No. 24-

IN THE

Supreme Court of the United States

PARAGON ASSET COMPANY, LTD.,

Petitioner,

v.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INCORPORATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether, under federal maritime law, the unambiguous terms of a written maritime contract cannot be altered by parol evidence, as this Court has held, or can be contradicted and nullified by parol evidence where one party later claims certain terms were 'intended for its benefit', as the Fifth Circuit has now held.

2. Whether, under federal maritime law, a shipowner facing a *force majeure* event has a duty to exercise ordinary reasonable care, as this Court has held, where hindsight analysis cannot be used to determine the reasonableness of the shipowner's actions, as held in the Eleventh Circuit and other federal courts, or if this duty requires a shipowner to act upon predictions only verifiable through hindsight knowledge, a new standard imposed by the Fifth Circuit.

PARTIES TO THE PROCEEDING

Petitioners in this Court are Paragon Asset Company, Limited; Paragon International Finance Company; Paragon Offshore Drilling, L.L.C.; and Paragon Offshore Limited. Respondents in this Court are American Steamship Owners Mutual Protection and Indemnity Association, Incorporated; and Signet Maritime Corporation.

RULE 29.6 STATEMENT

Paragon Asset Company, Ltd. is not a corporation, and is a wholly owned subsidiary of Borr Drilling Limited (NYSE & OSE ticker "BORR"), a public limited liability company.

Paragon Asset Company Ltd.'s affiliate companies, Paragon Offshore Limited, Paragon Offshore Drilling, LLC, and Paragon International Finance Co., are also wholly owned subsidiaries of Borr Drilling Limited.

RELATED CASES

Related cases to this proceeding are:

- *Paragon Asset Company Ltd, as Owner of the Drillship DPDS1 v. Gulf Copper & Manufacturing Corporation, et al.*, No. 1:17-cv-203, U.S. District Court for the Southern District of Texas, Brownsville division. Judgment entered March 9,

2023.

- *Signet Maritime Corporation, as Owner of the Tug SIGNET ENTERPRISE, its engines, tackle, etc., in a cause of exoneration from or limitation of liability*, No. 1:17-cv-247, U.S. District Court for the Southern District of Texas, Brownsville division. Judgment entered March 9, 2023.

- *Signet Maritime Corporation, as Owner of the Tug SIGNET ARCTURUS, its Engines, Tackle, Etc., in a Cause of Exoneration from or Limitation of Liability*, No. 1:18-cv-035, U.S. District Court for the Southern District of Texas, Brownsville division. Judgment entered March 9, 2023.

- *Paragon Asset Company, Limited, as Owner of the Drillship DPDS1 v. American Steamship Owners Mutual Protection and Indemnity Association, Incorporated*, No. 23-40209, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 24, 2024.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES *Page*

CONSTITUTION & STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Paragon Asset Company, Ltd. (hereinafter "Paragon") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-28a) is reported at *Paragon Asset Company, Ltd. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 99 F.4th 736, 738-750 (5th Cir. 2024). The court of appeals' order denying Paragon's petition for rehearing en banc (App. D, pp. 158a-161a) is unreported.

The opinion of the district court (App. B, pp. 29a-153a) is reported at *Paragon Asset Company Ltd. v. Gulf Copper & Manufacturing Corp., et al.*, 622 F.Supp.3d 360, 371-426 (S.D. Tex. 2022).

JURISDICTION

The court of appeals issued its opinion on April 24, 2024. App. A, pp. 1a-28a. Paragon's timely petition for rehearing was denied on May 29, 2024. App. D, pp. 158a-161a. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—**to all cases of admiralty and maritime jurisdiction;** to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1 (emphasis added).

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) **Any civil case of admiralty or maritime jurisdiction,** saving to suitors in all cases all other remedies to which they are otherwise entitled.

> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C. § 1333(1) (emphasis added).

STATEMENT OF THE CASE

The Fifth Circuit's decision doubly threatens the stability of maritime commerce. *Paragon Asset Co., Ltd. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc.*, 99 F.4th 736, 738-750 (5th Cir. Apr. 24, 2024) (App. A).

First, contrary to this Court's longstanding precedents governing the interpretation of maritime contracts, the Fifth Circuit sanctioned the use of parol evidence to contradict and subvert the plain, unambiguous terms of a written maritime contract.

A drafter may now selectively insert subjective intent to unilaterally nullify a contract's express written terms to escape its application, to grant itself "rights" found nowhere in its written terms, and to retroactively sanction its own actions otherwise prohibited by the contract's written terms.

The Fifth Circuit's judgment permits a party belatedly to claim that a provision is "for its benefit" in order to avoid said provision, even though the contract's written terms expressly prohibit it. And a party may accomplish this by adducing subjective

parol evidence to support a meaning found nowhere in the contract's four corners.

Hence, the Fifth Circuit has held that federal maritime law permits the unilateral waiver of a written contractual provision.

The Fifth Circuit's decision violates the standards for maritime contract interpretation articulated by this Court. Moreover, it provides an unsound method of contract interpretation and maritime policy. Undisturbed, this decision will undermine the national uniformity of federal maritime law and destabilize maritime commerce.

