

Foreword

This new publication revises and supersedes all previous editions of the *Expedited Forfeiture Settlement Policy for Mortgagees and Lienholders* and the *Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale*. It contains revised policies for expedited settlements and interlocutory sales and updated model forms. Additional forms are available on Asset Forfeiture and Money Laundering Online (AFML Online).

These policies are being covered by a single publication because they address similar concerns, and because they frequently overlap in practice. For example, entities that enter into expedited settlements with the Government early in a forfeiture case may later request an interlocutory sale after loans have gone into default or the forfeiture process has been unduly delayed.

The new policies contained in this publication address the legitimate concerns of the lending community while protecting the Government's interests as well. The expedited settlement policy seeks to avoid, insofar as possible, costly and unnecessary litigation between the Government and third-party lenders that have secured uncontested interests in forfeitable property. The interlocutory sale policy provides a means of protecting the interests of lenders and the Government, while preserving as much equity as possible for forfeiture, in cases where property owners default on their mortgages or other exigent circumstances arise.

I. *Expedited Forfeiture Settlement Policy for Mortgagees and Lienholders*

The new policy set forth in this section is intended to avoid unnecessary litigation between the United States and innocent third parties holding perfected liens or mortgages against property that is subject to federal forfeiture. The policy is intended to provide consistency, predictability, and fairness in handling the claims of such parties. It applies to property that is restrained, arrested, seized, or alleged to be civilly or criminally forfeitable by the United States.

The primary driving force behind this revision of the expedited settlement policy is the Civil Asset Forfeiture Reform Act (CAFRA) of 2000. CAFRA substantially changed civil forfeiture practice. Among other things, it limited the time between seizure and the provision of notice to interested parties, and the time between the filing of a claim and initiation of civil forfeiture. It provided for hardship releases of personal property. It made even clearer, consistent with *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993), that pretrial seizure of real estate is the exception, not the rule, in forfeiture cases. It also increased the Government's burden of proof at civil forfeiture trials, and provided for the payment of attorneys' fees to successful claimants in contested civil forfeitures.

On the one hand, by speeding up the forfeiture process and leaving real estate in the hands of the original owner until trial in most cases, CAFRA should reduce the likelihood of pretrial mortgage defaults and should also reduce the waiting period that mortgagees and lienholders will typically face before they receive final

payments with respect to forfeited real properties. On the other hand, CAFRA increases the risks to the Government of paying off mortgages or liens, other than by agreement of all parties, before properties are finally forfeited and sold.

The former expedited settlement policy often committed the Government to pay liens and mortgages before properties were sold. The new policy does not require such advance payments as a condition of any expedited settlement, and presumes that generally such payments will not be made, because the Department of Justice has determined that such advance payments are generally no longer warranted in light of the changes effected by CAFRA.

The objective of the new expedited settlement policy is to encourage early settlements with legitimate mortgagees and lienholders. In those settlements, the Government will agree not to contest payment of the principal and accrued interest that are due from the net proceeds of sale of the property to the full extent possible. Thus, by entering into an expedited settlement, mortgagees and lienholders will protect their interests in forfeitable property early in a forfeiture case, avoiding unnecessary litigation costs. They will receive payment after sale of the property, pursuant either to an approved interlocutory sale or a final order of forfeiture.

II. *A Guide to Interlocutory Sales in Forfeiture Cases*

Where a property owner has allowed a mortgage to go into default, and in certain other exigent circumstances, it is often advantageous and prudent to sell property seized or restrained for forfeiture before the conclusion of the forfeiture case. The proceeds of such an interlocutory sale are treated as a substitute for the original property (called the “substitute *res*” in a civil case) for purposes of jurisdiction and satisfaction of the final judgment.

The Attorney General’s Guidelines on Seized and Forfeited Property encourages the use of pre-forfeiture sales as a means of preserving forfeitable equity and reducing asset management expenses. Such interlocutory sales may be accomplished either by agreement of all parties with the court’s approval, or by court order on a contested motion.

The best, and least cumbersome, way to carry out an interlocutory sale is by agreement of all interested parties. In such a stipulated interlocutory sale, a proposed order setting forth the terms of the agreement is prepared and submitted to the court. If the court approves the order, the property is sold and the proceeds become the substitute *res*. Where all interested parties do not agree to the interlocutory sale, federal statutes and case law provide means of obtaining the court’s approval for a contested sale, pursuant to complex and strict guidelines.

A Guide to Interlocutory Sales in Forfeiture Cases addresses both stipulated and contested interlocutory sales. It also provides guidance for determining whether or not an interlocutory sale of the property is warranted, and addresses the pros and cons of the two types of interlocutory sale. Sample pleadings can be found in the appendices and on AFML Online.

Appendix B

Model Forms

1. Motion for Interlocutory Sale

Comment: This motion is intended for use in civil forfeitures where the interlocutory sale is contested. If this motion is used in cases where the parties have agreed to the sale and its terms, section C should be deleted to avoid confusion with the procedural requirements applicable to contested sales. For an alternative form of stipulation and order for use in uncontested sales, see Form 2.

Likewise, this form can be adapted for use in criminal forfeitures by substituting the discussion on legal authority.

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

 UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 - against -)
)
 REAL PROPERTY AND PREMISES)
 LOCATED AT _____)
 AND ALL IMPROVEMENTS AND)
 APPURTENANCES AFFIXED)
 THERETO,)
)
 Defendants.)
 _____)

Civil Action No. _____

MOTION FOR INTERLOCUTORY SALE OF
 [REAL PROPERTY AND PREMISES]

PLAINTIFF’S MOTION FOR INTERLOCUTORY SALE

COMES NOW the plaintiff, United States of America, by and through the United States Attorney for the District of _____, and moves the court to order the interlocutory sale of the defendant real property described as follows:

[INCLUDE LEGAL DESCRIPTION]

PROCEDURAL HISTORY

Plaintiff commenced this civil action on [DATE] to forfeit the defendant real property for violation of federal law, namely _____. Plaintiff served notice upon all persons and entities believed to have an interest in the defendant property by [PROVIDE DETAILS OF NOTICE] and notice of the action was published on [DATE] in [newspaper of general circulation]. On [DATES], _____ filed a claim to the defendant property and an answer to the complaint.

