**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ALABAMA**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| **XCOAL ENERGY & RESOURCES,** | ) | |
| | ) | |
| **Plaintiff/** | ) | |
| **Counter-Claim Defendant,** | ) | |
| | ) | |
| **v.** | ) | **CIV. ACT. NO.: 1:23-cv-361-TFM-C** |
| | ) | |
| | ) | |
| **ACCIAIERIE D'ITALIA S.P.A.,** | ) | |
| | ) | |
| **Defendant/** | ) | |
| **Counter-Claim Plaintiff,** | ) | |
| | ) | |
| **JAVELIN GLOBAL COMMODITIES,** | ) | |
| **(UK) LTD.,** | ) | |
| | ) | |
| **Intervenor/Plaintiff.** | ) | |

**REPORT AND RECOMMENDATION**

This cause is before the Court on the Motion for Summary Judgment (Doc. 219) and Memorandum in Support of Motion for Summary Judgment (Doc. 219-1) filed by Plaintiff/Counter-Claim Defendant, Xcoal Energy & Resources ("Xcoal"); the Memorandum in Opposition to Xcoal's Motion for Summary Judgment (Doc. 231) filed by Javelin Global Commodities (UK) Ltd. ("Javelin"); Javelin's Motion for Partial Summary Judgment (Doc. 234); Javelin's Supplemental Brief in Support of Motion for Partial Summary Judgment (Doc. 237-19)[1]; Xcoal's Opposition to Javelin's Motion for Partial Summary Judgment (Doc. 240); Javelin's Reply Memorandum in Further Support of Motion for Partial Summary Judgment (Doc. 242); and the Reply in Support of Xcoal Energy & Resources' Motion for Summary Judgment (Doc. 243). The motions have been referred to the undersigned Magistrate Judge for entry of a

[1] It does not appear that Javelin has explained any differences between the brief submitted under seal (Doc. 222) and the supplemental brief (Doc. 237). Only the supplemental brief was considered when preparing this Report and Recommendation. Additionally, the exhibits submitted under seal with Doc. 221 appear to be the same as those submitted with Doc.237.

report and recommendation pursuant to 28 U.S.C. Section 636(b)(1)(B) and S.D. Ala. Gen. LR. 72(a)(2)(S). (*See also* Doc. 147, 202, 226). It is determined that the parties' briefs are comprehensive, and therefore, oral argument as requested by Javelin is not necessary. (*See* Doc. 223). Upon consideration of all matters presented, it is **RECOMMENDED**, for the reasons stated herein, that Xcoal's Motion for Summary Judgment be **GRANTED**, and Javelin's Motion for Partial Summary Judgment be **DENIED**. Set forth below are the Findings of Facts and Conclusions of Law.

## I. Background

As security for claims against ADI arising out of the alleged breach of several contracts that are subject to Swiss arbitration, Xcoal invoked the Federal Arbitration Act ("FAA"), and later sought, under Rule B of the Supplemental Admiralty Rules pursuant to the Court's admiralty and maritime jurisdiction, attachment of a cargo of coal loaded on the MV BULK DESTINY (IMO No. 9781994)("*Bulk Destiny*").

Xcoal's Verified Complaint (Doc. 1) and supporting Verification (Doc. 8) filed with the Court on September 22, 2023, caused the Court to issue the requested Rule B Attachment the same day. (Doc. 9). The Rule B Attachment called for the seizure of property – specifically, coal – aboard the *Bulk Destiny*. However, the cargo of coal that was the subject of the Rule B Attachment was owned by Javelin, not ADI, at the time of the attachment.

On October 6, 2023, Javelin filed a Verified Complaint in Intervention in this action (the "Intervening Complaint") under the Court's admiralty and maritime jurisdiction, within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. (Doc. 50).[2] The Intervening Complaint alleged wrongful attachment of the cargo loaded on the *Bulk Destiny* against Xcoal. (Doc. 50, Count I at ¶¶ 13-27; PageID.3-5). Javelin's Complaint also sought damages related to vessel detention, legal fees and costs (*Id*. at ¶¶ 13; 25; 28- 33). On June 26, 2024, Xcoal answered Javelin's Intervening Complaint. (Doc. 94).

[2] On October 12, 2023, Javelin filed its Motion for Leave to file an Intervening Complaint. (Doc. 61).

It was recommended that the Rule B attachment obtained by Xcoal be vacated because the contractual relationship between Xcoal and ADI referenced in support of the application for writ of attachment was not based on maritime contracts but instead for the sale of goods. (*See* Doc. 51). Thereafter, Xcoal filed a Motion to Vacate attachment pursuant to Fed. R. Civ. P. 41 and withdrew its request for an issuance of a warrant of maritime attachment over the subject coal loaded on the *Bulk Destiny*. (Doc. 55). On October 12, 2023, District Judge Terry F. Moorer entered an Order vacating the attachment, allowing the *Bulk Destiny* to depart this District with the coal at issue. All other issues and claims, including costs, the issue of wrongful attachment and Javelin's Complaint in Intervention were reserved for consideration, with no rulings made by the Court. (Doc. 63).