This rule will open all maritime contracts to parol evidence and subjective intent and deny commercial parties the ability to rely on the negotiated plainly written terms of a contract.

In nuce, the Fifth Circuit now permits a drafter to defeat the plain written terms of a contract via the drafter's subjective intent. This is opposed by law and logic, and will render written contracts meaningless.

Second, contrary to this Court's longstanding precedent governing maritime negligence and the *force majeure* defense, the Fifth Circuit has transformed the duty of care owed by a shipowner from one of ordinary reasonableness to one of perfection.

To reach this result, the Fifth Circuit condoned the district court's use of hindsight analysis to evaluate the shipowner's actions, forever compromising the viability of *force majeure* as a defense in maritime cases by imposing a duty to accurately predict and respond to future unknowable events squarely outside of its control.

Such an analysis – originally decried by the Fifth Circuit itself almost 70 years ago – remains verboten in the other Circuit courts.

But the Fifth Circuit has now held "prudent shipowners foresee" unforeseeable situations, and make plans which assume any possible "sudden changes in circumstances."

It is impossible to reconcile the Fifth Circuit's holding with this Court's 150-year-old standard of ordinary reasonable care.

Furthermore, the Fifth Circuit's requirement to "foresee" any and all potential events by third-party vessels, port authorities, the United States, or the weather – over which it has no control –effectively eliminates seventy years of consistency among the Circuit courts prohibiting hindsight analysis in determining whether a shipowner acted reasonably in responding to a *force majeure* threat.

The Fifth Circuit's sanction of hindsight is not only unreasonable, but dangerous. It creates a rule where, to be considered 'ordinarily reasonable,'

shipowners must execute an evacuation from port if its location falls within a potential "cone of uncertainty." In this case, that encompassed a 600 mile stretch of coastline spanning two countries – the majority of which was ultimately unaffected by the storm. The Fifth Circuit's standard will result in mass evacuations, chaos, unnecessary loss of life and property as vessels depart port into unknown conditions as to the actual path of the storm.

And it creates a circuit split in a literal sense – dividing the Gulf of Mexico in half – separating ports in Texas, Louisiana, and Mississippi from the rest of the United States.

In short, it requires sheer luck, essentially foreclosing the *force majeure* defense for any overwhelmed vessel – no matter her efforts – and is akin to strict liability for the shipowner.

This case presents the ideal vehicle to resolve the newly created conflict among the circuits and articulate a uniform standard applying to the *force majeure* defense.

A. Legal Background

This case presents an important issue of federal maritime law that warrants this Court's review, particularly in light of this Court's vital role in shaping rules of admiralty and safeguarding maritime commerce.

Article III, Section 2, Clause 1 of the United States Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction."[1]

This grant of power - "the *only* instance where the Constitution delegates jurisdiction over an entire subject matter to the federal judiciary"[2] - "contemplates a system of maritime law coextensive with, and operating uniformly in, the whole country."[3]

Thus, "[t]he policy reason for this important and unique doctrine is the need for *uniformity*, which is an overriding value in admiralty law,"[4] and "[t]he

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[1] Seizing upon this grant of authority, Congress enacted the Judiciary Act of 1789, which vested the district courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction ...." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3:1 (6th ed. 2018) (citations omitted). This congressional grant of judicial power has been carried through to today's 28 U.S.C. § 1333.

[2] Schoenbaum, *supra* § 3:1 (emphasis added).

[3] *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 69 (2024) (citation and internal quotation marks omitted). This principle has been consistently reinforced and upheld by this Court. *See, e.g., The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874); *S. Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004); *Great Lakes*, 601 U.S. 65.

[4] Schoenbaum, *supra* § 4:1 (emphasis original).

purposes of that uniform system include promoting 'the great interests of navigation and commerce ....'"[5]

Indeed, "[f]rom earliest times, maritime law [has been] shaped by the practical needs of those engaged in maritime commerce."[6] And as this Court has instructed, "[t]he 'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime *commerce*."'"[7]

B. Factual Background

This case involves claims for damages arising after the breakaway of an unmanned and unpowered drillship (the "DPDS1") during the landfall of Hurricane Harvey on Friday, August 25, 2017.

Prior to and during Hurricane Harvey's landfall, DPDS1, owned by Paragon, was cold-stacked and moored at a dock in Port Aransas, Texas.

On Monday, August 21, Paragon put Signet (a local harbor tug company) on notice that it might need tow-out services for DPDS1, depending upon the then-unnamed storm's development, which Paragon was monitoring.

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[5] *Great Lakes*, 601 U.S. at 69 (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1666 (1st ed. 1833)).
[6] Schoenbaum, *supra* § 1:1.
[7] *Norfolk S. Ry.*, 543 U.S. at 15, 25 (citations omitted, emphasis original).

The morning of Wednesday, August 23, although no official advisories had been issued at the time, Paragon informed Signet that DPDS1 would be towed out to open sea to evade the hurricane. The parties began contract negotiations under a master charter agreement, and port authorities scheduled DPDS1 as first in line to be towed out of port the morning of Thursday, August 24.

