IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
PARAGON OFFSHORE PLC (IN LIQUIDATION),	:	Case No. 16-10386 (CSS) Re: D.I. 2227, 2231, 2239 & 2241
Debtor.	:	**Hearing Date: June 10, 2021, at 11:00 a.m.** **Obj. Deadline: May 27, 2021, at 5:00 p.m. (extended for Paragon to June 2)**

REPLY OF THE UNITED STATES TRUSTEE IN SUPPORT OF HIS MOTION TO COMPEL FILING OF POST-CONFIRMATION QUARTERLY REPORTS AND PAYMENT OF STATUTORY FEES PURSUANT TO 28 U.S.C. § 1930(a)(6)

Andrew R. Vara, the United States Trustee for Region 3 (the "U.S. Trustee"), through his undersigned counsel, files this reply in support of his motion to compel the filing of post-confirmation quarterly reports and the payment of statutory fees pursuant to 28 U.S.C. § 1930(a)(6) (D.I. 2231) (the "Motion"), and in support thereof respectfully states as follows:

I. PRELIMINARY STATEMENT

1. The Court should grant the Motion. Distributions of the Noble settlement proceeds are plan payments. Plan payments are disbursements under 28 U.S.C. § 1930(a)(6). The plan and confirmation order provide that quarterly fees shall be paid in accordance with applicable law. The plan and litigation trust agreement make Paragon and the Paragon litigation trust liable for quarterly fees. Upon information and belief, Paragon has $988,000 cash on hand, which is enough to pay $250,000 in quarterly fees upon distribution of the Noble settlement proceeds. The U.S. Trustee is generally agnostic about who pays the quarterly fees, but the fees must be paid.

II. JURISDICTION

2. In addition to the jurisdictional bases identified in the Motion, article 11.1(r) and (s) of the Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors (D.I. 1614 Exh. A) (the "Plan") give this Court jurisdiction to hear and determine the Motion and this reply.

III. UPDATED BACKGROUND

3. On May 12, 2021, the U.S. Trustee filed the Motion. The Motion asks the Court to compel Paragon Offshore plc (in liquidation) ("Paragon")[1] and the Paragon litigation trust, as applicable, to pay all fees owed under 28 U.S.C. § 1930(a)(6) and any interest thereon pursuant to 31 U.S.C. § 3717 (together, "Quarterly Fees") in full when due. The Motion also sought to compel the filing of post-confirmation quarterly reports. On May 26, 2021, those reports were brought current. *See* D.I. 2234-2238. The reports show about $3,861,549 in disbursements from January 1, 2020-March 31, 2021. Upon information and belief, Paragon has about $988,000 cash on hand.

4. On May 27, 2021, the Paragon litigation trust filed a response opposing the Motion (D.I. 2239) (the "Response"). On June 2, 2021, Paragon filed a response opposing the Motion (D.I. 2241).

IV. REPLY

A. Distribution of Noble Settlement Proceeds Is Plan Payment That Is Subject to 28 U.S.C. § 1930(a)(6)

[1] In the Motion, the U.S. Trustee referred to Paragon Offshore plc (in administration) as the Debtor. For purposes of clarity, and for the avoidance of doubt, the U.S. Trustee's requested relief pertains to Paragon Offshore plc (whether in administration or liquidation), including both as the debtor commencing Case No. 16-10386 and as the reorganized entity under the Plan, as applicable.

5. The Paragon litigation trust argues that distribution of the Noble Corporation plc ("Noble") settlement proceeds is not a disbursement because it is not being made "on behalf of" Paragon and its affiliated debtors (together, the "Debtors"). *See* Response ¶¶ 14-20. The trust is incorrect.