ARGUMENT

THE DEFENDANT PROPERTY SHOULD BE SOLD IN AN INTERLOCUTORY SALE TO PRESERVE ITS VALUE PENDING A DECISION ON THE FORFEITURE CLAIM

When certain conditions are present, the court has authority under three statutory provisions to order an interlocutory sale of property that is subject to civil forfeiture prior to a final adjudication on the Government's forfeiture claim.

A. Statutory Authority

1. The Supplemental Rules for Certain Admiralty and Maritime Claims

The Supplemental Rules for Certain Admiralty and Maritime Claims generally apply to civil *in rem* forfeitures. *See* 28 U.S.C. § 2461(b); *United States v. \$506,231 in United States Currency*, 125 F.3d 442, 449 n.5 (7th Cir. 1997) (“The Supplemental Rules are applicable to civil forfeiture proceedings pursuant to 28 U.S.C. § 2461(b)”).

Supplemental Rule A states that:

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions *in rem*, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions *in rem* include such analogous statutory condemnation proceedings.

Civil forfeiture actions are such “analogous statutory condemnation proceedings” covered by the Supplemental Rules. *See United States v. All Right, Title and Interest et al.* 1996 WL 695671 *5 (S.D.N.Y. Dec. 5, 1996) (“A civil forfeiture proceeding is a type of *in rem* action within the meaning of ‘statutory condemnation proceedings analogous to maritime actions *in rem*’ as set forth in Supplemental Rule A.”); *see also United States v. U.S. Currency in the Amount of \$2,857*, 754 F.2d 208, 210 n.2 (7th Cir. 1984).

Supplemental Rule E(9)(b) provides:

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the 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:

- (A) the attached or arrested property is perishable, or liable to deterioration, decay or injury by being detained in custody pending the action;
- (B) the expense of keeping the property is excessive or disproportionate; or
- (C) there is an unreasonable delay in securing release of the property.

See *Berryhill Farm Estates*, 128 F.3d at 1389-90 (motion for interlocutory sale filed under Supp. R. E(9)(b)); *United States v. 8 Princess Court*, 970 F.2d 1156, 1160 (2d Cir. 1992) (Supp. R. E(9)(b) authorized interlocutory sale).

2. Customs Laws

Other statutory authority for interlocutory sales is found in the customs statute, 19 U.S.C. § 1612(a). Section 1612(a) is incorporated with other pertinent customs statutes by 21 U.S.C. § 881(d), 18 U.S.C. § 981(d), and 18 U.S.C. § 2254(d) to the extent it is “applicable and not inconsistent” with those civil forfeiture provisions. See *United States v. One Parcel of Property Located at 414 Kings Highway*, 128 F.3d 125, 127 n.2 (2d Cir. 1997) (19 U.S.C. § 1612 applies to forfeitures under 21 U.S.C. § 881). Section 1612(a), which is similar to Rule E(9)(b), also authorizes interlocutory sales when property becomes subject to diminishing value:

Whenever it appears to the Customs Service that any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof, and such [PROPERTY]... has not been delivered under bond... [AND IS NOT SUBJECT TO ADMINISTRATIVE FORFEITURE], the Customs Service shall forthwith transmit its report of the seizure to the United States attorney, who shall petition the court to order an immediate sale of such vessel, vehicle, aircraft, merchandise, or baggage, and if the ends of justice require it the court shall order such immediate sale, the proceeds thereof to be deposited with the court to await the final determination of the condemnation proceedings....

19 U.S.C. § 1612(a); cf. *United States v. 8.4 Acres of Land Located in Little River Township*, 823 F.2d 546, 1987 WL 38057 *2 (4th Cir. May 20, 1987) (Table) (interlocutory sale stayed upon posting of bond).

3. Civil Asset Forfeiture Reform Act of 2000

In addition to the explicit provisions above, 18 U.S.C. § 983(j), enacted as part of the Civil Asset Forfeiture Reform Act of 2000, also provides general authority for interlocutory sales. Section 983(j) enables courts to take any “action to...preserve the availability of property subject to civil forfeiture.” 18 U.S.C. § 983(j)(1). Interlocutory sales are intended for that very purpose—to preserve the value of property that is subject to forfeiture.

B. The Conditions for an Interlocutory Sale Are Present

As described in the Declaration of _____, the condition of the defendant property is [GIVE DETAILS REGARDING BASIS FOR INTERLOCUTORY SALE, E.G., PROPERTY SUBJECT TO DETERIORATION, DEPRECIATION, VANDALISM, NON-PAYMENT OF MORTGAGE, WHETHER THERE HAS BEEN A STAY OF THE PROCEEDINGS, ETC.]. These factors demonstrate the need for an interlocutory sale to preserve the value of the property pending a determination of the Government’s forfeiture claims.

C. Judicial Sale Procedures

Contested judicial sales of real property must comply with the provisions of 28 U.S.C. §§ 2001 and 2002. These statutes provide procedural safeguards to ensure that court-ordered sales are made on terms that best preserve the parties’ interests. Section 2001(a) authorizes public sales of real property and sales by court-appointed receivers. Section 2001(b) permits private sales of real property after a hearing with notice to all interested parties and after the court finds that the best interests of the estate will be conserved thereby. Before confirming a private sale, the court must obtain three appraisals. No private sale may be confirmed for less than two-thirds of the appraised value; the proposed sale terms must be published before confirmation; and the sale may not be confirmed if a bona fide offer is made to buy the property for at least ten percent more than the proposed sale price. 28 U.S.C. § 2001(b). These provisions apply to civil forfeitures such as this one. *See 1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. at 701 (noting that property subject to 21 U.S.C. § 881 forfeiture may be sold pursuant to 28 U.S.C. §§ 2001-2004 “to the extent... not inconsistent with the relevant portions of the Drug Control Act”).

CONCLUSION

For the reasons stated above, the United States respectfully requests that the court order the sale of the defendant property on the terms and conditions set forth in the proposed order submitted herewith.