On November 22, 2023, Javelin filed a separate action against Xcoal alleging claims of wrongful attachment/seizure, intentional interference with a contractual relationship, and tortious interference with a contractual relationship initiating a new action in this district. (*See* Doc. 1 filed in Cause No. 1:23-cv-00444-TFM-C at PageID.4-6). Javelin's Complaint also sought damages related to vessel detention, attorney's fees and costs. (*Id.* at PageID.9-10). On December 20, 2023, Xcoal answered the Complaint for Damages. (*See* Doc. 8 in Cause No. 1:23-cv-00444-TFM-C). The Court later consolidated both matters into a single action (Cause No. 1:23-cv-00361-TFM-C; *See* Memorandum Opinion and Order, Doc. 99).

## II. Legal Standard

Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has met its burden, the burden shifts to the nonmovant to show the existence of a genuine issue of material fact. *Id*. "If the nonmoving party fails to make a 'sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment." *Id*. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) (footnote omitted). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

When deciding whether summary judgment is appropriate, the Court must view the evidence and all reasonable factual inferences in the light most favorable to the party opposing the motion. *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998) (citations and quotations omitted). Nevertheless, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the [trier of fact] could reasonably find for that party." *Walker v. Darby*, 911 F2d 1573, 1577 (11th Cir. 1990). "Speculation does not create a genuine issue of fact." *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) (citation omitted). If the evidence advanced by the nonmoving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

## III. Analysis & Conclusions of Law

As an initial matter, Xcoal's failure to comply with Federal Rule of Civil Procedure 56 and Civil LR 56 of the Local Rules for the Southern District of Alabama is addressed. Xcoal's motion for summary judgment cites to Fed. R. Civ. P. 56 but Xcoal does not argue its position under the summary judgment standard. Instead, Xcoal seeks dismissal of all claims asserted by Javelin for wrongful attachment damages under federal maritime law and Alabama state law theories for the alleged wrongful attachment of the *Bulk Destiny*. (*See* Doc. 219, 219-1). However, Xcoal has already filed a motion to dismiss, which was denied by this Court. It is difficult to determine from Xcoal's Memorandum in Support of Motion for Summary Judgment (Doc. 219-1) the undisputed facts that entitle Xcoal to summary judgment as to Javelin's claims.

Under Rule 56, a party must support the assertion of undisputed or disputed facts by citing to materials in the record. Fed. R. Civ. P. 56(c)(1). Rule 56(c) provides, in part, as follows:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by…citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or…showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1)(A)-(B). Rule 56(e) provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials- including the facts considered undisputed – show that the movant is entitled to it; or (4) issue any other appropriate order." Fed. R. Civ. P. 56(e). Finally, the Local Rules for the United States District Court for the Southern District of Alabama also require the movant's brief to include "all facts relied upon, each supported by a specific, pinpoint citation to the record". S.D. Ala. CivLR56(a).

It is the undersigned's opinion that Xcoal has not fully complied with Fed. R. Civ. P. 56 and S.D. Ala. CivLR56(a). It does appear, however, that Javelin has not really contested Xcoal's failure to follow the federal and local rules governing summary judgment procedure. (*See* Doc. 231). Thus, the merits of Xcoal's arguments are considered herein below.

**A. Xcoal's Motion for Summary Judgment**

**a. Tortious Interference Claim(s)**

As noted *supra*, Javelin filed a separate action against Xcoal alleging claims of wrongful attachment/seizure, intentional interference with a contractual relationship, and tortious interference with a contractual relationship initiating a new action in this district. (*See* Doc. 1 filed in Cause No. 1:23-cv-00444-TFM-C at PageID.4-6). In October 2024, Xcoal moved to dismiss Javelin's claims for intentional interference with a contract and tortious interference with a contract, but it was recommended that Xcoal's request be denied. (*See* Doc. 119, 153). Judge Moorer adopted the Report and Recommendation and denied Xcoal's motion to dismiss. (Doc. 201).

Xcoal again seeks dismissal of Javelin's common law claims. In its motion for summary judgment, Xcoal argues: 1) the "bad faith" standard applies exclusively to any claims arising out of an alleged wrongful attachment, and 2) Javelin's common law claims are not available based on Eleventh Circuit precedent. (Doc. 219-1, PageID.2099-2105). In support of its argument, Xcoal relies on *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297 (5th Cir. 1937), *Furness Withy (Chartering) Inc. Panama v. World Energy Sys. Assoc., Inc.*, 854 F.2d 410 (11th Cir. 1988) (referred to as the "*Furness II*" decision)[3], and *Industrial Maritime Carriers LLC v. Dantzler*, 611 Fed.Appx. 600 (11th Cir. 2015). According to Xcoal, Javelin cannot escape Eleventh Circuit precedent that requires evidence of bad faith for wrongful maritime seizures by recasting its claim for wrongful attachment as common law tortious interference claims.[4]

As explained by the former Fifth Circuit,

> [t]he gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice or gross negligence of the offending party. The reasons for the award of damages are analogous to those in cases of malicious prosecution. The defendant is required to respond in damages for causing to be done through the process of the court that which would have been wrongful for him to do himself, having no legal justification therefor and acting in bad faith, with malice, or through a wanton disregard of the legal rights of his adversary.

