to whatever risks it
24 had prior to the asset sale. Second, the Poynters have not presented any evidence to
25 support their argument. Therefore, the alleged effects of the asset sale on any
26 insurance claims are not at issue.

27
28

1 The only issue presently before this Court is whether the proposed sale of assets
2 will be free and clear of successor liability. Before turning to that issue, there is one
3 more preliminary matter: what “successor liability” means.

4 **(iii) Defining successor liability under nonbankruptcy law**

5 No party has briefed what law would apply, and for purposes of the following
6 discussion this Bankruptcy Court assumes without deciding that California law would
7 apply. Alternatively, this Court assumes without deciding that other States would apply
8 similar tests for successor liability.

9 Under California law, the general rule is “that where a corporation purchases, or
10 otherwise acquires by transfer, the assets of another corporation, the acquiring
11 corporation does not assume the selling corporation's debts and liabilities.” *Fisher v.*
12 *Allis-Chalmers Corp. Prod. Liab. Tr.*, 95 Cal. App. 4th 1182, 1188 (2002) (emphasis
13 added, citation omitted). That general rule does not apply, however, if “(1) there is an
14 express or implied agreement of assumption, (2) the transaction amounts to a
15 consolidation or merger of the two corporations, (3) the purchasing corporation is a
16 mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the
17 fraudulent purpose of escaping liability for the seller’s debts.” *Id.* (same). The Poynters’
18 assertions of successor liability appear to rest on the concepts that are emphasized in
19 the above quotation. Facts that may bear on whether a purchaser is a “mere
20 continuation” of the seller include whether there is “inadequate consideration” paid, or “if
21 one or more persons are officers, directors, or stockholders of both corporations.” *Ray*
22 *v. Alad Corp.*, 19 Cal. 3d 22, 28 (1977) (citations omitted).

23 In sum, successor liability is an exception to the general rule that claims against
24 an entity do not follow the sold assets. With this background, this Bankruptcy Court
25 turns to whether a bankruptcy sale can be free and clear of successor liability. It can.
26
27
28

1 **d. Liability that would follow the assets under nonbankruptcy law is an**
2 **“interest” in those assets within the meaning of § 363(f)**

3 Under § 363(f) a chapter 11 debtor may sell the estate’s property “free and clear
4 of any interest in such property of an entity other than the estate.” § 363(f) (emphasis
5 added). This Court joins numerous other courts in holding that a claim for “successor
6 liability” is an “interest” in the property being sold.

7 **(i) Plain meaning**

8 The plain meaning of the statute cuts off successor liability. Section 363(f)
9 provides for sales free and clear of “any interest.” Merriam-Webster’s dictionary defines
10 an “interest” to include a “legal share in something,” and lists synonyms as “claim,
11 share, stake.” <https://www.merriam-webster.com/dictionary/interest> (last checked
12 3/20/20). As noted above, a § 363 sale does not discharge a debtor’s own liability, or
13 any liability of insiders or third parties such as insurers; and creditors share in net
14 proceeds, if any. So a creditor who asserts successor liability in the context of a
15 bankruptcy sale is asserting that the estate’s property cannot be transferred without the
16 claim – *i.e.*, that the claim legally shares in, or has a stake in, whatever profits,
17 proceeds, or other value will be derived in future from the property being transferred.
18 That fits within the common understanding of an “interest,” as reflected in Webster’s
19 dictionary definition. *See Food Marketing Inst. v. Argus Leader Media*, 139 S.Ct. 2356,
20 2363 (2019) (citing several versions of Webster’s Dictionary to define “confidential”).
21 *See also Trans World Airlines*, 322 F.3d 283, 289 (“the term ‘any interest’ is intended to
22 refer to obligations that are connected to, or arise from, the property being sold” and
23 includes successor liability) (citation and internal quotation marks omitted). Therefore,
24 under the plain meaning of § 363(f), a bankruptcy sale can be free and clear of
25 successor liability.

26 **(ii) Statutory context**

27 Other parts of § 363(f) support this plain reading of “any interest.” *See United*
28 *Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365,

1 371 (1988) (“Statutory construction ... is a holistic endeavor. A provision that may seem
2 ambiguous in isolation is often clarified by the remainder of the statutory scheme-
3 because the same terminology is used elsewhere in a context that makes its meaning
4 clear ...”).