Respectfully submitted,

DATED:

United States Attorney

Assistant U.S. Attorney

2. Stipulation and Order for Uncontested Interlocutory Sale

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

)
 UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 - against -)
)
 REAL PROPERTY AND PREMISES)
 LOCATED AT _____)
 AND ALL IMPROVEMENTS AND)
 APPURTENANCES AFFIXED)
 THERETO,)
)
 Defendants.)
 _____)

Civil Action No. _____

STIPULATION AND ORDER
FOR INTERLOCUTORY SALE
OF [REAL PROPERTY AND
PREMISES]

WHEREAS, the United States of America (“plaintiff”), by and through its counsel, _____, United States Attorney, and _____, Assistant United States Attorney, filed this action in the _____ District of _____ on _____, seeking the forfeiture of property known as _____, AND ALL IMPROVEMENTS AND APPURTENANCES AFFIXED THERETO (“defendant property”); and

WHEREAS, on [DATE] plaintiff served notice upon all persons and entities believed to have an interest in the defendant property by [PROVIDE DETAILS OF NOTICE] and notice of the action was published on [DATE] in [NEWSPAPER OF GENERAL CIRCULATION]; and

WHEREAS, on [DATES], _____ filed a claim to the defendant property, and an answer to the complaint; and

WHEREAS, no other person or entity has filed a claim to the defendant property and the time to do so has expired; and

WHEREAS, the parties agree that the defendant property should be sold to preserve its value pending a final adjudication on the merits;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED that plaintiff, by and through its undersigned counsel, Claimant _____, _____, attorney of record for Claimant _____, and lienholder _____, by its undersigned authorized representative consent to the following:

1. The legal description of the defendant property is: _____, and the owners of record are _____.
2. In furtherance of the interlocutory sale, Claimant _____ agrees to execute promptly any documents which may be required to complete the interlocutory sale of the defendant property.
3. In furtherance of the interlocutory sale, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] will retain a licensed, certified real estate appraiser to perform an appraisal of the defendant property. Claimant _____ agrees that he/she and his/her agents will fully cooperate with the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] for purposes of the appraisal, in that they will do the following:
 - a. Allow the appraiser full access to the defendant property;
 - b. [IF PROPERTY HAS RENTAL INCOME] Immediately provide the rent roll (the list of renters and the amount of rent paid by each) for the defendant property;
 - c. [IF PROPERTY HAS RENTAL INCOME] Immediately provide the last three years of operating expense records for the defendant property.
4. After the above-referenced appraisal has been completed, the Government will promptly forward a copy to claimant through his/her attorney of record. If any claimant disagrees with the value of the defendant property determined by the appraiser retained by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY], said claimant shall have the right, at his/her own expense, to have the property appraised by a licensed certified real estate appraiser of his/her choosing. If the parties thereafter are unable to agree on a sales price for the defendant property, the parties agree that the Honorable _____, United States [MAGISTRATE/DISTRICT] Judge, shall determine the offering price of the defendant property.
5. The parties agree that the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] will market and sell the defendant property and that the defendant property will be listed with a licensed real estate broker selected by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY].

6. The parties agree that claimant will be notified of all reasonable offers to purchase the defendant property.
7. If the highest offer to purchase is less than 95 percent of the offering price, the sale shall go forward only if plaintiff and claimant agree to the sale. However, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] may, in its sole discretion, accept any offer to purchase the defendant property that is 95 percent or more of the offering price. The [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] may, in its sole discretion, reject any offer to purchase the defendant property where it determines that the offer is being made by, or on behalf of, a person involved in the criminal activity alleged as the basis for forfeiture.
8. The purchase price of the defendant property will be a cash price.
9. The net proceeds from the sale of the defendant property will include all money realized from the sale of the defendant property, except for the following:
 - a. Real estate commissions, if any;
 - b. The amounts due to lienholder _____ pursuant to a _____ evidenced by documents recorded at the _____;
 - c. Amounts due the holder of any other valid lien which was recorded at the _____ prior to the time plaintiff's Notice of *Lis Pendens* was recorded;
 - d. Real estate property taxes which are due and owing;
 - e. Insurance costs, if any;
 - f. All costs incurred by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] in connection with the maintenance, repair, marketing, and sale of the defendant property;
 - g. Escrow fees;
 - h. Document recording fees not paid by the buyer;
 - i. Title fees;
 - j. County transfer taxes.
10. Plaintiff and claimant hereby agree to substitute the net proceeds realized from the sale of the defendant property as a "substitute *res*" for the defendant property in this lawsuit. The net proceeds shall be remitted to the custody and control of the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY, OR CLERK OF THE COURT] as the substitute *res* in this case, and held pending further order of the Court.
11. [IF MORTGAGE PAYMENTS ARE IN ARREARS]: Claimant _____ agrees that he/she will bring current the [MORTGAGE/DEED OF TRUST] held by _____, which is currently in arrears, and will further keep all payments current until the interlocutory sale is completed and the [MORTGAGE/DEED OF TRUST] held by _____ has been paid in full from the net proceeds of the sale of the defendant property.

- 12. Claimant _____ agrees that he/she will retain custody, control, and responsibility for the defendant property until the interlocutory sale has been completed. Claimant _____ further agrees that he/she will retain existing insurance on the defendant property until the interlocutory sale has been completed.

- 13. The signature pages of this stipulation may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument.

DATED:

United States Attorney

Assistant U.S. Attorney

DATED:

Claimant

DATED:

Attorney for Claimant

DATED:

By: Authorized Representative
for [LIENHOLDER]

ORDER

Having reviewed the foregoing Stipulation and good cause appearing,
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- 1. The Stipulation is hereby APPROVED.

- 2. Plaintiff and claimants have agreed to the interlocutory sale of the defendant property.

- 3. In furtherance of the interlocutory sale, Claimant _____ will execute promptly any documents which may be required to complete the interlocutory sale of the defendant property.

