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VIA CM/ECF, EMAIL, AND HAND DELIVERY

The Honorable Christopher S. Sontchi
United States Bankruptcy Court for the District of Delaware
824 North Market Street, 5th Floor
Wilmington, Delaware 19801

Re: In re Paragon Offshore plc (in liquidation), Case No. 16-10386 (CSS)

Dear Judge Sontchi:

We represent Paragon Offshore plc (in liquidation) (“**Paragon**”). We write in response to Your Honor’s request for supplemental letter briefing in connection with the *Motion of the U.S. Trustee to Compel Filing of Post-Confirmation Quarterly Reports and Payment of Statutory Fees* [D.I. 2231] (the “**Motion**”), following the hearing on the Motion on June 10, 2021. Your Honor posed the following question to the parties: under *Butner v. United States* and assuming, for the sake of argument, that U.S. Trustee fees are due here, whether as a matter of state trust law the Litigation Trust¹ cannot be liable for the fees because the grantor’s liability cannot be collected from trust property once it has been transferred to the trust for the benefit of the trust’s beneficiaries.

Delaware law² provides that, as a general matter, a grantor cannot claw back trust property to satisfy the grantor’s liabilities. Delaware law, however, recognizes and enforces parties’ right to contract in establishing trusts, including to contract around that general principle. Here, the parties did that. The provisions of the Litigation Trust Agreement support Paragon’s position on the Motion that the Litigation Trust is responsible for any U.S. Trustee fees triggered by the proposed distribution of settlement proceeds. More fundamentally, the Litigation Trust Agreement’s provisions confirm that Paragon is not the relevant grantor for the purpose of the Court’s question and that the applicable distribution occurred in 2017, not now. The Court should uphold established Delaware law and enforce the parties’ contract as reflected in the Litigation Trust Agreement and as approved by this Court through the Plan and Confirmation Order.

¹ Capitalized terms used but not otherwise defined herein have the meanings given to them in the *Fifth Joint Chapter 11 Plan of Paragon Offshore plc and Its Affiliated Debtors* [D.I. 1582] (the “**Plan**”). The substantially final form of Litigation Trust Agreement was filed at D.I. 1593, Ex. E-1.

² Paragon and the Litigation Trust agree that Delaware law governs.



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To the Court's general question, a trust settlor ordinarily cannot look to the trust's assets following settlement of the trust, as the trust corpus is held and administered for the sole benefit of the trust beneficiaries. *See Paradee v. Paradee*, C.A. No. 4988-VCL, 2010 WL 3959604, at *10 (Del. Ch. Oct. 5, 2010) (noting trust property must be administered "solely in the interests of the beneficiary" (citation and internal quotation marks omitted)). That said, "[n]otwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trust, and trust administration" 12 *Del. C.* § 3303(a). Furthermore, it is the policy under codified Delaware law "to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments." *Id.*; *see also, e.g., J.P. Morgan Tr. Co. of Del., v. Fisher*, C.A. No. 12894-VCL, 2021 WL 2407858, at *14 (Del. Ch. June 14, 2021) (enforcing trust agreement's limitation on trustee's liability). Here, the parties contracted in the Litigation Trust Agreement and the Court should give effect to the parties' agreements therein.

The Litigation Trust Agreement contracts around the general rule, to the extent Paragon is the "grantor", to provide that the Litigation Trust Expenses "shall mean 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, Confirmation Order, and this Agreement" Litigation Trust Agreement § 4.3 (emphasis added). That includes "all claims, fees, expenses, charges, liabilities, and obligations of the Litigation Trust as contemplated by this Agreement and as required by law. . . ." *Id.* § 4.3(a). Contrary to the trust's argument at the hearing, this does not only apply to "typical" litigation service provider costs. Indeed, those already are covered by § 4.3(b)–(d). The trust's position ignores the initial clause of § 4.3, instead focusing on the non-exhaustive list of potential expenses, which includes professionals. When this provision is read together with § 6.1(c), it is clear that the Litigation Trust is responsible for any and all costs it creates by litigating the Noble Claims and distributing the proceeds thereof. *See id.* § 6.1(c) ("[F]or the avoidance of doubt, the Litigation Trust Management shall no power or authority to create any obligations or liabilities of the Debtors or Reorganized Debtors, as applicable, in respect of the prosecution, compromise, settlement, or defense of such Noble Claims."). Thus, the parties' agreement reflected in the provisions of the Litigation Trust Agreement covers more than simply the "typical" expenses of professionals and litigation service providers, and the Court should enforce that agreement. *See, e.g., 12 Del. C.* § 3303(a); *J.P. Morgan Tr. Co. of Del.*, 2021 WL 2407858, at *14.

Implicit in the Court's question is that the Debtors were the grantors or settlors of the Litigation Trust; this basic assumption is incorrect. The Litigation Trust Agreement is explicit on this point:

The Debtors, the Litigation Trust Management, and all holders of Litigation Trust Interests must treat the transfer to the Litigation Trust of the portion of the Trust Assets attributable to such Litigation Trust Beneficiaries **as a transfer of such assets directly**

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to such Litigation Trust Beneficiaries followed by a contribution of the Trust Assets to the Litigation Trust. Consistent therewith, the Debtors, the Litigation Trust Management, and all holders of Litigation Trust Interests must treat the Litigation Trust as a grantor trust of which the *Litigation Trust Beneficiaries* are the deemed owners and *grantors* and must treat the taxable earnings of the Litigation Trust (under U.S. federal income tax principles) as subject to current taxation as though taxable income of such holders of Litigation Trust Interests as described in the Revenue Procedure.

Litigation Trust Agreement § 5.1 (emphasis added). All parties agreed that the Litigation Trust is a grantor trust, for which the Litigation Trust Beneficiaries were the grantors. All parties therefore also agreed that the initial distribution of the Noble Claims would be a transfer “directly to such Litigation Trust Beneficiaries” upon the Plan’s Effective Date and creation of the trust in 2017, rather than a transfer of assets by Paragon to the Litigation Trust for later distribution to the beneficiaries. *Id.* The plain language of the Litigation Trust Agreement thus reinforces both the Litigation Trust’s and Paragon’s arguments that the pending distributions of the settlement proceeds cannot trigger liability for any party under 28 U.S.C. § 1930 in 2021. The structure and treatment of the direct distribution was clear prior to Plan confirmation in 2017, and triggered U.S. Trustee fee liability upon the Effective Date through that distribution. The Court approved that structure, the parties effected the distribution of those assets “directly to such Litigation Trust Beneficiaries,” and Paragon paid the requisite fees in the applicable quarter. To find that the pending distributions now are a disbursement would be inconsistent with how the parties have treated the 2017 distributions for tax and other purposes for the past four years, and upend the parties’ contract in the Litigation Trust Agreement contrary to established Delaware law.

For these reasons and those stated in Paragon’s response [D.I. 2241], Paragon respectfully requests that the Court deny the Motion or, if the Court finds U.S. Trustee fees are due, order that the Litigation Trust pay such fees.

Respectfully submitted,

/s/ Amanda R. Steele

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AS/cgb

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