5 When Congress meant only an ownership interest it said so in § 363(h) (referring
6 to the interests of any “co-owner” including any interests “as a tenant in common, joint
7 tenant, or tenant by the entirety”). When Congress meant only liens it said so in
8 § 363(f)(3) (distinguishing liens from other types of interests). When Congress meant to
9 address other, narrow types of “interest” it said so. See, e.g., § 363(g) (referring to
10 rights “in the nature of dower or curtesy”).

11 In addition, as noted by the Court of Appeals for the Third Circuit, “to equate
12 interests in property with only in rem interests such as liens would be inconsistent with
13 section 363(f)(3), which contemplates that a lien is but one type of interest.” *Trans*
14 *World Airlines*, 322 F.3d 283, 290. Moreover, “[t]o allow [successor liability] claimants to
15 assert successor liability claims against [the purchaser of the asset] while limiting other
16 creditors' recourse to the proceeds of the asset sale would be inconsistent with the
17 Bankruptcy Code's priority scheme.” *Id.*, 322 F.3d at 292.

18 In sum, as the Third and Fourth Circuits have concluded, the plain meaning of
19 the statute is that “any interest” is broad enough to include successor liability. *Id.*; *In re*
20 *Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir.1996). Congress knew how
21 to limit an “interest” to specific types of interests when it wanted to do so. But it chose
22 not to place any limits on the ability to sell property of the estate free and clear of “any
23 interest” in § 363(f). Those words should be given their natural, broad meaning.

24 (iii) Precedent

25 Numerous courts have held that “any interest” includes any successor liability.
26 See, e.g., *Leckie Smokeless Coal*, 99 F.3d 573, 576, 581-82 (agreeing with Bankruptcy
27 Court that “even if the purchasers of the debtors’ assets would be the debtors’
28 successors in interest, the Bankruptcy Court could extinguish all successor liabilities

1 arising under the Coal Act by entering a free and clear order pursuant to 11 U.S.C.
2 § 363(f)(5)”) (emphasis added); *In re Trans World Airlines*, 322 F.3d 283, 289 (“the term
3 ‘any interest’” includes successor liability) (citation and internal quotation marks
4 omitted); *Myers v. United States*, 297 B.R. 774, 784 (S.D. Cal. 2003) (Section 363(f) of
5 the “Bankruptcy Code preempts California state law in this case regarding successor
6 liability”) (emphasis added); *In re Wilkes Bashford Co.*, 2009 Bankr. LEXIS 5063, at *9-
7 10 (Bankr. N.D. Cal.) (order approving sale free and clear of “any theory of successor or
8 transferee liability”) (emphasis added). See also *In re Art and Architecture Books of the*
9 *21st Century*, 2015 WL 3492900, at *6 (Bankr. C.D. Cal., 2015) (“‘Interests’ are defined
10 collectively as any and all obligations, ... including claims or liabilities otherwise arising
11 under doctrines of successor liability, de facto merger or substantial continuity...”)
12 (emphasis added); *In re THQ Inc.*, 2013 Bankr. LEXIS 783, at *16-19 (Bankr. D. Del.)
13 (sale free and clear of “any theories of successor liability or causes of action related
14 thereto”) (emphasis added); *In re Renaissance Lafayette LLC*, 2011 Bankr. LEXIS 1893,
15 at * 17-18 (Bankr. E.D. Wis.) (sale free and clear of successor liability); *In re McPhillips*
16 *Motors, Inc.*, 2010 WL 3157062, at *2 (Bankr. C.D. Cal. 2010) (selling assets pursuant
17 to Section 363(f) “free and clear of all claims and will not subject the Buyer or any of the
18 Buyer’s assets to any liability for any claims” including “successor or transferee liability”)
19 (emphasis added); *In re Egghead.com, Inc.*, 2001 WL 35671549, at *3 (Bankr. N.D. Cal.
20 2001) (“Under Section 11 U.S.C. § 363(f) ... the Assets shall hereby be transferred, sold
21 and delivered to Buyer free and clear of ... any theory of successor liability, defacto
22 merger, or substantial continuity”) (emphasis added). See generally, e.g., *In re Verity*
23 *Health*, 598 B.R. 283, 292-93 (Bankr. C.D. Cal. 2018) (conditions on sale of nonprofit
24 hospital, imposed by California attorney general, were derived from prior usage of
25 assets being sold and reducible to a monetary obligation, and hence were an “interest”
26 in property and hospital could be sold free and clear of such interests under § 363(f)).
27 *But see, e.g., Zerand-Bernal Group v. Cox*, 23 F.3d 159, 164 (7th Cir.1994) (affirming
28 Bankruptcy Court’s decision that it lacked jurisdiction to enjoin successor product