Port authorities had scheduled two warm-stacked, manned vessels to be towed out on Wednesday, prior to DPDS1's Thursday departure. After the first of those vessels suffered mechanical breakdowns and delays, the port authorities moved the second vessel's tow-out to take place during the first slot on Thursday, bumping DPDS1's departure to the second slot.

The morning of Thursday, August 24, that second vessel (which now occupied DPDS1's former slot) began its tow-out. DPDS1, next in line, was ready and waiting only for Signet's tugs to come retrieve her. But just before DPDS1's departure - in response to the rapid intensification of the storm overnight - port authorities abruptly closed the port to facilitate the evacuation of military vessels and cancelled all remaining tow-outs - including DPDS1's, forcing the vessel to remain in port.

Only after the tow-out's cancellation was Harvey first officially forecast to make landfall as a "major" hurricane. And only three-and-a-half hours after the port's closure, the Coast Guard ordered all

personnel remaining at the dock to evacuate. During that window, Paragon fortified DPDS1's moorings, had a marine surveyor inspect the lines, and enlisted tugs to support the lines during the storm.

Concerned whether DPDS1's moorings could withstand the now-major hurricane (which Paragon reasonably believed could withstand low-category one conditions), Paragon and Signet (the tug company originally hired to tow DPDS1 out, and the only tug company in operation at the time) agreed that Signet would provide two harbor tugs, ARCTURUS and ENTERPRISE, to remain alongside DPDS1 during the storm. The tugs would apply motive power to help keep the vessel moored during the storm and attempt to control DPDS1 if she broke free.

After the port's closure, Signet and Paragon briefly discussed these tug services over the phone, including the rate and nature of the services. Later that afternoon, in the midst of a mandatory civilian evacuation, Signet's in-house counsel emailed Signet's Ingleside Tariff to Paragon's in-house counsel, merely stating the attached document would govern the services. Paragon acknowledged the email.

The morning of Friday, August 25, Signet's tugs secured themselves to DPDS1. For at least ten hours, DPDS1's moorings withstood progressively strengthening tropical storm and hurricane-force winds as Hurricane Harvey advanced towards the Texas coast. Two hours after the Category-4 eyewall began to pass over Port Aransas, the winds started

pushing DPDS1 away from the dock. This overwhelmed the moorings and, around 11:00 p.m., at the height of the storm, DPDS1 broke free.

Signet's tugs, unable to control DPDS1's movement in near-100 mph winds, were pushed into two nearby drilling rigs, their towlines snapping. ENTERPRISE sank and ARCTURUS was damaged, but no crew were injured.

DPDS1, now free-floating in the midst of the hurricane, was driven into the ship channel, and eventually grounded near the bank.

The next morning, Paragon retained Signet to provide a tug to monitor the grounded vessel until she could be salvaged. This arrangement continued until the evening of August 28, when DPDS1 refloated and began drifting, eventually alliding with a nearby university research pier. Afterwards, Signet's tug pinned DPDS1 to the shore. Signet subsequently provided additional tugs to hold DPDS1 to the shore until the drillship could be towed to another dock to be scrapped.

C. Proceedings Below

Three Complaints in Limitation ensued, filed by Paragon (as owner of DPDS1) and Signet (as owner of ARCTURUS and ENTERPRISE). Both parties filed counterclaims, and Paragon made claims against Signet's insurer ("American Club").

The owners of the dock, the two adjacent drilling rigs, and the research pier filed claims for property damages, respectively. Paragon and Signet each independently settled all of these claims prior to trial.

In July and August of 2021, the district court held a five-day bench trial on the claims remaining between Paragon, Signet, and American Club.

On August 17, 2022, the district court filed an amended order and opinion (App. B, p.p. 29a-153a) in which it ruled that Paragon was solely responsible for the August 25, 2017 breakaway of DPDS1 and liable for all damages resulting from the immediate aftermath of that event. The district court also ruled that Paragon and Signet were equally liable for damages resulting from the refloating and allision.

The district court rejected Paragon's *force majeure* defense, holding Paragon acted unreasonably by failing to issue an evacuation order on Monday, August 21 and by relying on inaccurate engineering reports regarding its mooring system. The district court reasoned that, as of Monday afternoon, Paragon should have anticipated the future breakdowns, delays, and evacuations of other vessels and the port's eventual closure on Thursday (the combination of which resulted in the cancellation of DPDS1's tow), as well as the storm's future rapid intensification into a on Thursday, which overwhelmed DPDS1's moorings.

The district court did not evaluate Signet's conduct under towage law, holding that, because Signet did not undertake to transport DPDS1, Signet's duties under towage law were inapplicable. Ascribing no duty to Signet under these circumstances, the district court did not engage in an analysis under comparative fault. It reasoned that Paragon was the only party who had any duty.

The district court accepted Signet's parol evidence and ignored the Tariff's written terms to find Signet unilaterally waived certain provisions for its benefit, despite the Tariff's written terms to the contrary. Partially invoking Texas law despite the Tariff's governance by general maritime law, the district court held that, because Signet impliedly waived the Tariff's written provisions prohibiting its application to a deadship or during heightened port conditions, the Tariff governed the parties' relationship. As a direct result, Signet was able to seek (and was subsequently awarded) both indemnity for its separate, pretrial settlement agreement and attorney's fees from Paragon.

