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

XCOAL ENERGY & RESOURCES	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CA NO.: 1:23-cv-00361-TFM-C**
	)	
ACCIAIERIE D'ITALIA S.P.A,	)	
	)	
Defendant,	)	
	)	
PANGAEA LOGISTICS SOLUTIONS (BVI), LTD.,	)	
	)	
Intervenor,	)	
	)	
v.	)	
	)	
JAVELIN GLOBAL COMMODITIES (UK) LTD. and ACCLAIERIE D'ITALIA, S.P.A.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

This matter concerns an Order for Writ of Attachment and Garnishment pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Doc. 9) ("Rule B Attachment"), which was obtained by Xcoal Energy & Resources ("Xcoal") on September 22, 2023 on an *ex parte* basis based on a Verified Complaint and Request for Issuance of Writ of Maritime Attachment and Garnishment setting forth certain representations ("Xcoal Compl.") (Doc. 1). Pending before the Court are the Emergency Motion to Vacate Maritime Arrest and Attachment and Memorandum in Support filed by Acciaierie D'Italia S.P.A. ("ADI") (Doc.

44), the Emergency Motion to Vacate Maritime Arrest and Attachment and Memorandum in Support filed by Javelin Global Commodities Ltd. ("Javelin") (Doc. 16), and the Motion for Security for Costs Under Supplemental Rule E(2)(b) filed by Javelin (Doc. 43).

Having heard the parties in a hearing held on October 3, 2023, and having reviewed the parties' submissions as well as the entire record, the undersigned makes the following findings of fact and conclusions of law, and recommends that the Court enter a judgment in favor of ADI and Javelin. Xcoal has failed to show, as was its burden, that the Rule B attachment should not be vacated. Two of the required elements needed to support the Rule B attachment have not been shown. First, Xcoal has not established that the property seized is the property of ADI or that ADI has a possessory interest in the property subject to attachment. Secondly, ADI has established that the contractual relationship between Xcoal and ADI referenced in support of the application for a writ of attachment is not based on maritime contracts but contracts for the sale of goods. *See* Order (Doc. 49) (October 5, 2023). Set forth below are the Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. The Parties

1. ADI operates a steel-manufacturing business, primarily through its plant in Taranto, Italy, the largest steel-making facility in the European Union. Declaration of Domenico Ponzio ("Ponzio Decl.") (Doc. 44-1, PageID.312) at ¶ 3. Italian law designates the Taranto plant as a plant of

national interest (the only plant in the country with such designation) and mandates its continuous operation. *Id.,* PageID.313-14, at ¶ 12. ADI's Taranto plant manufactures flat steel products, which are used by its customers for manufacturing, motor vehicles, home construction, infrastructure, food processing, and many other industrial uses. *Id.* at ¶ 13.

2. Xcoal is a supplier of coal, including for ADI. (Momper Decl., Doc. 47-1, PageID.419, ¶ 3.

B. The Contracts Between ADI And Xcoal

3. ADI and Xcoal entered into contracts under which Xcoal sold and ADI purchased coal. Specifically, ADI and Xcoal entered into a Master Agreement dated March 14, 2023 ("Master Agreement"). Ponzio Decl. at ¶ 18 and Ex. 6 (Doc. 44-7, PageID.368-378). ADI and Xcoal also entered into certain Spot Purchase Agreements ("Purchase Agreements"), to which the Master Agreement applies. Ponzio Decl. at ¶ 18 and Ex. 7 (Doc. 44-8, PageID.380-391). These agreements are sale of goods contracts for the sale and purchase of coal.