*Frontera*, 91 F.2d at 297.[5]

---

[3] In *Industrial Maritime Carriers*, the Eleventh Circuit cited to this case as Furness II to distinguish the 1988 decision (*Furness II*) from *Furness Withy (Chartering), Inc. v. World Energy Systems Associates, Inc.,* 772 F.2d 802 (11th Cir.1985), which held that the claimant failed to prove that an attachment of cargo was conducted in bad faith.

[4] There was no attempt by Javelin to oppose this argument in its Memorandum in Opposition to Xcoal's Motion for Summary Judgment (Doc. 231). Javelin also does not include its claims for tortious and intentional interference in its motion for partial summary judgment. (Doc. 237). It is assumed the term "partial" is used in the title of Javelin's motion for this reason.

[5] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions issued before October 1, 1981, as well as decisions issued after that date by a Unit B panel of the former Fifth Circuit. *Bonner*

In *Furness II*, Hemmert Shipping Corporation/Texas Chartering, Inc. ("Hemmert") appealed the district court's ruling that Hemmert could not recover for conversion because said claim was identical to Hemmert's claim for wrongful attachment, which had failed. *Furness II,* 854 F.2d at 411. Hemmert sought compensation under a claim of conversion for the loss of use of its property during the period which it was under attachment. *Id*. The Eleventh Circuit explained "[i]t is an established principle of maritime law that one who suffers a wrongful attachment may recover damages from the party who obtained the attachment, provided he prove that such party acted in bad faith." *Id*. The Eleventh Circuit declined to address the "question of whether the common law tort of conversion, which does not contain the element of bad faith, provides a remedy in the context" because maritime precedent provides that the "claimant must prove bad faith by the party who obtained the attachment." *Furness II,* 854 F.2d at 412.

In *Industrial Maritime Carriers,* Industrial Maritime Carriers, LLC ("IMC"), the charterer of a vessel that was arrested in Brazil for collection of a judgment awarded to Dantzler, filed suit against Dantzler, Inc. in the Southern District of Florida for wrongful arrest of a vessel and tortious interference with contract and business relationships. 611 Fed.Appx. at 601. The Southern District of Florida ultimately granted summary judgment in favor of Dantzler. On appeal, the Eleventh Circuit opined that the tortious interference claim was "properly subsumed under the wrongful attachment claim" because the "proper cause of action" when a party seeks to recover on wrongful attachment and conversion theories "is wrongful attachment, not some other cause of action taken from the common law." *Id*. at 604 (citing *Furness II*, 854 F.2d at 412). The Eleventh Circuit did not consider the claim for tortious interference separate from the wrongful attachment claim.[6] *Indus. Mar. Carriers,* 611 Fed.Appx. at 604.

*v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

[6] The United States District Court for the Southern District of Florida did not consider the claim for tortious interference with contract and/or business relationship separately from the wrongful attachment claim, and this was not disputed by the parties on appeal. *Industrial Maritime Carriers, LLC v. Dantzler*, 611 Fed.Appx. at 604.

Under Alabama law, the elements of a tortious interference claim are: (1) the existence of a protectable business relationship; (2) of which the defendant knew; (3) to which the defendant was a stranger; (4) with which the defendant intentionally interfered; and (5) damage. *Ex parte BTC Wholesale Distributors, Inc.*, 400 So. 3d 561, 569 (Ala. 2023) (citing *White Sands Grp., L.L.C. v. PRS II, LLC*, 32 So. 3d 5, 14 (Ala. 2009)). The Alabama Supreme Court has recognized that the torts of interference with a contractual relationship and interference with a business relationship are separate and distinct torts but are related torts "that should be viewed on a spectrum." *BTC Wholesale Distributors,* 400 So. 3d at 569. "[T]he relevant difference between these torts is the object of the interference – i.e., the contract vs. the business relationship." *Id*. Notably, bad faith is not an element of an Alabama tortious interference claim.

Javelin's claims for tortious and intentional interference with a contract arise from the same facts as its maritime wrongful attachment claim. For each claim, Javelin seeks to recover damages for each day the cargo was seized as well as other damages such as attorney's fees. (*See* Doc. 1 in this action, and Doc. 1 in Cause No. 1:23-cv-00444-TFM-C). Thus, based on Eleventh Circuit precedent, the Alabama state law claim of tortious interference is not available to Javelin under the circumstances of this case.

Considering the foregoing, and Javelin's lack of response, it is recommended that summary judgment should be **GRANTED** in favor of Xcoal as to Javelin's claims for tortious and intentional interference with a contract and/or business relationship.

**b. Wrongful Attachment Claim**

Xcoal seeks to dismiss Javelin's claim for wrongful attachment on the basis that there is no evidence Xcoal acted in bad faith or with malice or gross negligence. Xcoal's motion for summary judgment is organized into the following broad arguments: (1) Javelin cannot meet the high standard of proof required for claiming wrongful attachment damages; and (2) Xcoal relied on advice of competent counsel which is a complete defense to Javelin's wrongful attachment claim. (*See* Doc. 219-1). In its response, Javelin claims Xcoal's seizure of coal based on a "hunch" that ADI made a 100% prepayment establishes Xcoal's reckless disregard for Javelin's legal rights, and the continued attachment, after Xcoal received proof of the payment structure between Javelin and ADI, establishes Xcoal's malice and bad faith. (Doc. 231, PageID.2492). Javelin also claims Xcoal has not met its burden of proving the advice of counsel defense applies here.