6. Distribution of the Noble settlement proceeds is on behalf of the Debtors, in particular Paragon. The distribution is a plan payment, and the confirmed plan is the Debtors' plan. *See* D.I. 1614 ¶ M ("In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtors as proponents."). The Paragon litigation trust was established "for the sole purpose of prosecuting the Noble Claims and distributing the proceeds thereof in accordance with the Plan and the Litigation Trust Agreement." Plan § 5.7(b). The litigation trust agreement, which is incorporated into the Plan pursuant to Plan § 12.12, provides that its "principal purpose . . . is to aid in the implementation of the Plan" and that the Noble claims are "to be administered for the benefit of holders of Allowed Revolver Claims, Allowed Term Loan Claims, and Allowed Senior Notes Claims." D.I. 1593 Exh. E-1 §§ 10.14 & 2.4. Five of the eight counts asserted in the complaint against Noble are core chapter 5 claims of the Debtors' estates. *See* Adv. No. 17-51882 D.I. 1, 168, & 172. Now that the Noble claims have been reduced to cash, 75% of the proceeds will be distributed pursuant to the Plan's treatment of class 4 claims, which consisted of $1,021,000,000 in senior notes that Paragon issued. *See* Plan § 4.4(a) & p. 15 (identifying Paragon as issuer under "Senior Notes Indenture"). Paying proceeds of the Debtors' core chapter 5 claims, pursuant to the Debtors' confirmed Plan, as part of the Plan's treatment of claims against the Debtors, including $1 billion of senior notes that Paragon issued, is a disbursement in this case on behalf of the Debtors, particularly Paragon. *See In re Genesis Health Ventures, Inc.*, 402 F.3d 416, 421 (3d Cir. 2005) (adopting

dictionary definition of "disburse" as "to expend" or "to pay out"). Such Plan distributions are subject to 28 U.S.C. § 1930(a)(6).

7. Paragon argues that distributing the Noble settlement proceeds is not a disbursement of Paragon because Paragon is not the entity distributing the money, and because Paragon no longer owes a legal obligation to the trust's beneficiaries. *See* D.I. 2241 ¶¶ 12-14. This argument elevates form over substance. Assets that are reduced to cash after the effective date are still being distributed pursuant to the Plan's treatment of class 3 and class 4 claims. Subsequent Plan payments are not sheltered from 28 U.S.C. § 1930(a)(6) just because the underlying assets were illiquid on the effective date. In any event, disbursements are not determined according to which entity has the legal obligation, nor according to which entity actually pays the money. *See In re GC Companies, Inc.*, 298 B.R. 226, 230-31 (D. Del. 2003) (disbursements "not limited solely to payments made by each Debtor" and not limited to legal obligations of debtor; "Congress considered and rejected basing fees on 'a debtor's liabilities,' a term which includes 'anything for which a person is legally bound or obligated.'").

8. Neither Paragon nor the Paragon litigation trust disputes that distribution of the Noble settlement proceeds is a Plan payment. Even cases that have been reversed on appeal for interpreting "disbursements" too narrowly have observed that plan payments are disbursements. *See, e.g.*, *In re Pettibone Corp.*, 244 B.R. 906, 922 (Bankr. N.D. Ill. 2000) (despite plan not specifically providing for post-confirmation quarterly fees, such fees must be paid on plan distributions: "Congress plainly intended the statute to cover post-confirmation plan 'distributions[.]'") (*rev'd in part by U.S. Trustee v. Pettibone Corp.*, 251 B.R. 335, 340 (N.D. Ill. 2000) (bankruptcy court erred in limiting quarterly fees to payments made pursuant to confirmed plan; "The legislative history of the January 1996 amendment reveals that

Congress intended the term 'disbursements' to include post-confirmation disbursements and that the term should be interpreted broadly."); *In re Wintersilks, Inc.*, 243 B.R. 351 (Bankr. W.D. Wis. 1999) (quarterly fees measured on plan distributions but not on ordinary-course disbursements post-effective date) (*rev'd by In re Wintersilks, Inc.*, 2000 WL 34236011 at *6 (W.D. Wis. June 2, 2000) (disbursements not limited to plan distributions)); *In re Quality Truck & Diesel Injection Service, Inc.*, 251 B.R. 682 (S.D. W.Va. 2000) (reversing bankruptcy court ruling that disbursements were limited to disbursements made pursuant to confirmed plan, and holding that disbursements include ordinary-course disbursements post-confirmation). Distributions of the Noble settlement proceeds are subject to 28 U.S.C. § 1930(a)(6).

B. Contrary to Paragon Litigation Trust's Argument, Plan and Confirmation Order Do Not Limit Who Must Pay Quarterly Fees

9. The Paragon litigation trust argues that under the Plan and confirmation order, the reorganized Debtors are the only entities responsible for Quarterly Fees. *See* Response ¶¶ 21-24.