On April 24, 2024, the Fifth Circuit affirmed the district court's opinion in its entirety. (App. A, p.p. 1a-28a).

The Fifth Circuit rejected Paragon's argument that, under general maritime law, the Tariff should be construed according to its written terms, which prohibited its application, and Signet should not be permitted to alter the plain meaning of those terms

after-the-fact via parol evidence. Against well-established principles of maritime contract interpretation, the Fifth Circuit held that the Tariff's language "explicitly excluding 'assistance to a deadship' or services during 'heightened Coast Guard port conditions' was for the benefit of Signet and could be waived unilaterally under federal maritime and Texas law."

The Fifth Circuit rejected Paragon's argument that, under general maritime law, a shipowner responding to a *force majeure* event is held to a standard of ordinary reasonable care, not a standard of perfection, and that its decisions should not be examined under facts knowable only through hindsight. Against well-established principles of general maritime law governing the *force majeure* defense, the Fifth Circuit held Paragon "failed to show that it 'took reasonable precautions under the circumstances as known or reasonably to be anticipated'", endorsing the district court's conclusions that "a prudent shipmaster would [not merely] anticipate" future mechanical failures of other vessels, future delays of other vessels, future evacuations of Naval vessels, future rapid intensification of the storm, and future closure of the port less than 24-hours before landfall, but also "anticipate" and accurately respond to these events almost *four days* before any of them even began to transpire.

The Fifth Circuit rejected Paragon's argument that, under general maritime law, Signet, as a tug

company providing tug services, should be judged according to its obligations under towage law. Instead, the Fifth Circuit created a "voyage" test, holding that tugs providing tug services to a vessel, but not literal transportation from 'point A' to 'point B', are not bound by the traditional duties of a tug under general maritime law, including a tug's responsibility to protect itself. Declining to articulate *any* duty owed by a tug under these circumstances, the Fifth Circuit affirmed the district court's allocation of total liability to Paragon for damages to Signet's tugs during the breakaway, the very risk Signet was hired to face.

The court of appeals subsequently denied rehearing en banc. (App. D, p.p. 158a-161a).

REASONS FOR GRANTING THE PETITION

I. Under federal maritime law, parol evidence cannot modify the written terms of a maritime contract.

The Fifth Circuit's departure from principles federal general maritime law governing the enforcement and interpretation of maritime contracts warrants this Court's review. *See* Sup. Ct. R. 10(a), 10(c).

The Fifth Circuit has created a new rule of maritime contract interpretation which conflicts with the precedent established by this Court and other circuit courts.

The effects of this departure will be felt beyond this case and will be detrimental to maritime commerce, and it is vital that this Court grant review to ensure the consistent application and continued uniformity of the federal general maritime law.

A. The principles of general maritime law governing interpretation and enforcement of maritime contracts are well-established.

The principles of general maritime law governing the interpretation of maritime contracts are well-established. The tenets articulated by this Court have been consistently followed the courts of appeal, including the Fifth Circuit – until this case.

First, federal common law controls the interpretation of a maritime contract. *See, e.g., Norfolk S. Ry. Co.*, 543 U.S. at 22-23 ("When a contract is a maritime one ... federal law controls [its] interpretation.") (citation omitted); *Har–Win, Inc. v. Consol. Grain & Barge Co.,* 794 F.2d 985, 987 (5th Cir. 1986).

Second, state law principles may only be applied insofar as they do not contravene general maritime law or disrupt the uniformity of maritime law. *See, e.g., Jensen,* 244 U.S. at 216 (prohibiting application of state law which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony

and uniformity of that law"); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

Third, a maritime contract must be construed by its terms and consistent with the intent of the parties. *See, e.g., CITGO Asphalt Ref. Co. v. Frescati Shipping Co, Ltd.*, 589 U.S. 348, 355 (2020) ("Maritime contracts must be construed like any other contracts: by their terms and consistent with the intent of the parties.") (citation and internal quotation marks omitted); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1214 (5th Cir. 1986) (a "contract should be read as whole, and a court should not look beyond the written language ... to determine the intent of the parties") (citing *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 955 (5th Cir. 1984); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332-33 (5th Cir. 1981)).

Fourth, a maritime contract should be read *in toto*, and its clear, unambiguous terms should be given their plain meaning. *See, e.g., CITGO*, 589 U.S. at 355 ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.") (citation and internal quotation marks omitted); *Weathersby*, 752 F.2d at 955 ("A maritime contract ... should be read as a whole and its words given their plain meaning") (citation and internal quotation marks omitted); *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir. 2007); *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003); *Davis*

v. Valsamis, Inc., 752 Fed. App'x. 688, 692 (11th Cir. 2018).