4. In furtherance of the interlocutory sale, the United States Marshals Service will retain a [STATE]-licensed certified real estate appraiser to perform an appraisal of the defendant property. Claimant _____ and his/her agents will fully cooperate with the United States Marshals Service for purposes of the appraisal, in that they will do the following:
 - a. Allow the appraiser full access to the defendant property;
 - b. [IF PROPERTY HAS RENTAL INCOME] Immediately provide the rent roll (the list of renters and the amount of rent paid by each) for the defendant property;
 - c. [IF PROPERTY HAS RENTAL INCOME] Immediately provide the last three years of operating expense records for the defendant property.
5. After the above-referenced appraisal has been completed, the Government will promptly forward a copy to claimant through his/her attorney of record. If any claimant disagrees with the value of the defendant property determined by the appraiser retained by the United States Marshals Service, said claimant shall have the right, at his/her own expense, to have the property appraised by a licensed certified real estate appraiser of his/her choosing. If the parties thereafter are unable to agree on a sales price for the defendant property, the parties agree that the Honorable _____, United States [DISTRICT/MAGISTRATE] Judge, shall determine the offering price of the defendant property.
6. The [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] will market and sell the defendant property and the defendant property will be listed with a licensed real estate broker selected by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY].
7. The claimant will be notified of all reasonable offers to purchase the defendant property.
8. If the highest offer to purchase is less than 95 percent of the offering price, the sale shall go forward only if plaintiff and claimant agree to the sale. However, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] may, in its sole discretion, accept any offer to purchase the defendant property that is 95 percent or more of the offering price. The [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] may, in its sole discretion, reject any offer to purchase the defendant property where it determines that the offer is being made by, or on behalf of, a person involved in the criminal activity alleged as the basis for forfeiture.
9. The purchase price of the defendant property will be a cash price.
10. The net proceeds from the sale of the defendant property will include all money realized from the sale of the defendant property, except for the following:
 - a. Real estate commissions, if any;
 - b. The amounts due to lienholder _____ pursuant to a _____ evidenced by documents recorded at the _____;
 - c. Amounts due the holder of any other valid lien which was recorded at the _____ prior to the time plaintiff's Notice of *Lis Pendens* was recorded;

- d. Real estate property taxes which are due and owing;
 - e. Insurance costs, if any;
 - f. Any and all costs incurred by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] in connection with the maintenance, repair, marketing, and sale of the defendant property;
 - g. Escrow fees;
 - h. Document recording fees not paid by the buyer;
 - i. Title fees;
 - j. County transfer taxes.
11. Plaintiff and claimants will substitute the net proceeds realized from the sale of the defendant property as a “substitute *res*” for the defendant property in this lawsuit. The net proceeds shall be remitted to the custody and control of the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] as the substitute *res* in this case, and held pending further order of the Court.
12. [IF MORTGAGE/DEED OF TRUST PAYMENTS ARE IN ARREARS] Claimant _____ will bring current the [mortgage/deed of trust] held by _____, which is currently in arrears, and will further keep all payments current until the interlocutory sale is completed and the deed of trust held by _____ has been paid in full from the net proceeds of the sale of the defendant property.
13. Claimant _____ will retain custody, control, and responsibility for the defendant property until the interlocutory sale has been completed. Claimant _____ will retain existing insurance on the defendant property until the interlocutory sale has been completed.

DATED:

Honorable
United States District Court Judge

3. Order for Public Judicial Interlocutory Sale

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

)
 UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 - against -)
)
 REAL PROPERTY AND PREMISES)
 LOCATED AT _____)
 AND ALL IMPROVEMENTS AND)
 APPURTENANCES AFFIXED)
 THERETO,)
)
 Defendants.)
 _____)

Civil Action No. _____

ORDER FOR PUBLIC JUDICIAL
INTERLOCUTORY SALE
OF [REAL PROPERTY AND
PREMISES]

Plaintiff United States of America has moved this court, pursuant to the Court’s powers under 18 U.S.C. § 983(j); Rule E(9)(b) of the Supplemental Rules to the Federal Rules of Civil Procedure for Certain Admiralty and Maritime Claims; and the customs laws, 19 U.S.C. § 1612(a) (made applicable to this action by [21 U.S.C. § 881(D) OR OTHER STATUTE AS APPROPRIATE]), for an order directing the interlocutory sale of the defendant real property with all its buildings, appurtenances, and improvements. Plaintiff has shown that:

[INCLUDE ANY APPROPRIATE FINDINGS, SUCH AS—]

1. The defendant real property is liable to deterioration, decay, or injury pending this action and the expenses of keeping and maintaining the property during the pendency of the proceedings are excessive.
2. The equity in the property is being reduced by the accruing interest on the note payable to _____ because the owner and claimant _____ is not making mortgage payments. The Government’s forfeitable interest in the property could be significantly reduced or eliminated if the mortgagee were permitted to conduct a foreclosure sale of the property.
3. An immediate interlocutory sale is in the best interests of all parties concerned.

4. Plaintiff does not contest the claim of [MORTGAGE HOLDER] and an agreement between plaintiff and [MORTGAGE HOLDER] has been filed with this Court and approved.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The defendant property shall be sold in an interlocutory sale pursuant to terms agreed to by all interested parties, in a written stipulation submitted to this court on or before _____.
2. If the parties cannot agree on the terms of the sale by the above referenced date, the defendant property shall be sold at public sale pursuant to 28 U.S.C. § 2001(a) or, if the best interests of the estate will be conserved thereby, at a private sale pursuant to 28 U.S.C. § 2001(b), after notice and a hearing has been held, pursuant to 28 U.S.C. § 2001(b).

[THE FOLLOWING APPLIES IF THE COURT ORDERS A PUBLIC SALE—SEE SEPARATE FORM FOR PRIVATE SALE]

3. Pursuant to 28 U.S.C. § 2002, notice of the sale shall be published once a week for four weeks in _____, a newspaper regularly issued and of general circulation in the county, state, or district where the defendant property is located. Notice shall also be sent by mail or other reasonable means to all persons known to the government to assert an interest in the property. The notice shall include the legal description of the property, the time and location of the sale, and either a copy of this order or a statement to the effect that: the property will be sold free and clear of all liens and encumbrances; any person having an interest in the property who fails to appear and participate in the sale will lose any right to assert that interest against the property; and only persons filing timely claims in this forfeiture proceeding may assert claims against the proceeds of sale. [ADD ANYTHING ELSE APPROPRIATE]
4. The sale shall take place at _____ on _____.
5. The net proceeds of the sale (sales price less real estate commission, closing costs, and other selling expenses) shall be used to pay off the outstanding taxes on the real property, the costs incurred by the _____ to maintain the property since the seizure on _____, and the note payable to [LIENHOLDER]. If the net proceeds are insufficient to pay the note, this order shall not affect any rights [LIENHOLDER] may have to seek a deficiency judgment against its obligor. No deficiency resulting from a sale pursuant to this order shall be a basis for action or recovery against the United States.