10. The trust misconstrues the Plan. The Plan and confirmation order provide: "Quarterly fees owed to the U.S. Trustee shall be paid when due in accordance with applicable law . . . . Each and every one of the Debtors shall remain obligated to pay quarterly fees to the U.S. Trustee until the earliest of that particular Debtor's case is closed, dismissed, or converted to a case under Chapter 7 of the Bankruptcy Code." *See* D.I. 1614 ¶ 35. Nothing in this language limits who is responsible for paying Quarterly Fees or excuses any entity from paying them.

11. In fact, every version of the plan filed in these cases had the same Quarterly Fee provision. This language was in the prearranged plan the Debtors filed with

their chapter 11 petitions. *See* D.I. 11 § 12.4. What eventually changed was how certain estate causes of action (i.e., the Noble claims) would be resolved, not how statutorily prescribed quarterly fees are imposed by law.

12. In late September 2016, the Court held a confirmation hearing on the Debtors' second joint chapter 11 plan. Generally, that plan proposed a balance-sheet restructuring in which Paragon's unsecured noteholders would receive cash and a 47% equity stake in reorganized Paragon, and existing equity holders would receive a 53% equity stake in reorganized Paragon. *See* D.I. 644.

13. On November 15, 2016, the Court denied confirmation because the plan was not feasible. *See* D.I. 890. The Court wrote that the plan "siphons $450 million in cash out of the estate, which is at least $150 to $200 million too much. That cash is needed for the Reorganized Debtors to be able to survive the challenging business environment of off-shore oil and gas production over the next several years and to be reasonably able to refinance their debt in 2021." *Id.* at 2, ¶ 77. The Court did not discuss or rule on the plan's proposed settlement with Noble. *See id.* ¶ 154.

14. Thereafter, the Debtors filed three more versions of the plan. The fourth joint chapter 11 plan, filed April 28, 2017, was the first plan to propose a litigation trust. *See* D.I. 1433. It contemplated prosecution of the Noble claims by the reorganized Debtors or an estate representative, including a litigation trust. *See id.* § 5.18.

15. On May 2, 2017, the Debtors filed the fifth joint chapter 11 plan. *See* D.I. 1459. The plan provided for the establishment of the Paragon litigation trust. *See id.* § 5.7.

16. Thus, during the first 15 months of these cases, the Debtors filed five different chapter 11 plans. *See* D.I. 11, 644, 1232, 1433 & 1459. Each plan contained identical language about the payment of quarterly fees under 28 U.S.C. § 1930(a)(6):

> All fees payable under section 1930 of chapter 123 of title 28 of the United States Code shall be paid on the Effective Date, or as soon as practicable thereafter, by the Debtors or Reorganized Debtors. **Quarterly fees owed to the U.S. Trustee shall be paid when due in accordance with applicable law** and the Debtors and Reorganized Debtors shall continue to file reports to show the calculation of such fees for the Debtors' Estates until the Chapter 11 Cases are closed under section 350 of the Bankruptcy Code. **Each and every one of the Debtors shall remain obligated to pay quarterly fees to the U.S. Trustee until the earliest of that particular Debtor's case is closed, dismissed, or converted to a case under Chapter 7 of the Bankruptcy Code.**

D.I. 11 § 12.4; D.I. 644 § 12.4; D.I. 1232 § 12.5; D.I. 1433 § 12.5; D.I. 1459 §12.5; D.I. 1614 Exh. A § 12.5 (emphasis added).

17. The Plan and confirmation order are clear: "Quarterly fees owed to the U.S. Trustee shall be paid when due in accordance with applicable law[.]" *See* D.I. 1614 ¶ 35. The Paragon litigation trust is asking the Court to rewrite this language to specifically exclude the trust almost four years after the Plan became effective.

18. To buttress its argument that the Plan and confirmation order do not require the Paragon litigation trust to pay Quarterly Fees, the trust states that under 28 U.S.C. § 1930, only "[t]he parties commencing a case under title 11" are responsible for paying Quarterly Fees, and that the trust did not commence this case. *See* Response ¶ 22. The trust is wrong. "The parties commencing a case under title 11" does not exist in 28 U.S.C. § 1930(a)(6).