4. Support for the conclusion that the contracts are for the sale of goods (specifically, coal) is reflected in the title of the Purchase Agreements: a "Spot Purchase Agreement [relating to the] sale and purchase of Xcoal USA Permac LV PCI Coal." Ponzio Decl., Ex. 7 (Doc. 44-8, PageID.381) (Purchase Agreement). The terms of the contracts confirm their nature and purpose as a contract for the sale of goods: "The purpose of this Purchase Agreement is to outline the special conditions under which the Seller will sell

and the Buyer will buy the raw material as defined hereunder (the 'Product')." *Id.* at Section 1. Thus, the primary objective of the contracts is the sale and purchase of coal. *Id.* That the coal was to be shipped to ADI's plant in Taranto, Italy does not change the fact that they are sale of goods contracts whose primary objective is the sale of coal. *Id.*

C. The Dispute Between ADI And Xcoal

5. Earlier this year, a dispute arose between ADI and Xcoal concerning certain Purchase Agreements under which ADI agreed to purchase coal from Xcoal. The dispute is in arbitration under the rules and auspices of the International Chamber of Commerce ("ICC"). In July, Xcoal filed requests for arbitration in the ICC, alleging purported contractual breaches by ADI. Ponzio Decl. at ¶ 18 and Ex. 5 (Doc. 44-6, PageID.365-366) (Excerpts from Request for Arbitration dated July 18, 2023).

6. Xcoal submitted letters to the ICC quantifying its claims against ADI at $3,437,552.00. Ponzio Decl. at ¶ 19 and Ex. 9 (Doc. 44-10) (Xcoal's letters to the Secretariat of the ICC dated August 4, 2023). The ICC confirmed, based on Xcoal's representations, that "the amount in dispute is now quantified at US$ 3 437 552." Ponzio Decl., Ex. 8 (Doc. 44-9) (Secretariat of the ICC's letter to Xcoal and ADI dated August 24, 2023). In its Verified Complaint that served as the basis for obtaining the Rule B Attachment on an *ex parte* basis, Xcoal stated that "[t]he Swiss arbitration arises out of ADI's various breaches of the Agreements, which have caused

Xcoal to sustain damages of approximately $38,000,000 in U.S. currency." *See* Xcoal Compl. at ¶ 10.

7. Apparently, Xcoal had not finished its filing of claims in the arbitration under Swiss law at the time of attachment. The estimate of damages submitted in the Verified Complaint (Doc. 1) ($38,000,000) was based on computations now disclosed in a declaration filed on October 3, 2023. Momper Decl., Doc. 47-1, PageID.421-22.

D. The Coal Belonging To Javelin That Is Subject To The Rule B Attachment

8. As noted, Xcoal obtained the Rule B Attachment on an *ex parte* basis pursuant to a Verified Complaint it filed on September 22, 2023 (Doc. 1) and caused the Court to issue the Rule B Attachment the same day (Doc. 9). The Rule B Attachment called for the seizure of property – specifically, coal – aboard the MV BULK DESTINY (IMO No. 9781994). Rule B Attachment (Doc. 9).

9. In its Verified Complaint that served as the basis for the Court's issuance of the Rule B Attachment, Xcoal asserted that "ADI has property located within this District, specifically a cargo of coal that is currently aboard and/or will soon be loaded aboard the non-party garnishee vessel M/V BULK DESTINY." Xcoal Compl. at ¶ 7. It further represented to the Court that ADI "owns tangible property, namely coal," in this District, and that "ADI is the owner of the coal." Xcoal Compl. at ¶¶ 25, 26. Based on the representations in Xcoal's Verified Complaint, including that "ADI is the

owner of the coal," the Court issued the Rule B Attachment (Doc. 9) and the Court's Deputy Clerk then entered a Warrant of Arrest (Doc. 13).

10. However, the cargo of coal that is the subject of the Rule B Attachment was owned by Javelin at the time of the attachment, not ADI. Javelin is the seller under a sale of goods contract with ADI. On September 6, 2023, ADI entered into a Master Coal Purchase and Sale Agreement with Javelin. Ponzio Decl., Ex. 1 (Doc. 44-2, PageID.318-349) (Master Coal Purchase and Sale Agreement). On that date, ADI and Javelin also entered into a Purchase and Sale Confirmation No. AIE23(TS)0001. Ponzio Decl., Ex. 2 (Doc. 44-3, PageID.351-359) (Confirmation). Under these agreements, ADI ordered from Javelin approximately 50,000 metric tons of "Javelin Oak Grove LV Hard – Coking Coal". *Id.* at PageID.351. That coal was then loaded onto the vessel M/V Bulk Destiny (IMO No. 9781994), which was to be shipped from Mobile, Alabama so as to arrive in Taranto, Italy on or about October 16, 2023. Ponzio Decl., PageID.313 at ¶ 7.