6. The remaining proceeds shall be deposited in [THE REGISTRY OF THE COURT, U.S. MARSHALS SEIZED ASSET DEPOSIT FUND, OR OTHER INTEREST BEARING ESCROW ACCOUNT] and shall be substituted as the defendant *res* in this action.

SO ORDERED, this ____ of _____, 20__.

Honorable
United States District Judge

4. Order for Private Judicial Interlocutory Sale

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

)
 UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 - against -)
)
 REAL PROPERTY AND PREMISES)
 LOCATED AT _____)
 AND ALL IMPROVEMENTS AND)
 APPURTENANCES AFFIXED)
 THERETO,)
)
 Defendants.)
 _____)

Civil Action No. _____

ORDER FOR PRIVATE JUDICIAL
INTERLOCUTORY SALE
OF [REAL PROPERTY AND
PREMISES]

This court, having issued an order on _____ directing the interlocutory sale of the defendant real property pursuant to Rule E(9)(b) of the Supplemental Rules to the Federal Rules of Civil Procedure for Certain Admiralty and Maritime Claims, [AND ANY OTHER STATUTE AS APPROPRIATE], and having found after a hearing held on _____ pursuant to 28 U.S.C. § 2001(b), that the best interests of the estate will be conserved by a private sale of the defendant property rather than a public sale,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The defendant real property and premises, as described in Exhibit __ attached hereto and incorporated herein by reference, shall be sold as provided by 28 U.S.C. § 2001(b).
2. [THE UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] is authorized to retain a licensed, certified real estate broker, who shall be paid the usual and customary commission and/or fees from the proceeds of the sale, but not exceeding __ percent.

3. The following three disinterested appraisers are hereby appointed by the court to appraise the fair market value of the defendant property: _____. The appraisers shall submit their appraisal reports to [THE UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] no later than [DATE].
4. No private sale shall be confirmed at a price less than two-thirds of the appraised value of the property, as determined by the court.
5. The terms and conditions of the sale shall be as follows:
 - (a) The sale shall be for cash;
 - (b) The defendant property shall be sold in its entirety, free and clear of all right, title, claim, liens and interest of any and all persons or parties whatsoever existing in said property.
If the property is to be sold subject to a prior mortgage or lien, use the following language instead of 5(b):
 - (b) The defendant property shall be sold subject to the following mortgages or liens: [LIST].
6. [THE UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] shall publish the terms of the highest and best contract of sale offered for the defendant real property in _____, a newspaper of general circulation at least ten days before confirmation.
7. Such private sale shall not be confirmed if a bona fide offer is made which guarantees at least ten percent over the price offered in the private sale.
8. Any bona fide offer (over bid) that guarantees at least a ten percent increase over the price offered in the private sale, as published in the newspaper, shall be made in the same terms and conditions as ordered by the court herein. Such over bid shall be reported by the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] as the sale price without the need of further publication for confirmation by the court.
9. Thereafter, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] shall file its report of sale, along with the reports of the appraisers. The report of sale shall include a statement of the highest and best offer of contract of sale, and the highest and best over bid, if any, for consideration by the court.
10. Upon the confirmation by the court of the private sale, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] shall execute the contract of sale on the terms ordered by the court; proceed to consummate the sale and shall issue a deed without covenants or warranties, expressed or implied [OR QUITCLAIM DEED], to the buyer at such private sale.
11. From the proceeds of the sale, the [UNITED STATES MARSHALS SERVICE OR OTHER APPLICABLE AGENCY] shall pay any real estate commission, closing costs, and other selling expenses; all outstanding state and local taxes prorated to the date of the sale; all costs incurred by the

_____ to maintain the property since the seizure on _____; and the following mortgages and liens: _____.

12. The remaining net proceeds shall be deposited in [THE REGISTRY OF THE COURT, U.S. MARSHALS SEIZED ASSET DEPOSIT FUND, OR OTHER INTEREST BEARING ESCROW ACCOUNT] and shall be substituted as the defendant *res* in this action.

[THE FOLLOWING PROVISION MAY BE INCLUDED IF THE PARTIES WOULD PREFER TO TERMINATE A SALE RATHER THAN COMPLETING IT AT A PRICE TOO LOW TO COVER OUTSTANDING TAXES, LIENS, AND EXPENSES OF SALE. NOTE THAT IN SUCH CIRCUMSTANCES, IT MAY BE APPROPRIATE TO STIPULATE TO DISMISSAL OF THE FORFEITURE, PERMITTING THE LIENHOLDER TO FORECLOSE ON THE PROPERTY.]

13. The sale of the defendant property shall not be confirmed if the net proceeds of the sale fail to equal or exceed any expenses of the sale and any mortgages, liens, or taxes encumbering the defendant property.

SO ORDERED, this ____ of _____, 20__.

Honorable
United States District Judge

5. Joint Motion for Interlocutory Sale of Real Property

Comment: When a court orders an interlocutory sale over the objection of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002, and/or 2004. These statutes provide procedural safeguards to ensure that court-ordered sales are made on terms that best preserve the parties’ interests. The case law does not explicitly address whether a court is bound by these provisions when all interested parties agree to an interlocutory sale and to the specific terms of sale. The apparent purpose of these provisions is to protect the rights of the parties in situations where the court orders an interlocutory sale over a party’s objection. Once proper notice of the intended interlocutory sale has been given to all interested parties (including, for example, lienholders and unindicted co-owners in criminal forfeitures) and all interested parties have agreed on the terms of sale, the concerns that might otherwise have justified costly protective measures such as publishing the terms and obtaining three appraisals prior to a private sale are no longer present. Accordingly, courts routinely approve stipulated interlocutory sales without reference to 28 U.S.C. §§ 2001 et seq. *See BCCI Holdings*, 69 F. Supp. 2d at 44-45 (describing uncontested interlocutory liquidation of assets in criminal case); *see also 22 Santa Barbara Drive*, 264 F.3d at 866-67 (describing stipulated sale without citation of section 2001 et seq.); *United States v. 4118 West 178th Street*, 1995 WL 758436 (N.D. Ill. Dec. 21, 1995) (same).