C. Confirmed Plan Makes Paragon Litigation Trust Liable for Quarterly Fees as Successor to Debtors

19. The Paragon litigation trust argues, incorrectly, that nothing in the Plan makes it liable for Quarterly Fees. *See* Response ¶ 25.

20. Articles 12.8 and 12.9 of the Plan provide in relevant part:

> [U]pon the occurrence of the Effective Date, the terms of this Plan and the Plan Documents shall be immediately effective and enforceable and deemed binding upon . . . the Debtors, the Reorganized Debtors . . . and each of their respective successors and assigns.
>
> The . . . obligations of any Entity named or referred to in this Plan shall be binding on . . . any heir, executor, administrator, successor, or permitted assign, if any, of each such Entity.

Plan §§ 12.8 & 12.9.[2]

21. The Plan also provides that the Paragon litigation trust is the Debtors' successor, administrator, or assign with respect to the Noble claims.

> The Litigation Trust . . . shall be authorized to exercise and perform all rights and powers held by the Estates with respect to the Noble Claims, including, without limitation, the authority under section 1123(b)(3) of the Bankruptcy Code, and shall be deemed to be acting in the capacity of a bankruptcy trustee, receiver, liquidator, conservator, rehabilitator, creditors' committee, representative appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, or any similar official who has been appointed to take control of, supervise, manage or liquidate the Estates, to provide for the prosecution, settlement, adjustment, retention, and enforcement of the Noble Claims.

[2] The Debtors are Entities. *See* Plan at 6 (defining "Entity" to have "the meaning set forth in section 101(15) of the Bankruptcy Code."); 11 U.S.C. § 101(15) ("The term 'entity' includes person, estate, trust, governmental unit, and United States trustee.") (emphasis added); and 11 U.S.C. § 101(13) ("The term 'debtor' means person . . . concerning which a case under this title has been commenced.") (emphasis added).

D.I. 1614 Exh. A § 5.7(e). *See also* Litigation Trust Agreement §§ 2.2 (Paragon litigation trust's management agrees to "administer the Litigation Trust pursuant to the terms and conditions of this Agreement and the Plan."); 2.4 (Debtors "transfer, assign, and deliver" Noble claims to Paragon litigation trust, "to be administered for the benefit of holders of Allowed Revolver Claims, Allowed Term Loan Claims, and Allowed Senior Notes Claims."); 2.4 ("Upon the transfer of the Trust Assets to the Litigation Trust hereunder, the Litigation Trust shall succeed to all of the Debtors' and the Estates' rights, title, and interests in and to the Trust Assets."); & 6.1 ("On the Effective Date, the Litigation Trust Management shall succeed to all rights of the Debtors and the Estates with respect to the Trust Assets necessary to protect, conserve, and liquidate all the Trust Assets."). D.I. 1593 Exh. E-1 (emphasis added).

22. Therefore, pursuant to articles 5.7(e), 12.5, 12.8, and 12.9 of the Plan, the Paragon litigation trust is liable for Quarterly Fees on Plan payment(s) of the Noble settlement proceeds.[3]

23. The same result was reached in *In re CSC Industries, Inc.*, 226 B.R. 402 (Bankr. N.D. Ohio 1998). There, the Bankruptcy Court held that the post-confirmation liquidating trustee was responsible for paying quarterly fees even though the plan and liquidating trust agreement did not specifically address the payments. The Court held that the

[3] The litigation trust agreement also makes the Paragon litigation trust liable for Quarterly Fees on distributions of the Noble settlement proceeds. *See* D.I. 1593 Exh. E-1 §§ 6.6 ("The Litigation Trust Management shall apply all Trust Assets as follows: *First*: to pay, in full, all Litigation Trust Expenses") & 4.3 (defining "Litigation Trust Expenses" as "all reasonable and documented costs, expenses, and obligations incurred in connection with administering the Litigation Trust and liquidating, monetizing, and distributing the Trust Assets in accordance with the provisions of the Plan, the Confirmation Order, and this Agreement, including the following: (a) all claims, fees, expenses, charges, liabilities, and obligations of the Litigation Trust as contemplated by this Agreement and as required by law[.]").

liquidating trust "has essentially stepped into the shoes of the original debtor and is therefore liable for any such [quarterly] fees which may be imposed." *Id.* at 404.