Fifth, a maritime contract should be interpreted so that all its terms are consistent with each other, and no terms are rendered meaningless or superfluous. *See, e.g., CITGO*, 589 U.S. at 361-62 ("Perhaps the dissent says it best: We must 'reject [this] interpretation that ... se[ts] up ... two clauses in conflict with one another.'") (citation and internal quotation marks omitted, alterations in original); *Capozziello v. Brasileiro*, 443 F.2d 1155 (2d Cir. 1971) ("an interpretation [which] would not only create an internal redundancy in the clause but [ ] also render the clause meaningless .... should be avoided") (citations omitted); *Am. Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, Inc.*, 479 F.3d 288, 293 (4th Cir. 2007) ("maritime contracts, like other contracts, should be interpreted as so to give effect to each provision of the contract") (citation omitted); *Foster Wheeler Energy Corp. v. An Ning Jiang MV*, 383 F.3d 349, 354 (5th Cir. 2004) ("[f]ederal courts sitting in admiralty adhere to the axiom that 'a contract should be interpreted so as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous'") (citation and internal quotation marks omitted; *Internaves de Mexico s.a. de C.V. v. Andromeda S.S. Corp.*, 898 F.3d 1087 (11th Cir. 2018).

Sixth, where a maritime contract's terms are unambiguous, they cannot be varied by extrinsic

evidence, and the parties' intent is determined from the face of the agreement. *See, e.g., CITGO*, 589 U.S. at 355; *Puerto Rico Fast Ferries LLC v. SeaTran Marine, LLC*, 102 F.4th 538, 546 (1st Cir. 2024); *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 26-37 (2d Cir. 1988) ("The purpose and essence of the [parol evidence] rule is to avoid the possibility that fraud might be perpetrated if testimony as to subjective intent could be substituted for the plain meaning of a contract. In the absence of ambiguity, the effect of admitting extrinsic evidence would be to allow one party to substitute his view of his obligations for those clearly stated; *Corbitt*, 654 F.2d at 332-33; *Progressive Rail Inc. v. CSX Transp., Inc.*, 981 F.3d 529 (6th Cir. 2020); *Day v. Am. Seafoods Co. LLC*, 557 F.3d 1056, 1058 (9th Cir. 2009); *Flores*, 335 F.3d at 910.

Seventh, an oral maritime contract is valid if there is a meeting of the minds on all essential terms and obligations of the agreement. *See, e.g., Kossick*, 365 U.S. at 734 ("oral contracts are generally regarded as valid by maritime law"); *Fuesting v. Lafayette Parish Bayou Vermilion Dist.,* 470 F.3d 576, 580 (5th Cir. 2006); *Am. Marine Tech, Inc. v. World Grp. Yachting, Inc.*, 2021 WL 4785888, at *3 (11th Cir. Oct. 14, 2021).

In a non-maritime context, the Fifth Circuit has cautioned that courts "may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the

dispensation of equity upon the facts of a given case." *Young v. Merrill Lynch & Co.*, 658 F.3d 436, 448 (5th Cir. 2011) (citation omitted); *see CITGO*, 589 U.S. at 364 ("Neither tort principles nor policy objectives, however, override the ... clause's unambiguous meaning.").

B. The Fifth Circuit's decision conflicts with this Court's precedent.

Despite foundations of contract interpretation, the Fifth Circuit held that the Tariff's language "explicitly excluding 'assistance to a deadship' or services during 'heightened Coast Guard port conditions' was for the benefit of Signet and could be waived unilaterally under federal maritime and Texas law." *See* App. A, p.p. 19a-28a.

That holding permitted extrinsic evidence to override the Tariff's written terms, thereby rendering multiple portions of the Tariff's language meaningless, and allowed one party's subjective intent to override the Tariff's plain language.

This decision and line of reasoning directly conflicts with this Court's precedent and the rules followed by the other circuit courts.

First, the Tariff's language expressly excludes services to a deadship or during heightened port

conditions.[8] Nowhere does the Tariff state or indicate that this provision is intended for Signet's benefit.

Second, the Tariff's language mandates that any services to a deadship or under heightened port conditions "... shall be governed by the terms and conditions of a suitable contract used by Signet for such Services."[9] On its face, the terms indicate Signet intended for a contract other than the Tariff to apply. As the drafter, Signet could have included a "right" to waive this section if it so desired, but instead expressly stated the opposite, mandating that the Tariff would not apply. By accepting extrinsic parol evidence, the Fifth Circuit rendered this provision meaningless.

Third, the Tariff's language provides that "... Signet shall have the right at any time, upon thirty (30) days' advance notice to Owners, to ... adjust terms or conditions."[10] These terms indicate Signet intended for any amendment to be predicated by 30-days advance notice to a shipowner. By permitting Signet to alter the Tariff's terms less than 24-hours prior to the commencement of services, the Fifth Circuit rendered this provision meaningless.

Fourth, the Tariff's language provides that "[a]ll notices under this Tariff shall be in writing ...."[11]

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[8] *See* Section 5, ROA.14301.
[9] *See Id*. The Fifth Circuit did not discuss this portion of Section 5 in its Opinion.
[10] *See* Section 21(a), ROA.14308.
[11] *See Id*.

These terms indicate that, in addition to requiring 30-days' advance notice, any such notice adjusting the contract's terms must be in writing. By permitting Signet to alter the Tariff's terms orally and/or impliedly, the Fifth Circuit rendered this provision meaningless.