To support maritime attachment of property pursuant to Rule B, a plaintiff must show that:

(1) the plaintiff has a valid *prima facie* maritime claim against the defendant; (2) the defendant cannot be "found" within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment. *Austral Asia Pte. Ltd. v. SE Shipping Lines Pte. Ltd.*, C.A. No. 12-1600, 2012 WL 2567149, at *1-2 (E.D. La. July 2, 2012) (*citing Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2nd Cir.2006) (*abrogated on other grounds by Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2nd Cir.2009)).

Rule B provides, in relevant part: "If a defendant is not found within the district … a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process." Fed. R. Civ. P. Supp. Adm. Rule B (1). "No *quasi in rem* jurisdiction under Rule B can exist without some *res* to be attached. In fact, for Rule B attachment to be appropriate, it is clear that the property must be located within the district and the property must belong to the defendant." *Artic Ocean International, Ltd. v. High Seas Shipping Ltd.*, 622 F.Supp.2d 46, 51 (S.D.N.Y. 2009)(citing *Blueye Nav., Inc. v. Oltenia Nav., Inc.*, No. 94 CIV. 1500 (LAP), 1995 WL 66654 (S.D.N.Y. Feb. 17, 1995)). The purpose of a writ of foreign attachment under Rule B is twofold: (1) to obtain jurisdiction of the named respondent *in personam* through his property and only to the extent of his property, and (2) to seize such property as security in the event that suit against its owner is successful. *Frontier Acceptance Corp. v. United Freight Forwarding Co.*, 286 F. Supp. 367, 371 (D.C.N.J. 1968). "For maritime attachments under Rule B, the question of ownership is critical." *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia*, 817 F.3d 241, 246 (5th Cir. 2016)

When property not belonging to the defendant has been wrongfully attached or seized, the aggrieved party may recover damages "provided that he prove that such party acted in bad faith." *Furness Withy (Chartering), Inc., Panama v. World Energy Sys. Assocs., Inc.*, 854 F.2d 410, 411 (11th Cir. 1988) ("*Furness II*"); *Frontera Fruit Co., Inc. v. Dowling*, 91 F.2d 293, 294 (5th Cir. 1937) ("these awards are necessarily based on findings of bad faith, malice, or such negligence as would constitute bad faith"). As explained by the Fifth Circuit in *Frontera*:

> The gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad faith, malice, or gross negligence of the offending party. The reasons for the award of damages are analogous to those in cases of malicious prosecution. The defendant is required to respond in damages for causing to be done through the process of the court that which would have been wrongful for him to do himself, having no legal justification therefor and acting in bad faith, with malice, or through a wanton disregard of the legal rights of his adversary.

*Frontera*, 91 F.2d at 297. Mere negligence will not satisfy the burden of proof; rather, a party must show the attachment arose from either (i) malice, (ii) bad faith, or (iii) reckless disregard of the other party's legal rights. *Coastal Barge Corp. v. M/V Mar. Prosperity*, 901 F. Supp. 325, 328 (M.D. Fla. 1994). Negligence is defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation...." *Indus. Mar. Carriers,* 611 F. App'x at 604 (citing *Black's Law Dictionary* (10th Ed.2014)). Recklessness, on the other hand, is defined as "[c]onduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." *Id.* at 605 (citing *Black's Law Dictionary* (10th Ed.2014).

Xcoal first contends that wrongful attachment damages are awarded solely for outrageous conduct, and no conduct by Xcoal meets that standard. Xcoal provides the following bases in support: Xcoal had a good faith basis to believe that ADI owned or had an attachable property interest in the coal aboard the *Bulk Destiny*; ADI was purchasing the coal and had paid at least 25% of the purchase price; ADI was planning to complete the purchase and become the full titled owner of the coal; In Italian court proceedings, ADI argued against Xcoal that part payment allowed ADI to claim ownership over the coal; ADI owed Xcoal millions of dollars for previous purchases of coal and those amounts included substantial maritime elements, including vessel charter and demurrage; Xcoal had a good faith belief that there were sufficient maritime elements to assert a Rule B defense; Xcoal could protect its interests solely by attaching coal it knew was either owned by or being purchased by ADI; and Xcoal had no malice against Javelin, but was solely interested in attaching property of ADI. (*See* Doc. 219-1, PageID.2104). Xcoal only provided portions of Ernie Thrasher's deposition transcript as evidence to support its summary judgment motion. Xcoal does not cite to materials in the record supporting the foregoing declarations. However, Xcoal does cite various legal authority to support its position that asserting good faith legal and factual arguments, which a court rejects, do not give rise to wrongful attachment damages. (Doc. 219-1, PageID.2104-2105). Finally, citing *Comar Marine, Corp. v. Raider Marine Logistics, L.L.C.*, 792 F.3d 564 (5th Cir. 2015), Xcoal claims the facts in this case are vastly different from those limited cases awarding damages for wrongful attachment. (Doc. 219-1, PageID.2105).