1 liability action against purchaser of assets by persons injured in an “accident [that]
2 occurred after the bankruptcy proceeding had wound up” and thus had no notice of free
3 and clear sale under § 363(f)).

4 **(iv) Legislative intent**

5 Even if there were any ambiguity (which there is not) about whether “any interest”
6 includes successor liability, the policy reasons for broadly interpreting “any interests” to
7 include successor liability run throughout the Bankruptcy Code. The broad policy of the
8 Code is to maximize the value of the estate’s assets, for the benefit of all creditors and
9 other parties in interest, as recognized by many courts both in the successor liability
10 context and more generally. *See, e.g., Trans World Airlines*, 322 F.3d 283, 292-93; *In*
11 *re K & D Industrial Services Holding Co., Inc.*, 602 B.R. 16, 29 (Bankr. E.D. Mich. 2019)
12 (“If a sale of assets out of a bankruptcy estate cannot be made free and clear of a
13 successor or alter ego liability claim, the value of such assets, and the price that a
14 purchaser will pay for such assets, will be deeply depressed, thwarting the policies of
15 the Bankruptcy Code.”) (emphasis added); *In re Old Carco LLC*, 538 B.R. 674, 682 fn. 6
16 (Bankr. SD NY 2015) (citing authority that “the potential chilling effect of allowing a tort
17 claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code,
18 which is to maximize the value of the assets and thereby maximize potential recovery to
19 the creditors”). *See also Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (general policy of
20 Bankruptcy Code is “maximizing the value of the bankruptcy estate”); *In re Realia, Inc.*,
21 2012 Bankr. LEXIS 1083, at *31-31 (9th Cir. BAP) (“the purpose of the ‘free and clear’
22 language [in section 363(f)] is to allow the debtor to obtain a maximum recovery on its
23 assets in the marketplace”), *aff’d*, 2014 U.S. App. LEXIS 7138 (9th Cir.).

24 **(v) Policy considerations**

25 Consider what would happen if a purchaser of assets has to contend with an
26 unknown dollar amount of successor liability. In this case, for example, the Poynters
27 assert a claim of \$10 million or more. *See* Claim No. 5. If Mariculture cannot acquire
28 the purchased assets without also being liable for this claim, the best case scenario is

1 that it would reduce its \$1.75 million offer to account for the risk of \$10 million or more of
2 liability, and the more likely scenario is that it would withdraw its offer.

3 More broadly, why would any purchaser expend \$1.75 million on the purchased
4 assets, and then invest whatever additional millions of dollars might be needed to turn
5 those assets into a profitable business, only to be exposed to \$10 million of potential
6 liability? True, the Poynters assert that successor liability is particularly appropriate in
7 this case because the proposed purchaser has close affiliations with Debtor. But if, as a
8 matter of law, the statute is construed as the Poynters suggest then any purchaser
9 would face potential claims of successor liability – the only difference would be that
10 successor liability might be less likely for non-affiliates under nonbankruptcy law.

11 Exposure of purchasers to potential successor liability is a sure-fire way to
12 minimize the value of the bankruptcy estate. That is directly contrary to Congressional
13 intent, and sound policy, of maximizing the value of assets. Such a policy ultimately
14 would harm all creditors, including personal injury claimants like the Poynters in future
15 bankruptcy cases who would share in a distribution if the value of assets is maximized
16 but will have nothing in which to share if the value of assets is minimized. See *Myers*,
17 297 B.R. 774, 781 (“who would ever purchase assets at a bankruptcy proceeding if the
18 successor liability were not limited, despite the plain wording of the bankruptcy order?”);
19 *In re Ormet Corp.*, 2014 Bankr. LEXIS 3071, at *9-10 (Bankr. D. Del.) (“[t]he very
20 uncertainty of that potential exposure could result in bids which are discounted”); *In re*
21 *WBQ P’ship*, 189 B.R. 97, 108-09 (Bankr. E.D. Va. 1995) (absent a sale free and clear
22 of successor liability, remaining options would involve either discounted price or
23 foreclosure sale, and “[e]ither option would injure . . . other creditors – a result that the
24 ‘free-and-clear’ language is designed to avoid”).