Fifth, the Tariff's language provides that "[t]his Tariff supersedes all previous contracts of whatsoever kind or nature, and constitutes the final, entire, complete, and integrated agreement between or among the parties ...."[12] Allowing Signet to incorporate oral and/or implied amendments to the Tariff, and holding that the Tariff was incorporated into a prior oral agreement between the parties by reference, the Fifth Circuit rendered this provision meaningless.

Sixth, the Tariff's language provides that "[a]s between the parties, no oral statements or prior written material not specifically incorporated herein shall be of any force and effect."[13] Allowing Signet to incorporate oral and/or implied amendments to the Tariff, and holding that the Tariff was incorporated into a prior oral agreement between the parties by reference, the Fifth Circuit rendered this provision meaningless.

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[12] *See* Section 21(b), ROA.14308. The Fifth Circuit did not discuss this portion of Section 21(b) in its Opinion.

[13] *See Id*. The Fifth Circuit did not discuss this portion of Section 21(b) in its Opinion.

Seventh, the Tariff's language provides that "[t]he parties specifically acknowledge that, in agreeing to this Tariff, each is relying solely upon the representations and agreements contained in this Tariff and no others."[14] Allowing Signet to incorporate oral and/or implied amendments to the Tariff, and holding that the Tariff was incorporated into a prior oral agreement between the parties by reference, the Fifth Circuit rendered this provision meaningless.

Eighth, the Tariff's language provides that "[a]ll prior representations or agreements, whether written or oral, not expressly incorporated herein, are superseded."[15] By allowing Signet to incorporate oral and/or implied amendments to the Tariff, and holding that the Tariff was incorporated into a prior oral agreement between the parties by reference, the Fifth Circuit rendered this provision meaningless.

Ninth, the Tariff's language provides that "[t]his Tariff shall not be amended, modified, or waived unless and until made in writing and signed by each party hereto."[16] This provision is self-evident, and nowhere does the Tariff state or indicate that a provision may otherwise be orally or impliedly altered. Yet the Fifth Circuit accepted extrinsic parol evidence directly contradicting this provision, substituting subjective intent for plain meaning. By

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[14] *See Id*. The Fifth Circuit did not discuss this portion of Section 21(b) in its Opinion.
[15] *See Id*. The Fifth Circuit did not discuss this portion of Section 21(b) in its Opinion.
[16] *See Id*.

allowing Signet to orally and/or implied alter the Tariff, the Fifth Circuit rendered this provision meaningless.

In sum, the Tariff's terms prohibited both its application under the instant circumstances, and any implied waiver of its terms. It also excluded any exception to these provisions, whether intended for Signet's benefit or otherwise. The Tariff's written, mandatory terms foreclosed any argument that Signet had an implied "right" to impliedly waive the terms of Section 5. Yet the Fifth Circuit held Signet did have such a right, and permitted Signet to circumvent the written terms via the use of parol evidence.

Through its acceptance of extrinsic evidence, and in disregard of this Court's precedents and the general maritime law, the Fifth Circuit altered the Tariff's unambiguous, written provisions via parol evidence; disregarded the plain meaning of the Tariff's language;[17] disregarded four instances of the word "shall";[18] rendered multiple terms meaningless

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[17] *See Green v. Biddle*, 21 U.S. (8 Wheat) 1, 89-90 (1823) ("where the words of a ... contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded").

[18] As this Court has explained, use of the term "shall" in a clause, which "usually connotes a requirement," should "foreclose[ ] the ... permissive view" that the clause merely indicates an "elective right", as such interpretation would "sidestep[] the ... clause's plain terms." *See CITGO*, 589 U.S. at 1088 n.3 (internal quotation marks and citations omitted).

and superfluous; and rendered multiple provisions contradictory.[19]

C. The Fifth Circuit's decision relied on state law in contravention of federal principles governing maritime contracts, disrupting the uniformity of general maritime law.

This Court has long instructed that federal common law controls the interpretation of maritime contracts, and that state law which conflicts with general maritime law cannot apply.[20] Furthermore, the Tariff's provisions expressly mandated that its interpretation "shall" be governed by the general maritime law.[21]

Against this Court's precedent and the Tariff's own instructions, the Fifth Circuit "borrowed" state law which conflicted with the general maritime law, applying it to the exclusion of established principles of contract interpretation. Relying on state law, the Fifth Circuit held that, under federal maritime law, a

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[19] As this Court has explained, "[w]e must 'reject [this] interpretation that ... se[ts] up ... two clauses in conflict with one another.'" *CITGO*, 589 U.S. 348 at 361-62 (quoting Thomas, J., dissenting).

[20] *See Great Lakes*, 601 U.S. at 86 (Thomas, J., concurring) ("Litigants and courts should heed our instruction that general maritime law applies in maritime contract disputes unless they 'so implicate local interests as to beckon interpretation by state law.'") (quoting *Norfolk S. Ry.*, 543 U.S. at 27).

[21] *See* Section 20(a), ROA.14308.

party may unilaterally waive a contract provision intended for its benefit.

Unclear is where the Fifth Circuit found any maritime authority articulating, supporting, or lending itself to such a rule.