Javelin claims the majority of Xcoal's motion is an "after the fact rationalization for 'outrageous conduct.'" (Doc. 231, PageID.2492). Javelin is correct that Xcoal's claim that it had a good faith basis to attach the coal because ADI made a 25% prepayment of coal (and thus arguably had an attachable property interest) is not the basis upon which Xcoal sought the attachment. (*See* Doc. 51, pageID.552, ¶6). Mr. Thrasher's deposition testimony shows Xcoal initiated the Rule B attachment because it assumed Javelin would require 100% payment upon loading the cargo. The record shows Xcoal sought to sustain the attachment on the premise that ADI had an attachable property interest in the coal because of the 25% prepayment. (*See Id.*) Javelin contends Xcoal's "hunch" about ownership is not a reasonable basis to initiate a Rule B attachment. Further, Javelin places emphasis on what it considers Xcoal's lack of legal advice supporting Xcoal's argument about ownership. (Doc. 231, PageID.2493).[7]

[7] In footnote 25 of Javelin's Memorandum in Opposition to Xcoal's Motion for Summary Judgment, Javelin summarizes and opines on deposition testimony of Michael Wray, citing to Exhibit 2. Exhibit 2

To establish a good faith basis for its actions, Xcoal repurposes its prior argument that Rule B is construed broadly and does not require a defendant have a particular type of interest in the property or hold title to the property subject to an attachment. (Doc.219-1, PageID.2105). Xcoal again cites *World Fuel Servs., Inc. v. SE Shipping Lines Pte., Ltd.*, No. CIV.A. 10-4605, 2011 WL 446653 (E.D. La. Feb. 4, 2011), *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (2d Cir. 1929), and *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V.*, 817 F.3d 241, 245 (5th Cir. 2016) to support its argument. As noted in the Report and Recommendation (Doc. 51) regarding the motions to vacate and motion for security costs (Doc. 44, 16, 43), the foregoing cases contradict Xcoal's position regarding Rule B. (*See* Doc. 51, PageID.554). For example, in *Malin*, the Fifth Circuit observed that "the instant at which title to personal property passes from seller to buyer depends on the parties' intent." 817 F.3d at 248. The Circuit explained that there are two basic types of contracts as to this question: those that provide that title passes upon delivery (a "credit sale") and those that provide that title does not pass until full payment is made (a "cash sale"). *Id*. The contract at issue was "silent as to when payment was due or when title would pass," and the Court concluded based on the parties' conduct that the agreement should be classified as a "credit sale" – in which title passed upon delivery. *Id*. Only on that basis – that the property at issue had been delivered and right of title had passed – did the Fifth Circuit find that there was an attachable property right under Rule B. *Id*. at 249. Xcoal again argues that the terms of the Purchase and Sales Confirmation, ADI's tendering of the prepayment, and Alabama's adoption of the Uniform Commercial Code supports Xcoal's position that ADI had an attachable property interest in the coal aboard the *Bulk Destiny* under Rule B.

In its Verified Complaint, Xcoal asserted that "on information and belief … ADI is the owner of coal that is located in this District…." but later sought to defend the Rule B attachment on the theory that

attached to Javelin's Memorandum (Doc. 231) consists of excerpts from Mr. Wray's deposition testimony. However, Exhibit 2 (attached to Doc. 231) does not appear to contain pages 41-42, 66-72, or 81-82 referenced in the Memorandum.

ADI holds "conditional title to the coal pending the tendering of the Provisional Payment to Javelin." (*See* Doc. 1, and Doc. 51 (citing Doc. 21, PageID.121)). Xcoal now argues that it had a good faith basis to seize the coal because Xcoal believed ADI either owned the coal *or* had an attachable property interest in the coal based on conditional title. Javelin claims Xcoal's conditional title argument does not explain Xcoal's pre-arrest conduct but does relate to Xcoal's post-arrest conduct. (Doc. 231). Again, deposition testimony of Mr. Thrasher shows that at the time of filing the attachment, Xcoal assumed a prepayment of 100% of the price of the coal had been made by ADI to Javelin, making ADI owner. Xcoal did not receive documentation showing the terms of the sale until after the vessel was seized and the property attached. Thus, it's reasonable to think, based on these facts, that Xcoal's conditional title argument would only apply to Xcoal's post-arrest actions.

The Court has already ruled the ADI-Javelin sale contract, governed by English law, does not allow attachment based on a partial ownership theory. (*See* Doc. 51). The contract is not silent as to when title passes. It provides that title shall not pass to ADI-and ADI shall have no right to receive delivery or obtain possession of the coal -until ADI makes payment in full. Citing *Wave Maker Shipping Co., Ltd. V. Hawksphere Shipping Co. Ltd.*, 56 Fed. Appx. 594 (4th Cir. 2003), Javelin alleges Xcoal's post-arrest conditional title argument is not based in the law or a good faith extension of the law. (Doc. 231, PageID.2495). Javelin considers this post-arrest conduct by Xcoal to be evidence of malice. However, Javelin has provided no authority that establishes asserting incorrect legal arguments amount to bad faith, malice, or gross negligence.