UNITED STATES DISTRICT COURT
 _____ DISTRICT OF _____

UNITED STATES OF AMERICA)	
)	
- against -)	Criminal No.
)	_____
JOHN DOE)	

JOINT MOTION FOR INTERLOCUTORY SALE OF REAL PROPERTY

The United States of America, by its attorney, _____, United States Attorney for the District of _____, and Defendant _____ by his/her attorney, _____, hereby move that the Court enter an Order, in the form attached hereto as Exhibit A, permitting the sale of certain real property located at _____ [PROPERTY ADDRESS]. As reasons therefor, the parties state as follows:

[BRIEFLY DESCRIBE CIRCUMSTANCES AND REASONS FOR SALE, SUCH AS:]

1. On _____, a grand jury in this district indicted Defendant _____ (hereafter, “Defendant”), charging him with, among other offenses, money laundering, in violation of 18 U.S.C. § 1956. The indictment alleged further, that upon Defendant’s conviction, certain property would be forfeitable to the United States, including the real property (hereafter the “Property”) described in the indictment as follows: _____ [FULL PROPERTY DESCRIPTION]. On the United States’ motion, this

Part II

A Guide to Interlocutory Sales in Forfeiture Cases

I. Introduction

Forfeiture litigation may take years to complete, and situations may arise in which it is necessary or desirable to liquidate the property to preserve its value prior to a final order or judgment of forfeiture. Such sales, called “interlocutory” because they occur during the pendency of litigation, may be held pursuant to a court-approved stipulation of all parties. In the absence of an agreement, the court may order an interlocutory sale when certain criteria are met. The sale proceeds (called the “substitute *res*” in a civil case) are substituted for the original property and used to satisfy the judgment whether for the United States or the opposing party. Interlocutory sales may be held in both civil and criminal forfeiture cases.

II. Situations Where Interlocutory Sales May Be Appropriate

Interlocutory sales are appropriate where: (1) property is perishable or subject to depreciation, decay, or injury; (2) the expense of maintaining the property is excessive or disproportionate to the property’s value; (3) a stay, lengthy pretrial proceedings, or some other factor delays the litigation; or (4) other exigent circumstances arise. The following are some examples:

- vacant real property that is subject to vandalism or that poses a particular danger to the community
- real property with delinquent mortgage payments, especially where a mortgagee is threatening or attempting to foreclose on the property
- real property that is deteriorating or in need of extensive repair work
- real property with growing crops that need constant attention
- livestock that must be fed and cared for
- perishable items that will lose their value if not sold immediately
- cars, planes, or boats that are expensive to store and maintain in relation to their value
- inherently dangerous materials such as explosives
- chemicals and pharmaceuticals with limited shelf life
- businesses operating under state or local licenses which may be revoked
- cases that have been stayed or otherwise delayed
- personal property subject to rapid, significant depreciation or loss in equity (*e.g.*, business interests; securities; and equipment, vessels, aircraft, and automobiles subject to lease or financing arrangements)

Courts have ordered interlocutory sales in these circumstances. *See, e.g., United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001) (stipulated sale paid off mortgage); *United States v. Pelullo*, 178 F.3d 196, 198-99 (3d Cir. 1999) (interlocutory sale approved over criminal defendant's objections where equity was being depleted by accruing taxes and interest on mortgagee's foreclosure judgment); *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1389-90 (10th Cir. 1997) (because property was subject to deterioration and decay, district court granted Government's unopposed motion for interlocutory sale and confirmed sale despite claimant's subsequent motion to block it); *United States v. \$82,685.53, More or Less in Proceeds from the Interlocutory Sale of 218 Cattle*, 2000 WL 828080 (S.D. Ala. May 31, 2000) (livestock sold); *Aguilar v. United States*, 1999 WL 1067841 *5 (D. Conn. Nov. 8, 1999) (despite claimant's opposition, interlocutory sale was warranted because properties were abandoned and subject to "vandalism, deterioration and depreciation" and mortgage payments were several months in arrears); *United States v. One 1979 Peterbilt*, 1994 WL 99540 *2 (E.D. La. Mar. 18, 1994) (granting unopposed motion for interlocutory sale because of depreciating value of vehicle); *cf. United States v. Real Property Known As 2916 Forest Glen Court*, 162 F. Supp. 2d 909, 917 (S.D. Ohio 2001) (court denied claimant's motion for interlocutory sale of seized, and nearly expired, pharmaceuticals because, *inter alia*, claimant failed to show likelihood of success on the merits and it was not in public interest to require Government to incur significant expense for tests to determine whether expiration date could be extended).

The proceeds of an interlocutory sale are substituted for the forfeitable property (as the substitute *res* in a civil case) and are held by the U.S. Marshals Service (USMS) or other custodial agency in a Seized Assets Deposit Fund or, if the court so orders, in the registry of the court or an interest-bearing escrow account, until the forfeiture is concluded. *See Berryhill Farm Estates*, 128 F.3d at 1390 (court ordered USMS to hold real property sale proceeds in Marshals' escrow account as substitute *res*). *See also Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania*, 93 F.3d 728, 734 (11th Cir. 1996) (proceeds deposited in court registry); *Bowman v. United States*, 35 Fed. Cl. 397, 399 (Cl. Ct. 1996) (proceeds substituted as *res* and held in escrow); *United States v. Real Property Located at 40 Clark Road et al.*, 52 F. Supp. 2d 254, 257 n.1 (D. Mass. 1999) (same); *United States v. Premises Known as 1625 S. Delaware Avenue*, 1989 WL 156346 *1 (E.D. Pa. 1989) (same).

The primary consideration in deciding to seek an interlocutory sale is whether prompt sale is necessary to preserve the value of the property for forfeiture. Other factors may also weigh on the decision, such as whether the property has special evidentiary value, whether the property in its present condition poses a danger to the community or is fit to be sold to the public, and, in some cases, whether the most appropriate final disposition of the property is for official or public use rather than sale.