> [T]o give any meaning to the post-confirmation obligation imposed by Congress, [quarterly] fees should be calculated against disbursements made pursuant to a plan. The example of a liquidating plan demonstrates the logic of this approach. In a liquidating plan it is not unusual for some assets to be liquidated post-confirmation to provide additional payments to creditors. In such a case, payments from assets liquidated pre-confirmation would clearly be disbursements subject to the UST quarterly fee. It makes no sense to hold that the post-confirmation payments made from the liquidation of the remaining assets are *not* disbursements just because the remaining assets were vested in a reorganized debtor or liquidating trust at confirmation.

In re Betwell Oil and Gas Co., 204 B.R. 817, 819 (Bankr. S.D. Fla. 1997).

24. Paragon is also liable for Quarterly Fees pursuant to Plan §§ 5.2(a), 12.5, 12.8 & 12.9. Indeed, Paragon has paid Quarterly Fees in other quarters since the Plan's effective date.

D. Quarterly Fees Are Not Double-Dipping

25. The Paragon litigation trust asserts that transfer of the Noble claims to the trust was already recorded as a disbursement and subject to Quarterly Fees. *See* Response ¶¶ 3, 9, & 18. The trust cites no evidence to support its assertion. The Debtors' post-confirmation quarterly report for the quarter the Plan became effective shows $581,983,000 in disbursements by Paragon. *See* D.I. 1980 at 5. Of that figure, $515,000,000 was cash distributed as part of the Plan's treatment of class 3 and class 4 claims. *See* Plan §§ 4.3(a) & 4.4(a). Nothing on the face of that quarterly report indicates the Noble claims were captured or itemized as a disbursement then. Nor does the trust describe how that could have been achieved, given that the Court-approved disclosure statement attributed no particular value, if any, to the Noble claims. *See* D.I. 1446 at nn. 3 & 4 ("This approximate percentage recovery

does not include estimated amounts for recoveries, if any, for the Noble Claims.") and § XI.C.4 ("the value, if any, of the Noble Claims is undetermined").[4] When the Plan became effective, there was no disbursement for Paragon to report with respect to the Noble claims. *See In re Genesis Health Ventures, Inc.*, 402 F.3d at 421 (adopting dictionary definition of "disburse" as "to expend" or "to pay out"); *Staiano v. Cain (In re Lan Associates XI, L.P.),* 192 F.3d 109, 121 (3d Cir. 1999) (in trustee compensation case, disbursements are based on cash disbursements, not disbursements in kind); *Tamm v. U.S. Trustee (In re Hokulani Square, Inc.),* 776 F.3d 1083, 1085-86 (9th Cir. 2015) ("It's also clear that 'disburse' means to 'pay out[.]'" (citing Black's Law Dictionary 561 (10th ed. 2014))). Rather, the Noble claims were wholly unliquidated. No adversary proceeding was pending, and Noble reserved its rights and defenses with respect to any such claims. *See, e.g.*, Confirmation Order, D.I. 1614 ¶ 33 (describing rights of Paragon litigation trust "subject to the Noble Entities' applicable rights and defenses against the Litigation Trust with respect to the Noble Claims."). The Noble claims were not settled and reduced to cash until years after the Plan became effective. *See* D.I. 2223 (9019 settlement motion filed February 4, 2021); D.I. 2227 (order approving settlement entered February 24, 2021); Response ¶ 12 ("On March 19, 2021, the Trust received all of the payments required under the settlement agreement from the defendants, including $7.7 million from Noble."). Plan payments of the settlement proceeds appear to be the first

[4] At the disclosure statement hearing on March 27, 2017, the Court denied a request from Paragon shareholders to appoint an official equity committee. The Court observed that monetizing the Noble claims would not put shareholders in the money. "Litigation and victory takes a significant amount of cash and a significant amount of time, and contains a significant amount of risk. So you can't sort of look at what happened in 2014 and say if they don't settle for what's on the table today they can achieve $1.3, $1.4 billion dollars in recovery. That is possible, but that is a number that is (A) not a net number and (B) is significantly risk and (C) would require years to achieve." Disclosure Statement Hr'g Tr. D.I. 1302 at 68:16-23.

and only cash expenditure or payment to report on account of the Noble claims.[5] There is no double-dipping of Quarterly Fees.