Xcoal also recycles its prior argument that the contracts between Xcoal and ADI are maritime contracts under the mixed contract doctrine establishing jurisdiction to support the Rule B attachment. Xcoal contends this argument was initially made in good faith and does not constitute bad faith or malice necessary for an award of damages for wrongful attachment. (Doc.219-1, PageID.2114). Javelin alleges that Xcoal proceeded with reckless disregard for Javelin's rights by initiating the Rule B attachment despite its own counsel's advice that proving the contracts were maritime would be difficult. (Doc. 231, PageID.2492,2497).[8] Javelin further claims that Xcoal proceeded to make incorrect and legally unsupportable arguments about the contracts being maritime in nature after the attachment, which constitutes malice and bad faith. (*Id.*). Xcoal was generally advised pre-arrest that it would be difficult to prove the contracts were maritime under the ADI sales contracts. (Doc.221, PageID.2189). Following the seizure, Xcoal was advised that the question of maritime jurisdiction over this case is a very difficult legal issue because there is case law stating that commodities sales purchase agreements are not maritime contracts. (Doc.221, PageID.2194). Xcoal's position in this regard was described as a "much weaker legal position." (*Id.*). However, it does not appear from the evidence that Xcoal was advised there was no legal basis to proceed with its mixed contract argument. Javelin has not produced any authority establishing these actions by Xcoal amount to bad faith, malice, or reckless disregard for Javelin's rights.

Viewing the evidence in the light most favorable to Javelin, the non-movant, and drawing all reasonable inferences in favor of Javelin, it is determined that Javelin has failed to provide evidence from which a reasonable jury could find that Xcoal's action of attaching the cargo of coal was done in bad faith, with malice, or reckless disregard for Javelin's rights. Accordingly, it is **RECOMMENDED** that summary judgment be granted in favor of Xcoal as to Javelin's claim of wrongful attachment.

### B. Javelin's Motion for Partial Summary Judgment

#### a. Wrongful Attachment Claim

Javelin seeks summary judgment on its claims for wrongful attachment and storage costs during the arrest period. (*See* Doc. 237, 237-19). Neither Javelin's motion nor its supplemental brief explain why it seeks "partial" summary judgment. According to Javelin, the undisputed facts – no evidence or indicia of title or ownership of the cargo, no due diligence with respect to the ownership of the cargo, no written legal advice that Xcoal had a maritime claim against ADI, and that maritime jurisdiction was unlikely to

[8] In its Memorandum, Javelin again cites to certain exhibits attached to Doc. 221, which is Javelin's Motion for Partial Summary Judgment filed under seal. These exhibits were refiled with Doc. 237.

exist – demonstrate that Xcoal acted either in bad faith, with malice, with gross negligence, or with reckless disregard in proceeding with the Rule B attachment. Javelin claims Xcoal ignored the advice of counsel and proceeded to arrest the cargo despite knowing it had to prove ownership or title to the coal, and it had to have a maritime claim against ADI. (*Id.*). In support of this argument, Javelin relies on correspondence from Mark Coberly ("Mr. Coberly") and Mr. Wray as well as their respective deposition testimony. Xcoal disputes Javelin's characterization of Mr. Coberly's and Mr. Wray's deposition testimony, claiming transcript excerpts are taken out of context and incomplete. (Doc. 240, PageID.2904).

Javelin's advice of counsel argument, especially regarding advice given by Mr. Coberly, is not persuasive. A review of documentation provided with the parties' briefs show Xcoal was advised by Mr. Coberly that he did not think judges in Norfolk, Virginia would issue an attachment without clear evidence of ownership, but this advice was preliminary and specific to judges in Norfolk, Virginia. (*See* Doc. 237-4, PageID.2675, Doc. 240-6). Mr. Coberly's deposition testimony clearly shows his advice was specific to the court in Virginia. (*See* Doc. 240-6). In his deposition, Mr. Coberly stated:

> What I do know is that a judge in Norfolk will want to see some documents showing title or showing the time for passage of title or some evidence of title other than an argument that might be made at a later date. This may be perfectly valid that you can make this argument without having clear title, but the Court in Norfolk is not going to arrest a vessel based in an argument that you might make later in court.

(Doc. 240-6, PageID.2996-97). Mr. Coberly also testified that "other courts are not as strict." (*Id.*). As noted by Xcoal in its brief, Mr. Coberly was not retained by Xcoal due to a conflict of interest. (Doc. 240, PageID.2909). Thus, Mr. Coberly was not actually Xcoal's counsel. Mr. Wray, however, did serve as Xcoal's counsel. Mr. Wray testified that he disagreed with Mr. Coberly's concerns about having evidence of title and ownership. (Doc. 237-12, PageID.2733). Mr. Wray testified that he did not recall providing written advice to Xcoal between September 14 and the date Xcoal's complaint was filed. (Doc.240-7, pageID.3025, p.81, lines 22-23, p.82, lines 1-2). He also testified that Xcoal was advised by Squire Patton Boggs ("Squire Patton") that there was a good argument the cargo was ADI's property. (Doc.240-7, PageID.3025, p.82, lines 14-23, p. 83, lines1-6). The evidence does not prove that Xcoal ignored advice of its counsel by filing and maintaining the attachment in Mobile, Alabama.