III. Statutory Authority

A. Civil Forfeitures

Three statutory provisions authorize courts to order (or permit) interlocutory sale in civil forfeiture cases.

1. Supplemental Rules for Certain Admiralty and Maritime Claims

The Supplemental Rules for Certain Admiralty and Maritime Claims generally apply to civil *in rem* forfeitures. *See* 28 U.S.C. § 2461(b); *United States v. \$506,231 in United States Currency*, 125 F.3d 442, 449 n.5 (7th Cir. 1997) (“the Supplemental Rules are applicable to civil forfeiture proceedings pursuant to 28 U.S.C. § 2461(b)”).

In addition, Supplemental Rule A states that:

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions *in rem*, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions *in rem* include such analogous statutory condemnation proceedings.

Civil forfeiture actions are such “analogous statutory condemnation proceedings” covered by the Supplemental Rules. *See United States v. All Right, Title and Interest et al.*, 1996 WL 695671 *5 (S.D.N.Y. Dec. 5, 1996) (“civil forfeiture proceeding is a type of *in rem* action within the meaning of ‘statutory condemnation proceedings analogous to maritime actions *in rem*’ as set forth in Supplemental Rule A”); *see also United States v. U.S. Currency in the Amount of \$2,857*, 754 F.2d 208, 210 n.2 (7th Cir. 1984).

Supplemental Rule E(9)(b) provides:

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the 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:

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

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

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

See Berryhill Farm Estates, 128 F.3d at 1389-90 (motion for interlocutory sale filed under Supp. R. E(9)(b)); *United States v. 8 Princess Court*, 970 F.2d 1156, 1160 (2d Cir. 1992) (Supp. R. E(9)(b) authorized interlocutory sale).

2. Customs Laws

Other statutory authority for interlocutory sales is found in the customs statute, 19 U.S.C. § 1612(a). Section 1612(a) is incorporated with other pertinent customs statutes by 21 U.S.C. § 881(d), 18 U.S.C. § 981(d), and 18 U.S.C. § 2254(d) to the extent it is “applicable and not inconsistent” with those civil forfeiture provisions. *See United States v. One Parcel of Property Located at 414 Kings Highway*, 128 F.3d 125, 127 n.2 (2d Cir. 1997) (19 U.S.C. § 1612 applies to forfeitures under 21 U.S.C. § 881). Section 1612(a), which is similar to Rule E(9)(b), also authorizes interlocutory sale when property’s value is diminishing:

Whenever it appears to the Customs Service that any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof, and such [property]...has not been delivered under bond...[and is not subject to administrative forfeiture], the Customs Service shall forthwith transmit its report of the seizure to the United States attorney, who shall petition the court to order an immediate sale of such vessel, vehicle, aircraft, merchandise, or baggage, and if the ends of justice require it the court shall order such immediate sale, the proceeds thereof to be deposited with the court to await the final determination of the condemnation proceedings... .

19 U.S.C. § 1612(a); *cf. United States v. 8.4 Acres of Land Located in Little River Township*, 823 F.2d 546, 1987 WL 38057 *2 (4th Cir. May 20, 1987) (Table) (interlocutory sale stayed upon posting of bond).

3. Civil Asset Forfeiture Reform Act of 2000

In addition to the explicit provisions above, 18 U.S.C. § 983(j), enacted as part of the Civil Asset Forfeiture Reform Act of 2000, also provides general authority for interlocutory sales. Section 983(j) enables courts to take any “action to...preserve the availability of property subject to civil forfeiture.” 18 U.S.C. § 983(j)(1). Interlocutory sales are intended for that very purpose—to preserve the forfeitable value of property.

B. Criminal Forfeitures

1. Protective Orders

Statutory authority for interlocutory sales in criminal forfeiture cases can be found in the general provision for forfeiture protective orders, 21 U.S.C. § 853(e), which states:

Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of the property...for forfeiture....

21 U.S.C. § 853(e)(1). Section 853(e) applies directly to title 21 criminal forfeitures and is incorporated by reference as to most other types of criminal forfeitures by 18 U.S.C. § 982(b)(1) and 28 U.S.C. § 2461(c).

Analogous provisions apply to other criminal forfeitures—18 U.S.C. § 2253(c) (forfeitures arising from sexual exploitation of children) and 18 U.S.C. § 1963(d) (RICO forfeitures).

2. Incorporation of Customs Laws

Most criminal forfeiture statutes also incorporate civil forfeiture procedures, including the customs laws, through a provision similar to 21 U.S.C. § 853(j), which states:

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

As noted above, the civil forfeiture provision 21 U.S.C. § 881(d) incorporates the customs law authorizing interlocutory sales, and 21 U.S.C. § 853 is applicable to other criminal forfeitures under 18 U.S.C. § 982 and 28 U.S.C. § 2461(c). A similar provision incorporating the customs law is found in 18 U.S.C. § 2253(i) (criminal forfeiture statute for child sexual exploitation offenses). Section 2253(i) cites an analogous provision in the corresponding civil forfeiture statute, 18 U.S.C. § 2254(d), which in turn incorporates the customs law. Accordingly, the customs law permitting or requiring interlocutory sales can be used with equal force in most criminal forfeitures.

IV. Obtaining Court Approval for an Interlocutory Sale

A. Stipulated Motion and Order

Interlocutory sales require court approval. This is most easily obtained when all interested parties agree to the sale. It is thus advisable to seek the consent of all parties *first* before filing a motion. Where there is a significant risk that property will lose value before the case is concluded, it will generally be in the best interests of all parties to agree to an interlocutory sale as the best way to preserve the property's value. *See United States v. One 1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. 697, 701 (W.D. Tex. 1992) (observing that “many circumstances could arise in which a claimant would want to be able to pursue [an interlocutory sale]”).