26. The Response suggests (without argument) that because Noble already paid Quarterly Fees on the settlement payments made to the Paragon litigation trust, the Paragon litigation trust's payment of Quarterly Fees is double-dipping. *See* Response ¶ 3. That position is baseless. 28 U.S.C. § 1930(a)(6) imposes Quarterly Fees on disbursements "in each case under chapter 11[.]" Noble's case is 20-33826 (DRJ) (Bankr. S.D. Tex.). Paragon's case is 16-10386 (CSS) (Bankr. D. Del.). "It is clear from [the language in 28 U.S.C. § 1930(a)(6)] that each Debtor in its respective Chapter 11 case is required to pay its own quarterly fee." *In re Genesis Health Ventures, Inc.*, 402 F.3d at 421. There is no basis to credit Quarterly Fees paid in Noble's case against Quarterly Fees to be paid in Paragon's case.

27. To the extent Paragon and the Paragon litigation trust ask the Court to *deem* disbursements on the Noble claims to have been made when the Plan became effective, when the maximum Quarterly Fee was already reached, such nunc pro tunc relief is unavailable.

> Federal courts may issue *nunc pro tunc* orders, or 'now for then' orders, Black's Law Dictionary, at 1287, to 'reflect[ ] the reality' of what has already occurred, *Missouri v. Jenkins*, 495 U.S. 39, 49, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). 'Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.' *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390, 32 S.Ct. 277, 56 L.Ed. 476 (1912). Put colorfully, '[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact.' *United States v. Gillespie*, 666 F.Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the

[5] The Response states the Debtors transferred $10 million to the Paragon litigation trust in connection with its creation. *See* Response n.6. That payment was an intercompany loan from Paragon International Finance Company to fund the litigation against Noble, not a Plan payment to creditors once the Noble claims had been reduced to cash. *See* D.I. 1593 Exh. E-1 § 4.1.

> court 'cannot make the record what it is not.' *Jenkins*, 495 U.S. at 49, 110 S.Ct. 1651.

Roman Catholic Archdiocese v. Feliciano, --- U.S. ----, 140 S. Ct. 696, 700-01 (2020). The Court cannot grandfather the Noble settlement proceeds into the quarter the Plan became effective. This fact never occurred because the Noble claims were not expended or paid out when the Plan became effective. The Noble claims were reduced to cash years later.

E. To Extent Plan Is Ambiguous, It Should Be Construed Against Debtors as Drafter

28. Even if a plan could prospectively limit application of a federal statute—which seems improper—the Plan does the opposite. Quarterly Fees "shall be paid when due in accordance with applicable law," and Paragon and its successors, administrators, executors and permitted assigns remain liable for paying Quarterly Fees on distributions of the Noble settlement proceeds. The Plan is not ambiguous.

29. Even if the Plan were ambiguous, any such ambiguity would be resolved against the drafter. *See In re Harstad*, 155 B.R. 500, 510-11 (Bankr. D. Minn. 1993) ("As with all contracts, any ambiguity that exists in the chapter 11 plan are interpreted against the drafter."); *In re Maruko*, 200 B.R. 876, 881 (Bankr. S.D. Cal. 1996) (same); In *re Lason, Inc.*, 290 B.R. 504, 506 (Bankr. D. Del. 2003) ("Since [the debtor] drafted the Employment Agreement and the Plan of Reorganization, any ambiguities therein must be construed against it."); *In re NVF Co.*, 309 B.R. 698, 704-05 (Bankr. D. Del. 2004) (construing ambiguity in plan against proponent, consistent with Delaware contract law). The Plan has a New York choice-of-law provision. *See* Plan § 12.7. To the extent New York law applies, it appears to support the same result. *See, e.g., Rentways, Inc. v. O'Neill Milk & Cream Co.*, 126 N.E.2d 271, 273 (N.Y. 1955) ("where there is ambiguity in the terms of a contract prepared by one of the parties, it is consistent with both reason and justice that any fair doubt as to the meaning of its

words should be resolved against such party.") (internal quotation marks omitted); *151 West Associates v. Printsiples Fabric Corp.*, 460 N.E.2d 1344, 1345 (N.Y. 1984) ("It has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it."); *In re Macmillan*, 204 B.R. 378, 402 (Bankr. S.D.N.Y. 1997) (court "should construe ambiguous language against the interest of the party that drafted it 'to protect the party who did not choose the language from an unintended or unfair result.'" (citing *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996)).