Xcoal was advised by Squire Patton and Mr. Wray that maritime jurisdiction was required, but jurisdiction could potentially be established under a mixed contract doctrine. (Doc. 240-7, PageID.3011, p. 27, lines 3-22). Xcoal was also advised by counsel that proving Xcoal's claims against ADI were maritime in nature would be difficult. (Doc.237-19, PageID.2864, Doc. 237-5, PageID.2682, Doc., 237-6, PageID.2687). Mr. Wray confirmed this advice was rendered before and after the attachment. (Doc. 237-19, PageID.2864). Again, no evidence has been presented that Xcoal was advised by counsel not to file or maintain the attachment.

Javelin also claims Xcoal misrepresented to the Court that ADI owned the coal at the time of the seizure and this conduct represents bad faith. Xcoal argues its investigation revealed that Javelin was receiving payment from ADI before Javelin would load the cargo. (Doc. 240, PageID.2911). Xcoal further contends the only way it could identify the "exact" ownership interest of ADI in the coal aboard the *Bulk Destiny* was to seek an attachment. (*Id.*).

The evidence shows Xcoal knew Javelin was the seller of the subject coal as of September 14, 2023. (Doc. 237-11, PageID. 2724). In September 2023, Mr. Coberly informed Squire Patton that judges in his district were not going to issue an attachment unless there was clear evidence of ownership. (Doc. 237, PageID.2690). Mr. Coberly was not retained as counsel for Xcoal. Mr. Wray disagreed with Mr. Coberly's concerns about title and ownership. (Doc. 237-12, PageID.2733). Xcoal was also advised by Squire Patton and Mr. Wray that Xcoal had to have maritime jurisdiction, and such jurisdiction could potentially be found based on a mixed contract doctrine. (Doc. 240-7, PageID.3011, p.27, lines 3-22). Mr. Thrasher's deposition testimony reveals that he understood iron ore suppliers were insisting on 100% payment from ADI prior to loading the vessel as of July of 2023. (Doc.237-1, PageID.2643, 2646). He testified that his assumption about prepayment was based on his knowledge and experience in the industry. (Doc.237-1, PageID.2644). He confirmed that he had not spoken to any of the ADI suppliers about whether they were insisting on 100% prepayment for cargo. (Doc.237-1, PageID.2647). Mr. Thrasher testified that he read in a shipping publication that a prepayment was going to be made. (Doc. 237-1, PageID.2647-2648). He testified that he did not think Javelin would charter a ship and load the cargo without having 100% prepayment. (Doc. 237-1, PageID.2648). He confirmed that prior to September 22, 2023, no one had informed Xcoal that ADI had fully paid for the shipment of cargo. (*Id*.). He also confirmed that as of September 22, 2023, Xcoal had not reviewed any documents to confirm that title had indeed vested in ADI as of the attachment. (*Id*.). Xcoal was informed by Javelin that Javelin owned the coal. (Doc. 237-13, 2756). On September 25, 2023, Javelin provided Xcoal with a redacted copy of Purchase and Sales Confirmation dated September 6, 2023. (Doc. 237-8, PageID.2701, Doc.237-14, PageID.2757). Mr. Thrasher testified the Purchase and Sales Confirmation was incomplete and there was a delay in getting the information. (Doc.237-1, PageID.2655).

As discussed *supra*, mere negligence will not satisfy the burden of proof for wrongful attachment; rather, a party must show the attachment arose from either (i) malice, (ii) bad faith, or (iii) reckless disregard of the other party's legal rights. *Coastal Barge Corp. v. M/V Mar. Prosperity*, 901 F. Supp. 325, 328 (M.D. Fla. 1994). The facts of this case are distinguishable from those awarding damages for wrongful attachment. *See e.g. Id.* (The arrestor knew of a previous agreement not to rearrest the vessel but did so regardless of the contract. The District Cout found the arrestor proceeded recklessly).

Considering the circumstances here, the Eleventh Circuit's findings in *Industrial Maritime Carriers, LLC* are significant. In that case, IMC alleged that Dantzler failed to provide the Brazilian court with the true identity of the vessel's owner prior to the vessel's arrest. *Indus. Mar. Carriers, LLC,* 611 F. App'x at 604. There was no evidence in the record to support IMC's conclusion that Dantzler knew the owner of the vessel before the arrest. (*Id*.). IMC claimed that Dantzler would have known the owner had Dantzler consulted maritime publications and resources. (*Id*.). The Eleventh Circuit found Dantzler's decision to proceed with the attachment without performing due diligence constituted negligence. Regarding Dantzler's post-arrest actions, the record showed that after learning the vessel owner's identity, Dantzler immediately notified its United States counsel who then notified the court. The Eleventh Circuit noted,

> In one of our few precedents to address the issue of wrongful arrest and bad faith, we explained that the district court did not err in determining that there was no bad faith when the defendant was notified that it was seizing the wrong party's vessel, but requested from that party further evidence to support that fact, rather than immediately releasing the vessel. *Furness Withy (Chartering), Inc., Panama v. World Energy Sys. Assocs., Inc.,* 772 F.2d 802, 808 n. 9 (11th Cir.1985) ("*Furness I*"). Thus, as *Furness I* indicates, there is no duty to do anything beyond diligently investigating the new information. The arresting party need not immediately seek the release of a vessel just because the arrest is contested.