If all interested parties consent to the sale, the parties may simply enter into a stipulation agreeing to sell the property, setting forth the terms of the proposed interlocutory sale, the process by which the sale will be conducted, and the agreed disposition of the proceeds pending conclusion of the case. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 69 F. Supp. 2d 36, 44-45 (D.D.C. 1999) (describing uncontested interlocutory liquidation of assets in criminal case to mitigate storage and maintenance costs); *United States v. Real Property and Residence at 3097 S.W. 111th Avenue*, 699 F. Supp. 287, 288 (S.D. Fla. 1988) (noting that parties had agreed to interlocutory sale). The stipulation should be signed by all interested parties known to the Government, including all claimants in a civil case, all lienholders of record, and all other persons known to have or to assert an ownership interest in the property. The signed stipulation is then

submitted to the court to be “so ordered,” or if required by local rule and practice, is submitted with a motion and proposed order for interlocutory sale.

B. Contested Motion and Order

If the parties do not agree to an interlocutory sale of the property or to the sale terms, a court order authorizing the sale must be obtained by motion served on all interested parties. *See United States v. Steel Tank Barge H 1651*, 272 F. Supp. 658, 662-63 (E.D. La. 1967) (vacating interlocutory sale order because barge’s owner had not received actual notice of the proposed sale). The court may order that such a sale take place over a party’s objection. *See Pelullo*, 178 F.3d at 198-99 (interlocutory sale approved over criminal defendant’s objections where equity was being depleted by accruing taxes and interest on mortgagee’s foreclosure judgment); *Aguilar*, 1999 WL 1067841 *4-6 (explaining that interlocutory sale opposed by claimant was warranted because properties were abandoned and subject to “vandalism, deterioration and depreciation” and mortgage payments were several months in arrears). In the order, the court must articulate the reasons justifying the interlocutory sale. *See 8 Princess Court*, 970 F.2d at 1160 (noting absence of findings by district court to justify sale and remanding case for further proceedings).

When a court orders an interlocutory sale over the objection of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002, and/or 2004. These statutes provide procedural safeguards to ensure that court-ordered sales are made on terms that best preserve the parties’ interests. Section 2001(a) authorizes public sales of real property and sales by court-appointed receivers. Section 2001(b) permits private sales of real property after a hearing with notice to all interested parties and after the court finds that the best interests of the estate will be conserved thereby.

Before confirming a private sale, the court must obtain three appraisals. No private sale can be confirmed for less than two-thirds of the appraised value. The proposed sale terms must be published before confirmation. The sale cannot be confirmed if a bona fide offer is made to buy the property for at least ten percent more than the proposed sale price. 28 U.S.C. § 2001(b).

These provisions apply to civil as well as criminal forfeitures. *See United States v. Macia*, 157 F. Supp. 2d 1369, 1371 (S.D. Fla. 2001) (applying section 2001 to interlocutory sale in criminal forfeiture); *1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. at 701 (noting that property subject to 21 U.S.C. § 881 forfeiture may be sold pursuant to 28 U.S.C. §§ 2001-2004 “to the extent...not inconsistent with the relevant portions of the Drug Control Act”). Contested interlocutory sales of personal property must be conducted in the same manner as real property sales, “unless the court orders otherwise.” 28 U.S.C. § 2004.

NB: The case law does not explicitly address whether a court is bound by these provisions when all interested parties agree to an interlocutory sale and to the specific terms of sale.¹ Section 2004 does expressly

¹ *Macia*’s scope is questionable. Although the decision purports to address the broad question “Does 28 U.S.C. § 2001 apply to the sale of forfeited property?” (157 F. Supp. 2d at 1371), other statements in the opinion indicate that the court was faced with the narrower issues presented by an interlocutory sale to which the claimant had objected. *See id.* at 1370.

allow courts to alter the procedures for sales of personal property, but sections 2001 and 2002 do not contain such language. However, the apparent purpose of these provisions is to protect the rights of the parties in situations where the court orders an interlocutory sale over a party's objection. Once proper notice of the intended interlocutory sale has been given to all interested parties (including, for example, lienholders and unindicted co-owners in criminal forfeitures) and all interested parties have agreed on the terms of sale, the concerns that might otherwise have justified costly protective measures such as publishing the terms and obtaining three appraisals prior to a private sale are no longer present. The parties' consent indicates that the terms of the sale are acceptable to them. Accordingly, courts routinely approve stipulated interlocutory sales without reference to 28 U.S.C. §§ 2001 *et seq.* See *BCCI Holdings*, 69 F. Supp. 2d at 44-45 (describing uncontested interlocutory liquidation of assets in criminal case); *see also* *22 Santa Barbara Drive*, 264 F.3d at 866-67 (describing stipulated sale without citation of section 2001 *et seq.*); *United States v. 4118 West 178th Street*, 1995 WL 758436 (N.D. Ill. Dec. 21, 1995) (same).

V. Practical Considerations

Interlocutory sales should be undertaken only after consultation with the USMS or, in cases where USMS is not the property custodian, with the applicable agency or contractor. USMS is authorized to carry out such sales under 28 U.S.C. § 566. The Secretary of the Treasury is authorized to retain contract services to do so. *See* 31 U.S.C. § 9703(a); Directive No. 27, October 1, 1995, "Processing Interlocutory Sales," issued by the Treasury Executive Office for Asset Forfeiture.

The proposed order should set out the terms and conditions of the interlocutory sale explicitly, with references to any applicable statutes and rules. It should include clear instructions to the USMS or the other agency or contractor conducting the sale. The order should also make specific provision for payment of taxes, any uncontested liens or mortgages, and all costs associated with the sale, and for the disposition of the net proceeds of the sale pending the conclusion of the case.

Assistant U.S. Attorneys (AUSAs) negotiating an interlocutory sale agreement or proposed order that will involve paying off a third-party claimant's mortgage or lien should include language to the effect that the parties will bear their own costs and attorneys' fees in the matter, unless the parties have agreed otherwise, such as where contract law requires the payment of costs and fees pursuant to the terms of the mortgage or lien and the Government has agreed to pay reasonable or negotiated costs and fees as part of the settlement agreement. Payment of costs and attorneys' fees should be rare in cases where the Government has promptly agreed not to contest a third party's claim. In all settlements it is appropriate for AUSAs to seek a waiver of any non-contractual claim for attorneys' fees under 28 U.S.C. § 2465(b).