11. The cargo of coal is due to be shipped to ADI in accordance with contracts between Javelin and ADI – specifically, a Purchase and Sale Confirmation ("Confirmation") executed pursuant to the Master Coal Purchase and Sale Agreement. *Id.,* PageID.312 at ¶ 5.

12. The Confirmation calls for ADI to make the following payments:

i. a prepayment of USD 3,506,250.00 on September 19, 2023 (the "Prepayment");

ii. a provisional payment five days prior to the Vessel's arrival in Taranto (the "Provisional Payment");

iii. a final adjustment payment (if needed) after discharge of the Vessel (the "Final Payment").

Id., PageID.313 at ¶ 8.

13. The Confirmation provides: "Title shall pass once Prepayment and Provisional Payment has been received in full." Ponzio Decl., Ex. 2 (Doc. 44-3, PageID.351) (Confirmation) at 3. It is undisputed that ADI has not made the Provisional Payment, which would not become due until five days prior to the Vessel's arrival in Taranto, Italy. Accordingly, because ADI has not made the Provisional Payment, it does not hold title to the coal or have a right to possess it or take delivery of it (or any part of it). *Id.*

14. The Confirmation and Master Coal Purchase and Sale Agreements are subject to the laws of England and Wales. Ponzio Decl., Ex. 1 (Doc. 44-2) (Master Coal Purchase and Sale Agreement) at Section 22.1 (PageID.338); Ponzio Decl., Ex. 2 (Doc. 44-3, PageID.351) (Confirmation).

E. Additional Costs Caused By The Rule B Attachment

15. Because Xcoal obtained the Rule B Attachment after the cargo of coal had been loaded on the M/V BULK DESTINY, the Rule B Attachment has caused the BULK DESTINY to be detained at the Port of Mobile. *See* Motion for Security for Costs Under Supplemental Rule E(2)(b) (Doc. 43); Declaration of Peter Michael James Bradley ("Bradley Decl.") (Doc. 16-1) at ¶¶ 5–6. In addition, though Xcoal does not have a claim

against the owner of the M/V BULK DESTINY, Pangaea Logistics Solutions (BVI) Ltd. ("Pangaea"), the Rule B Attachment that Xcoal obtained resulted in the seizure of the BULK DESTINY. Rule B Attachment (Doc. 9).

16. The detention of the M/V BULK DESTINY has caused demurrage charges to be incurred at the rate of $23,000 per day. Motion for Security for Costs Under Supplemental Rule E(2)(b) (Doc. 43); Bradley Decl. at ¶ 10; Emergency Motion to Vacate Maritime Arrest and Attachment and Memorandum in Support (Doc. 16).

CONCLUSIONS OF LAW

1. The two essential elements needed to support a Rule B attachment have not been shown by Xcoal. First, Xcoal has not established that the property seized is the property of ADI or that ADI has a possessory interest in the property, a dispositive issue in this matter. Secondly, ADI has established that the contractual relationship between Xcoal and ADI referenced in support of the application for a writ of attachment is not based on maritime contracts but contracts for the sale of goods. This is also a dispositive issue.

A. The Coal Subject To The Rule B Attachment Is Not The Property Of ADI

2. That the property arrested is the property of ADI is a threshold issue. Xcoal must establish this to obtain and sustain the Rule B Attachment. *See, e.g., 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) (noting requirement that "the defendant's property [] be found within the district"). "For maritime

attachments under Rule B . . . the question of ownership is critical. As a remedy *quasi in rem*, the validity of a Rule B attachment depends entirely on the determination that the *res* at issue is the property of the defendant at the moment the *res* is attached." *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 69 (2d Cir. 2009). Xcoal has failed to satisfy this requirement. The coal that is subject to the Rule B Attachment belongs to Javelin. The coal is not the property of ADI; nor does ADI have a right to possess it.