While the Fifth Circuit did cite one federal case in support of this supposed rule of federal maritime law, the *dicta* it relied upon lends no support to its sweeping and vague 'waiver rule.'[22] Unlike the circumstances surrounding the Fifth Circuit's decision in this case, *Stauffer Chemical Co. v. Brunson* concerned mutual waiver of a written term by both parties for the mutual benefit of both parties, and there was no mention of a written term prohibiting such waiver. 380 F.2d 174 (5th Cir. 1967).

The only other case relied upon by the Fifth Circuit, a Texas state court case, similarly fails to support the existence of a unilateral waiver rule.[23] Unlike the present case, the non-maritime contract at-issue in *Johnson v. Structured Asset Services, LLC* did not contain a provision prohibiting unilateral or implied waivers. 148 S.W.3d 711 (Tex. App. 2004). Even if this did support the Fifth Circuit's decision, the court's reliance on it would be impermissible under federal maritime law.

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[22] *See* App. A, p.p. 25a (citing *Stauffer Chem. Co. v. Brunson*, 380 F.2d 174 (5th Cir. 1967)).

[23] *See* App. A, p.p. 25a (citing *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711 (Tex. App. 2004)).

Furthermore, the Fifth Circuit relied on *Johnson* to the exclusion of Texas law directly contradicting its decision and unilateral waiver rule. For example, the contract at-issue in *Varibus Corp. v. South Hampton Co.* contained a written provision prohibiting verbal amendments. 623 S.W.2d 157 (Tex. App. 1981). The court rejected the notion that either party could verbally or unilaterally waive a term, even if intended only for that party's benefit, and held that any such waiver "would amount to a unilateral modification of the contract in violation of" its own provisions. 623 S.W.2d 157, 160 (Tex. App. 1981); *see Instone Travel Tech Marine & Offshore v. Int'l. Shipping Partners, Inc.*, 334 F.3d 423, 428 (5th Cir. 2003) ("Texas law requires us to peruse the complete document to understand, harmonize, and effectuate all its provisions.") (citation and internal quotation marks omitted).

Thus, the Fifth Circuit has created a new rule that under general maritime law, the drafter of a contract may unilaterally waive a written provision intended for its benefit, despite the contract's written terms expressly prohibiting same.

Nothing in the Fifth Circuit's decision explains how this is or why this should be a rule of general maritime law.[24]

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[24] *See* Schoenbaum, *supra* § 4:4 ("Although the federal judiciary has the power to announce new principles of general maritime law, this is done very infrequently and only when there is a compelling need to fashion new rules.").

The Fifth Circuit's new rule means that a written contract's plain, unambiguous terms may be nullified by extrinsic parol evidence which contradicts those terms and supplies subjective intent. This violates established principles of maritime contract interpretation discussed earlier, and "interferes with the proper harmony and uniformity of" the general maritime law.[25]

As the Fifth Circuit's unilateral waiver rule conflicts with general maritime principles of contract interpretation, and the court of appeals applied this rule to the exclusion of those principles, it is unclear which rule should prevail. Courts are left to wonder how to determine whether the unilateral waiver rule or another rule of construction should prevail.

That a contract's terms will be enforced as written in one circuit, but may be altered by subjective, extrinsic evidence in another circuit will lead to the sort of inconsistency in federal law that this Court typically grants certiorari to prevent.

D. The Fifth Circuit's decision will disrupt maritime commerce by destabilizing maritime contracts.

This decision will void the true enforceability of written terms prohibiting unwritten or unilateral amendments. This core principle – pervasively common to maritime contracts and many other areas

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[25] *See Jensen,* 244 U.S. at 216.

of interstate commerce – will become obsolete if one party can unilaterally decide to waive certain provisions of a contract which that party subjectively believes to be for its own benefit, and where that modification is not communicated to the other party – let alone reduced to writing and acknowledged by the signature of both parties, as required by the contract's written terms.

Here, Signet introduced parol evidence in circumvention of the Tariff's express provisions prohibiting its application. The court allowed this parol evidence to imply a waiver of those provisions, despite language expressly prohibiting such amendment. Signet then asserted the remainder of its Tariff should be strictly enforced by its written terms: namely, those allowing it to recover indemnity and attorney's fees from Paragon, which were never bargained for. The Fifth Circuit affirmed the district court's erroneous acceptance of this assertion, thereby disregarding two additional principles of general maritime law, and affording Signet remedies to which it would not otherwise be entitled.[26] Stated another way, the court's means to a desired result in this specific case is no justification for undermining the integrity of all written maritime contracts through a sweeping new rule.

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[26] *See Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992) (discussing contractual indemnity); *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 405-06 (5th Cir. 2003) (discussing attorney's fees).

Where the only evidence of a provision being for a party's benefit is derived from parol evidence, a party could advance almost any provision as being intended for its benefit, and thereby be permitted waive or invoke same despite contrary written terms.

How are courts to determine whether a provision is intended for a party's benefit? If a contract's written terms may not be enforced as written, how can a party ever be on notice of those terms? If a contract contains unspoken rights and remedies, how can there ever be a meeting of the minds?

Perhaps of greatest concern, it will be impossible for two parties to a written contract to eliminate the uncertainty created by this ruling, since even a written commitment *not* to amend terms without reducing that change to a bilaterally signed writing is unenforceable, as even that provision can be waived by one party if that party believes the waiver applies to a provision intended only for its benefit.