25 For all of these reasons, a sale free and clear of all interests in Debtor’s property
26 means a sale free and clear of successor liability. The next question is whether Debtor
27 qualifies to sell assets free and clear of all interests under one or more of the
28 paragraphs of § 363(f).

1 **e. § 363(f)(5)**

2 The Poynters raise no objections to Debtor's assertion that the elements of
3 paragraph "(5)" of § 363(f) are satisfied. See dkt. 104, p. 6:4-6 *and passim*. Any
4 arguments against application of that paragraph have been waived and forfeited.
5 *Hamer*, 138 S.Ct. 13, 17 n.1.

6 This Court approves the sale under that paragraph and, as against Mariculture,
7 also under paragraphs "(1)" and "(3)" of 363(f). See *Trans World Airlines*, 322 F.3d 283,
8 290-91 (because employees' claims were "subject to monetary valuation," debtor's
9 assets could be sold free and clear of successor liability for such claims under
10 § 363(f)(5)). See also *In re Vista Marketing Grp. Ltd.*, 557 B.R. 630, 635 (Bankr. N.D.
11 Ill. 2016) ("[O]ne would be hard pressed to present a clearer example of a situation
12 where the interest-holder could be compelled to accept a money satisfaction of its
13 interest under subsection (f)(5) than the calculable monetary obligation asserted by the
14 District in its surcharge bill and disconnection notice").

15 **f. § 363(m), good faith**

16 A lack of "good faith" is typically shown by fraud, collusion between the purchaser
17 and other bidders or the trustee, or an attempt to take grossly unfair advantage of other
18 bidders. *In re Filtercorp, Inc.*, 163 F.3d 570, 577 (9th Circuit 1998) (internal citations
19 and quotations omitted). This test of good faith applies regardless whether the
20 proposed buyer is or is not an insider. See *id.* The relevant focus of the inquiry is good
21 faith during the course of the sale proceedings. See *In re Suchy*, 786 F.2d 900, 902
22 (9th Cir. 1985).

23 There is some disagreement as to the burden of proof, but it makes no difference
24 in this case. On the one hand, it has been held that the proponent of a § 363(m) good
25 faith finding bears the burden of proof. *In re M Capital Corp.*, 290 B.R. 743, 747 (9th
26 Cir. BAP 2003). On the other hand, there may be an initial presumption in favor of good
27 faith. See *In re Zuercher Trust of 1999*, 2014 WL 7191348 at *9-10 & nn. 8-9 (9th Cir.
28 BAP 2014) *and In re Zuercher Trust of 1999*, 2016 WL 721485 at fn. 5 (9th Cir. BAP

1 2016). This Court presumes without deciding that there is an initial presumption in favor
2 of good faith. But the various connections between Mariculture and Debtor described
3 above are sufficient to shift the burden to Debtor and Mariculture to show good faith.
4 They have met that burden.

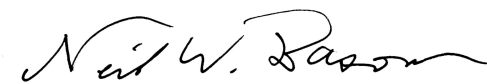
5 As described above, the evidence before this Court shows extensive marketing
6 efforts, and many assurances of a fair sale process, ultimately resulting in Mariculture's
7 bid being higher than what anyone else was willing to bid. There is no evidence to rebut
8 Mr. Molina's good faith declaration. A finding of good faith under § 363(m) is
9 appropriate.

10 **5. CONCLUSION**

11 For all of the foregoing reasons, this Court will issue a separate order granting
12 the Sale Motion. Debtor is directed to lodge a proposed order within seven days after
13 entry of this Memorandum Decision on the docket.

14 ###

15
16
17
18
19
20
21
22
23
24 Date: April 13, 2020



Neil W. Bason
United States Bankruptcy Judge