3. The contract between Javelin as seller and ADI as buyer provides: "Title shall pass once Prepayment and Provisional Payment has been received in full." Ponzio Decl., Ex. 2 (Doc. 44-3) (Confirmation) at 3. Because it is undisputed that ADI has not paid the Provisional Payment, ADI does not hold title to the coal or have any right to possess it or take delivery of it. *Id.*

4. The conclusion that the coal does not belong to ADI is consistent with Xcoal's assertions in its arbitration with ADI as to its own contracts with ADI, which are inconsistent with Xcoal's assertions in this action that ADI is the "owner of the coal" or has a right to possess it. Xcoal's contracts with ADI were structured the same way that ADI's contract with Javelin is structured, with a prepayment before shipping and title passing only upon the subsequent making of payment in full, and Xcoal's CEO has acknowledged that he understood the Javelin contract likely worked the same way. *See* Declaration of Joel Momper (Doc. 23-1, PageID.156) at ¶¶ 6-9. While Xcoal

asserted in its verified petition that ADI was the "owner of the coal" before it was even shipped, Xcoal averred in its arbitration with ADI that "title to the cargo does not pass to ADI until such time as ADI pay[s] to Xcoal the full price of all the goods under [the] Purchase Contract." Ponzio Decl., Ex. 5 (Doc. 44-6, PageID.366) (Excerpts from Xcoal's Request for Arbitration dated July 18, 2023).

5. As noted, Xcoal obtained the Rule B Attachment based on the premise that "ADI has property located within this District, specifically a cargo of coal," ADI "owns tangible property, namely coal" in this District, and "ADI is the owner of the coal." Xcoal Compl. (Doc. 1) at ¶¶ 7, 25, 26. Because the predicate for the issuance of the Rule B Attachment has not been established by Xcoal, the Rule B Attachment should be vacated.

6. After Javelin demonstrated in its motion to vacate that Javelin was the owner of the coal and that title would not pass to ADI unless and until ADI made the Provisional Payment under the Confirmation (Doc. 44-3), Xcoal abandoned the assertion in its Verified Complaint that "ADI is the owner of the coal" and instead sought to defend the Rule B Attachment on the theory that ADI holds "conditional title to the coal pending the tendering of Provisional Payment to Javelin." *See* Xcoal's Opposition to Javelin's Motion to Vacate, Doc. 21, PageID.121 at 7. Xcoal cannot sustain the Rule B Attachment by offering a different premise from the one upon which it obtained the Attachment. But even if could attempt to do so, it still has failed

to establish that the coal is the property of ADI or that ADI holds a property right subject to attachment.

7. Xcoal has not shown that ADI has any kind of attachable title or property rights in the coal. If Xcoal's argument is that conditional title means title that will pass in the future after certain events occur, Xcoal is acknowledging that ADI has no title today. The contract between Javelin and ADI provides that at the time of arrest ADI had no title or rights to the coal and will not have title unless and until ADI makes the Provisional Payment that would become due when the shipment of coal is five days from delivery to ADI in Taranto, Italy.

8. Unless and until ADI makes all the required payments, ADI does not have title to the coal, does not have the right to possess the coal and is not entitled to delivery of the coal. To the contrary, the Confirmation provides that if ADI does not make the Provisional Payment, Javelin is free to sell the coal to another party. *See* Ponzio Decl., Ex. 2 (Doc. 44-3, PageID.353-354) (Confirmation).