*Indus. Mar. Carriers, LLC*, 611 F. App'x at 604–05.

In sum, Javelin has not produced any evidence that proves Xcoal's pre-arrest and post-arrest actions meet the standard required under *Frontera*. Xcoal made assumptions about ownership of the cargo at the time of loading based on industry knowledge and experience as well as a shipping publication. Xcoal's knowledge that Javelin was selling the coal to ADI was not actual knowledge of ownership at the time of loading. Xcoal's counsel advised there was a good argument that ADI had a property interest in the coal. Xcoal was also advised it could potentially establish jurisdiction under a mixed contract doctrine. Javelin places significance on Xcoal's pre-arrest lack of due diligence, but *Industrial Maritime Carriers, LLC* demonstrates that Xcoal's failure to further investigate ownership prior to attachment amounts to nothing more than negligence. And "negligence is insufficient for liability under the *Frontera* standard." *Indus. Mar. Carriers*, 611 F. App'x at 605. After being notified Javelin owned the coal, Xcoal requested evidence. On September 25, 2023, Javelin provided Xcoal with a redacted copy of Purchase and Sales Confirmation dated September 6, 2023. (*See* Doc. 237-8, PageID.2701, Doc.237-14, PageID.2757). Mr. Thrasher testified the Purchase and Sales Confirmation was incomplete and there was a delay in getting the information. (Doc.237-1, PageID.2655). Xcoal had "no duty to do anything beyond diligently investigating the new information." *Indus. Mar. Carriers*, 611 F. App'x at 607. It is undisputed that Xcoal sought to exert commercial pressure over ADI to collect a debt, but Xcoal also had legal bases for opposing the release of the *Bulk Destiny*. Xcoal's legal arguments were rejected by the Court but "wrongful arrest is not a tool to redress good-faith mistake of a party's identity (Marastro) or the law (Central Oil, Ocean Ship)…[t]hese are the types of mistakes that our admiralty procedures anticipate and accept as a necessary evil to be suffered in the interest of preventing parties from fleeing a court's jurisdiction before the dispute can be adjudicated." *Indus. Mar. Carriers*, 611 F. App'x at 607. Eleventh Circuit precedent instructs that Xcoal's actions, at most, constitute negligent error. Javelin has failed to prove that it is entitled to summary judgment on this issue.

**b. Storage Costs**

Javelin also moves for summary judgment on its entitlement to recovery of the costs for storage of the seized coal. (Doc.237-19, PageId.2865). Javelin avers that judgment may be entered against Xcoal on these damages alone irrespective of a ruling on the motion related to Javelin's wrongful attachment claim. Javelin requests the Court enter judgment against Xcoal in the amount of at least a total of $482,707.19, plus any additional interest accrued from the filing. Xcoal has not challenged the amount Javelin seeks to recover.

Upon review of relevant case law authority, including *Marastro Compania Naviera, S.A. v. Canadian Mar. Carriers, Ltd.*, 959 F.2d 49 (5th Cir. 1992), *Zak Marine Co. v. Exportkhleb of Moscow*, 1993 U.S. dist. LEXIS 9953 (E.D. La. July 16, 1993), *Indus. Mar. Carriers, LLC v. Dantzler, Inc.*, 62 F. Supp. 3d 1355 (S.D. Fla. 2014), aff'd, 611 F. App'x 600 (11th Cir. 2015), and *Jaldhi Overseas PTE Ltd. v. United Bulk Carriers Int'l LTDA.*, No. CV 15-6148, 2016 WL 852481 (E.D. La. Mar. 4, 2016), it is determined that Javelin's request to collect storage costs under 28 U.S.C. §1921 (a)(1)(E) is untimely considering the stage of litigation. A determination of whether either party is entitled to fees and expenses under §1921 depends on the District Judge's decision on final judgment.[9]

[9] The undersigned is skeptical whether Javelin can be considered an innocent third party under the circumstances. Regardless, the prevailing party may be entitled to certain post-judgment expenses and fees.

**C. Advice of Counsel Affirmative Defense**

Because the Court recommends summary judgment in favor of Xcoal on Javelin's claim for wrongful attachment, a discussion and determination regarding whether Xcoal's advice of counsel defense applies under the circumstances here is not necessary.

**IV. Conclusion**

For the foregoing reasons, it is recommended that Xcoal's Motion for Summary Judgment be **GRANTED**, and Javelin's Motion for Partial Summary Judgment be **DENIED**.

Javelin's Motion to Withdraw and Refile Motion for Partial Summary Judgment (Doc. 236) is **GRANTED**. Any other motions referred to the undersigned in this action are considered resolved by this Report and Recommendation.

**Notice of Right to File Objections**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. Ala. GenLR 72(c). The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error, if necessary, "in the interest of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 29th day of April, 2026.

**/s/WILLIAM E. CASSADY**
**UNITED STATES MAGISTRATE JUDGE**