30. Here, the Debtors, as proponents, drafted the Plan. *See* 11 U.S.C. § 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.") *and* D.I. 1614 ¶ M ("In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtors as proponents."). Each version of the Plan filed in these cases provided that Quarterly Fees shall be paid when due in accordance with applicable law. "That Plan, a contract the Debtors proposed, now binds them." *In re Genesis Health Ventures, Inc.*, 402 F.3d at 424.

31. Article 12.5 of the fifth and final version of the Plan did not specifically reference the Paragon litigation trust. But article 12.5 did not specifically excuse the Paragon litigation trust from paying Quarterly Fees, either. The Debtors' lead counsel—Weil, Gotshal & Manges LLP—had more than 100 attorneys bill time to these cases. *See* Bankr. D.I. 1926. Weil, Gotshal & Manges LLP billed 14,822 hours of time and $12,872,955.72 in fees for plan- and confirmation-related services. *See id.* at 21 & D.I. 1972. The U.S. Trustee did not draft the Plan or litigation trust agreement. Any ambiguity that exists because article 12.5 of the Plan does not explicitly track the creation of a litigation trust (or explicitly excuse the litigation

trust from paying Quarterly Fees) should be construed against the Debtor and the Paragon litigation trust. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.") *and In re Forklift LP Corp.*, 363 B.R. 388, 397 n.7 (Bankr. D. Del. 2007) (ambiguity in plan should be construed against liquidating trust as successor to debtor).

F. Post-Confirmation Quarterly Reports Have Been Brought Current

32. After the U.S. Trustee filed the Motion, Paragon filed five post-confirmation quarterly reports. *See* D.I. 2234-2238. The reports show about $3,861,549 in disbursements from January 1, 2020-March 31, 2021.[6] Upon information and belief, Paragon has $988,000 cash on hand, which is enough to pay $250,000 in Quarterly Fees upon distribution of the Noble settlement proceeds. Paragon should confirm on the record how much cash it has on hand.

V. CONCLUSION

33. Distributions of the Noble settlement proceeds are Plan payments. Plan payments are disbursements under 28 U.S.C. § 1930(a)(6). The Plan and confirmation order provide that Quarterly Fees shall be paid in accordance with applicable law. Under the Plan, Paragon and the Paragon litigation trust are liable for Quarterly Fees on distributions of the Noble settlement proceeds. *See* Plan §§ 5.2(a), 5.7(e), 12.5, 12.8 & 12.9; *see also* Plan § 12.12

[6] The U.S. Trustee reserves his rights and remedies regarding any non-payment of Quarterly Fees for those quarters.

& D.I. 1593 Exh. E-1 §§ 6.6 & 4.3. To the extent the Plan is ambiguous, the Court should construe the ambiguity against Paragon and the Paragon litigation trust as proponents.

WHEREFORE, the U.S. Trustee respectfully requests that this Court grant the Motion and issue an order requiring Paragon and/or the Paragon litigation trust, as applicable, to reserve and pay all Quarterly Fees in full in cash when due, and granting such other relief as this Court deems appropriate, fair, and just.

Dated: June 4, 2021
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 & 9

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
PARAGON OFFSHORE PLC (IN LIQUIDATION),	Case No. 16-10386 (CSS)
Debtor.	Re: D.I. 2231
	Hearing Date: June 10, 2021, at 11:00 a.m.
	Objections Due: May 27, 2021, at 5:00 p.m.

CERTIFICATE OF SERVICE

I certify that on June 4, 2021, I caused to be served a copy of the REPLY OF THE UNITED STATES TRUSTEE IN SUPPORT OF HIS MOTION TO COMPEL FILING OF POST-CONFIRMATION QUARTERLY REPORTS AND PAYMENT OF STATUTORY FEES PURSUANT TO 28 U.S.C. § 1930(a)(6) in the above-entitled action via e-mail upon the following persons:

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