9. To the extent that Xcoal is suggesting that because ADI has made the first Prepayment of approximately 25% of the total amounts that must be paid under the contract, ADI has a property right giving it a right to possess 25% of the coal that is the subject of the contract, this assertion is unsupported and in fact refuted by the contract between ADI and Javelin. The Confirmation establishes that ADI has no title or right to possess or take delivery of any portion of the coal unless and until it makes the Provisional

Payment; and, as noted, if ADI does not make the Provisional Payment, Javelin is free to sell the coal to another party. *See Id*. Thus, ADI would have no right to appear at the dock in Mobile and seize 25% of the coal. That is contrary to what ADI's contract with Javelin provides and therefore would be illegal. To attach "property" that purportedly belongs to ADI, Xcoal must stand in the shoes of ADI. ADI has no right to seize 25% of the coal (or any of the coal cargo) that is subject to its contract with Javelin, and likewise Xcoal has no such right.

10. Significant cases that Xcoal cites in an effort to support its argument[1] fail to demonstrate a basis for supporting this attachment. To begin, in three of the cases on which Xcoal relies, the party whose property was attached had both possession of the property and the right to possess it. Here, ADI has neither: it does not possess the coal or have any right to possess it. Further, the reasoning of these cases, when applied here, does not support Xcoal's argument but instead contradicts it.

11. In *Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia S.A.*, the Fifth Circuit's analysis of whether property was subject to attachment focused on when title to the property had passed. The court observed that "the instant at which title to personal property passes from seller to buyer depends on the parties' intent." 817 F.3d 241, 248 (5th Cir. 2016).[2] The

[1] *See* responses to the motions to vacate filed by Xcoal on September 27, 2023 (Doc. 21) and October 3, 2023 (Doc. 47).

[2] The *Malin* court was applying Texas law, but the basic principle that the parties' respective rights and obligations depend on their intent as expressed in their contract is a fundamental principle of contract law.

court 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"). 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 (upholding the attachment "[b]ecause OSA held title to the bunkers at the time of Malin's attachment").[3]

12. By contrast, the contract between ADI and Javelin 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. Thus, the reasoning of *Malin* establishes that ADI has no title to the coal and therefore the coal is not property of ADI that is subject to attachment.

13. The *Malin* decision also makes clear why another decision on which Xcoal relies, *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.,* 31 F.2d 265 (2d Cir. 1929), does not apply here. In *Kingston*, the party subject to attachment had *possession* of the vessel at issue. Recognizing that possession "is historically the original source of all title,"

[3] Xcoal therefore was wrong when it asserted in opposition to Javelin's motion to vacate that *Malin* upheld an attachment "even though the vessel operator had not taken title to the bunkers." *See* Doc. 21 at 7.

Judge Hand noted that "[i]t would be curious if possession, coupled with a conditional right to title, could now be thought insufficient to support a seizure." *Id*. at 266-67. Accordingly, that court declined to vacate the attachment. *Id.; see also Malin*, 817 F.3d at 245. Here, ADI does not have possession of the coal or any right to possess it. As discussed, the Javelin-ADI Confirmation provides that unless and until ADI has made the Provisional Payment, ADI has no right of title to the coal or any right to possess it or take delivery of it. Thus, the possession of the attached property, combined with a conditional right of title, that created sufficient ownership in *Kingston* does not exist here.

14. For the same reason, the third case on which Xcoal relies, *World Fuel Servs. Inc. v. SE Shipping Lines PTE, Ltd.*, C.A. No. 10-4605, 2011 WL 446653 (E.D. La. Feb. 4, 2011), does not support Xcoal's position. The decision there rested on the court's determination that the respondents "have a right to possess [the property at issue] and apparently have a right to sell it." *Id.* at *2. Here, ADI does not possess the coal at issue, or have a right to possess it, or a right to sell it. *See* Ponzio Decl. (Doc. 44-1, PageID.313). Further, the contract expressly provides that if the Provisional Payment is not made, Javelin is entitled to terminate the Confirmation and sell the coal to another party. *See id.,* Ex. 2, Doc. 44-3 at PageID.353.

15. The conclusion that the coal at issue here is not the property of ADI under the Javelin-ADI sale agreement, to be subject to an attachment, is reinforced by the decision in *Wave Maker Shipping Co., Ltd. v. Hawksphere*

Shipping Co. Ltd., 56 Fed. Appx. 594 (4th Cir. 2003), which the *Malin* court cited with approval. *Malin*, 817 F.3d at 246-47. The contract in *Wave Maker*, like here, was governed by English law. As summarized by the *Malin* court, *Wave Maker* held as follows:

> In *Wave Maker Shipping Co., Ltd. v. Hawksphere Shipping Co. Ltd.*, creditors sought to attach a charterer's fuel bunkers. Relevantly, the charterer had purchased fuel from a fuel supplier, but had not yet paid for it. Under the contract between the charterer and the fuel supplier, the supplier retained title to the fuel until the charterer paid in full. The charterer contended that the attachment should have been vacated because it did not have title to the fuel; rather, the fuel supplier retained title. Examining whether the Rule B attachment of the fuel bunkers should have been vacated, the Fourth Circuit asked whether the charterer "ever acquired title to the bunkers." In answering this question, the Fourth Circuit relied on principles of English law, which governed the contract at issue. Concluding that the fuel supplier had retained title to the bunkers, the Fourth Circuit vacated the attachment of the fuel in possession of the charterer.

Malin, 817 F.3d at 246 (citations omitted). Here, too, ADI's English law contract with Javelin establishes that, because ADI has not made all the payments required under the contract, ADI has no title to the coal or attachable property rights to it.

16. The Fourth Circuit's decision in *Wave Maker* is directly on point here, because it addressed a contract that, like the ADI-Javelin contract, (a) was governed by English law and (b) provided that title would not pass to the buyer until payment in full had been made. The *Wave Maker* court confirmed that, as to both maritime principles and contracts for the sale of goods, the buyer under such a contract has no property that can be subject to attachment under a maritime arrest order. 56 Fed. Appx. 594 at 598 (holding that "[the seller], not [the buyer], owned the bunkers at the time of attachment because

payment had not yet been made"). The court specifically concluded that, "[s]uch a result comports with the British Sale of Goods Act. The Sale of Goods Act specifically provides that parties may negotiate for retention of title provisions in sales contracts. Sale of Goods Act, 1979, c. 54, Pt III, §§ 17–20 (U.K.); *see also, e.g., Armour v. Thyssen Edelstahlwerke A.G.*, [1991]1 Lloyd's Rep. 95 (1990)." *Id.*[4]

17. In sum, the coal that is subject to the Rule B attachment is owned by Javelin. It is not the property of ADI and ADI has no property right to it that would allow Xcoal to maintain the Rule B Attachment.

B. The Rule B Attachment Must Be Vacated On The Additional Ground That The Xcoal-ADI Contract Is Not A Maritime Contract

18. The Rule B Attachment that Xcoal obtained pursuant to the maritime rules must be vacated for the additional reason that the contract between Xcoal and ADI is not a maritime contract.[5]

19. A contract qualifies as a "maritime contract" – with the unique rules that apply to such a contract – only if its "primary objective is to

[4] To the extent Xcoal suggests that Alabama's Uniform Commercial Code supports its position, this fails for two reasons. First, the ADI-Javelin contract is governed by English law, which dictates in accordance with the ADI-Javelin contract that ADI has no attachable property rights because it acquires no title to the property until it makes payment in full. *Wave Maker*, 56 Fed. Appx. at 597-98. And, second, Alabama Code 7-2-301 provides that the parties' rights and obligations as to payment, transfer and delivery of goods are governed by their contract; and, here, Javelin and ADI agreed that ADI shall acquire no title or right to possess the coal until ADI has made payment in full.

[5] ADI's motion to vacate also noted that Xcoal would have no right to an attachment under Fed. R. Civ. P. 64 or Alabama law, including because Alabama Code 6-6-48 limits the attachment rights of nonresidents against other nonresidents, such as Xcoal and ADI, to an existing debt or ascertained liability. *See* ADI Motion to Vacate (Doc. 44) at 16-17. Xcoal has not attempted to defend the Rule B Attachment on this basis. Further, the fact that ADI does not own the attached coal or have an attachable property right in it would in any event require vacating the attachment.

accomplish the transportation of goods by the sea" and it is imbued with an "essentially maritime nature." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24-25 (2004). The contracts between Xcoal and ADI are not maritime contracts. They are contracts for the sale of goods.[6]

20. The terms of the Purchase Agreements executed by ADI and Xcoal demonstrate that they are contracts for the sale of goods – specifically, coal. Ponzio Decl., Ex. 7 (Doc. 44-8) (Spot Purchase Agreement). That the "primary objective" of the Purchase Agreements is the sale of coal is expressly confirmed by the Agreements' statement of purpose: "The purpose of this Purchase Agreement is to outline the special conditions under which the seller will sell and the Buyer will buy the raw material as defined hereunder (the 'Product')." *Id.* at Section 1. That these are contracts for the sale of goods is likewise confirmed by their title: "Spot Purchase Agreement [relating to the] sale and purchase of Xcoal USA Permac LV PCI Coal." *Id.* at 1.

21. That the contract between ADI and Xcoal provides for the coal to be shipped to Italy does not render it a maritime contract. As the court in *Aston Agro-Industrial AG v. Star Grain Ltd.* confirmed, applying *Kirby's* "primary objective" test to a contract calling for the sale of wheat that would be shipped across the ocean, the contracts at issue were not maritime, because

[6] When Xcoal obtained the Rule B Attachment on an *ex parte* basis, it did not submit the contracts between it and ADI. Instead, its Verified Complaint referred to it as "provid[ing] the maritime transportation services on behalf of ADI as set forth in the Agreements." Xcoal Compl. at ¶ 16. As discussed below, review of the contracts demonstrates that they are not maritime contracts but instead are sale of goods contracts.

"their primary objective was, undoubtably, the sale of wheat." 2006 WL 3755156 at *3 (S.D.N.Y. Dec. 20, 2006). As the court explained, "[t]hat the wheat was transported on a ship does not make the contracts maritime contracts any more than it would make them aviation contracts had the wheat been shipped via airplane." *Id.*

22. Similarly, the Eleventh Circuit has made clear that though a vessel is a maritime item, a contract for the sale of a vessel is not a maritime contract. To qualify as a maritime contract, the "nature of the contract" must "ha[ve] references to maritime service or maritime transactions." *Windspeed Enter. Ltd. v. M/V SEMI 1*, No. 22-12242, 2023 WL 3477365 (11th Cir. May 16, 2023) (citing *Nehring v. Steamship M/V Point Vail*, 901 F.2d 1044, 1048 (11th Cir. 1990). Hence, the purchase and sale of a vessel is not a maritime contract and an attachment or lien pursuant to the maritime rules would be improper. *Id.*

23. The court in *Preble-Rish Haiti, S.A. v. Republic of Haiti* recognized the same principles in granting vacatur of a plaintiff's Rule B attachment of a garnishee. 558 F. Supp. 3d 430 (S.D. Tex. 2021). While the plaintiff asserted that "the contracts at issue contain so many specific provisions relating to the details of shipping . . . that sea transport was the central purpose of the contracts," *id.* at 435, the court instead found that the "primary objective of the [underlying] contracts [between plaintiff and defendants] was the sale of goods (specifically, petroleum) to [the defendants]" rather than "to accomplish the transportation of goods by sea."

Id. (citation omitted). Like the other decisions discussed above, the *Preble-Rish Haiti* court emphasized that "[w]hile the contracts in this case indisputably involved delivery by sea . . . such delivery is necessarily premised on the purchase of petroleum from [the plaintiff] . . . the basic purpose of the contracts here is to accomplish the sale of oil." *Id.* at 436. Because the "contracts are not maritime in nature, Plaintiff has no valid prima facie admiralty claim against Defendant[], and attachment under Rule B would be improper." *Id.*

24. Similarly, the court in *EFKO Food Ingredients Ltd. v. Pac. Inter-Link SDN BHD* emphasized that "[i]t has been widely held that a commodity sale and purchase contract—even if the contract requires maritime transport relating to the shipment of the commodity—is not maritime in nature," and thus found that contracts for the sale and purchase of palm olein were not maritime in nature because "[n]either palm olein nor the sale thereof is directly or intimately related to the operation of a vessel or its navigation." 582 F. Supp. 2d 466, 470 (S.D.N.Y. 2008) (citations omitted).

25. In *Indagro S.A. v. Bauche S.A.*, the court likewise held:

> [T]he Contract cannot properly be characterized as a maritime contract that solely contains maritime obligations. The Contract's subject matter is the sale and purchase of fertilizer. Neither fertilizer nor its sale relates directly to the operation of a vessel or its navigation. While the Contract contains a number of terms concerning the ocean transportation of the fertilizer, it is well established that 'a commodity, sale and purchase contract—even if the contract requires [as here] maritime transport relating to the shipment of the commodity—is not maritime in nature.'

652 Supp. 2d 482, 491–492, 495 (S.D.N.Y. 2009).

26. Xcoal's opposition to ADI's motion to vacate does demonstrate that these cases do not apply to a contract for the sale of goods like the contracts between Xcoal and ADI. Xcoal suggests that the parties' contracts could be considered "mixed contracts" with maritime and non-maritime elements. But, as noted, the Xcoal-ADI contracts are contracts for the sale of goods, as confirmed by the multiple precedents discussed above; and the fact that the goods are to be shipped does not render them "mixed contracts." *See* cases cited above in paragraphs 19-25.

27. In any event, even if the contracts could be considered "mixed," this would not help Xcoal. As the *EFKO* court explained:

> Contracts that are "mixed"—that contain marine and non-marine elements—generally fall outside of admiralty jurisdiction, subject to two exceptions—(1) where the claim arises from a breach of a maritime obligation that is severable from the non-maritime obligations of the contract, and (2) where the non-maritime elements are merely incidental to the maritime elements.

582 F. Supp. 2d at 470 (citing *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307, 314 (2d Cir. 2005)).

28. Here, the non-maritime elements – the sale and purchase of coal – are not "merely incidental;" they are the primary objective of the contracts. Nor is there a maritime obligation that is "severable" from the non-maritime obligation: the coal to be shipped under the Xcoal-ADI Purchase Agreements is the same coal that Xcoal is selling and ADI is buying – not some other coal unrelated to or distinct from the contract for the sale of coal. Further, even assuming *arguendo* that the shipping of the purchased coal could be

considered a severable obligation, Xcoal does not contend that its claim against ADI arises from the shipping of the coal.

29. Nor is Xcoal's cause helped by its suggestion that its claimed damages will include demurrage costs. As the *EFKO* court held, "a sale and purchase contract is not maritime merely because it contains maritime terms, such as a requirement to pay demurrage, and does not give rise to maritime jurisdiction, even if the sole claim relates to the non-payment of demurrage." 582 F. Supp. 2d 466, 471–472 (S.D.N.Y. 2008); *see also Preble-Rish Haiti*, 558 F. Supp. 3d at 434-435 (discussing prior decision holding that "neither was the contract a mixed contract—i.e., one containing both maritime and non-maritime elements—because the demurrage claims were not severable from the sale of goods" which had meant that "[t]he court, therefore, could not exercise maritime jurisdiction over any portion of the contract dispute.").

30. In sum, the Rule B Attachment obtained by Xcoal should be vacated because the contractual relationship between Xcoal and ADI referenced in support of the application for a writ of attachment is not based on maritime contracts but rather on contracts for the sale of goods.

C. Wrongful Arrest Claim

31. Although the parties have argued the issue of wrongful attachment, no decision is made as to this issue at this time, and the issue is reserved for further proceedings consistent with the Report and Recommendation.

CONCLUSION

For these reasons, it is recommended that both the motion of ADI (Doc. 44) and the motion of and Javelin (Doc. 16) to vacate the Rule B Attachment (Doc. 9) be GRANTED.

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 10th day of October, 2023.

s/William E. Cassady
UNITED STATES MAGISTRATE JUDGE