The Fifth Circuit's decision will undermine the integrity of every form of maritime contract, as every written maritime contract is now open for challenge based on one party's subjective belief and intent, including marine insurance, charter parties, indemnity clauses, contracts of affreightment, and bills of lading. Parties will be held to terms unseen and never bargained for, left to the mercy of the other's subjective intent.

II. Under federal maritime law, a shipowner facing a *force majeure* event is held to a standard of ordinary reasonable care.

The Fifth Circuit's departure from the established principles of federal general maritime law governing the duty owed by a shipowner responding to a *force majeure* event warrants this Court's review. Sup. Ct. R. 10(a), 10(c).

The Fifth Circuit has placed an impossible burden of "reasonable" conduct on shipowners which conflicts with this Court's precedent and rejects general maritime law principles followed by the other circuit courts. By imposing a requirement to not only accurately predict future decisions by other shipowners, but also their potential mechanical issues or evacuation plans; to not only accurately predict and plan in advance for "sudden changes and circumstances", but also the actions of the United States and the weather; and by imposing a requirement that shipowners accurately act in advance of same, the Court has functionally eliminated a prohibition against hindsight analysis and limited viability of the *force majeure* defense.

If this standard is applied in the future, these criteria for "reasonable" conduct will defeat a *force majeure* defense in every case. Reasonable conduct does not require perfection and it certainly does not demand omniscience.

The effects of the Fifth Circuit's reasoning will reach beyond this case and be detrimental to maritime commerce, as it will essentially impose strict liability upon any vessel overwhelmed by a hurricane, effectively nullifying the *force majeure* defense.

A. The principles of general maritime law articulating the defenses governing collisions and allisions are well-established by this Court and well-developed by the circuit courts.

An analysis of the *force majeure* defense begins with the standards governing a shipowner's duty of care in allision or collision cases.

In *The Louisiana*, this Court articulated the presumption that when a drifting vessel allides with a stationary object, the drifting vessel is presumed to be at fault. 70 U.S. (3 Wall.) 164, 173 (1865). There are three ways in which a shipowner may rebut this presumption.

First, the shipowner may demonstrate that the allision "was the fault of the stationary object," similar to a contributory negligence[27] defense. *See Fischer v. S/Y Neraida*, 508 F.3d 586, 593 (11th Cir. 2007). Second, the shipowner may demonstrate that

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[27] *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

it "acted with reasonable care," similar to a denial of negligence. *See Fischer*, 508 F.3d at 593. Third, the shipowner may demonstrate that the allision was an "unavoidable accident" (also referred to as a *force majeure* or "Act of God"), similar to a superseding causation[28] defense. *See Fischer*, 508 F.3d at 593.

While the analysis of the second and third defenses can overlap, "[e]ach independent argument, if sustained, is sufficient to defeat liability." *Id*.

In *The Louisiana* and similar cases, this Court established that the standard of care in admiralty is "reasonable care under the circumstances" – and not a higher standard. *See, e.g., The Virginia Ehrman*, 97 U.S. 309 (1877); *The Clarita*, 90 U.S. (23 Wall.) 1 (1874); *The Grace Girdler*, 74 U.S. (7 Wall.) 196 (1868).

In keeping with this Court's precedent, the former Fifth Circuit articulated that the standard for determining whether the shipowner is free from fault is whether the shipowner "took reasonable precautions under the circumstances as known or reasonably to be anticipated." *In re United States*, 425 F.2d 991, 995 (5th Cir. 1970).

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[28] *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837-38 (1996). Superseding cause "applies where the defendant's negligence in fact substantially contributed to the [] injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." *Stolt Achievement v. Dredge B.E. Lindholm*, 447 F.3d 360, 367-68 (5th Cir. 2006).

The other circuit courts, in turn, have also adhered to the reasonable care standard. *See, e.g., Fischer*, 508 F.3d at 594 ("We find no authority and discern no reason now to impose upon defendants in allision cases a higher standard of care than ordinary reasonableness."); *Weyerhaeuser Co. v. Atropos Island,* 777 F.2d 1344, 1348 (9th Cir. 1985); *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 241 F. Supp. 99, 108 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 774 (2d Cir. 1966); *Swenson v. The Argonaut*, 204 F.2d 636 (3d Cir. 1953); *The Charles H. Sells*, 89 F.2d 631, 633 (2d Cir. 1937)

Importantly, as the Eleventh Circuit has instructed, "[a]though what 'reasonable care' requires changes with the circumstances, the standard recognizes the existence in every case of something more that could be done – and perhaps would be legally required under a 'highest degree of caution' standard – but that reasonable care does not demand." *Fischer*, 508 F.3d at 595.

In the context of a *force majeure* event, the shipowner must prove both that the weather was "heavy"[29] and that the shipowner "took reasonable precautions under the circumstances as known or reasonably to be anticipated." *In re United States*, 425 F.2d 991, 995 (5th Cir. 1970); *see Fischer*, 508 F.3d at 596.

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[29] In the present action, it was established that Hurricane Harvey was a *force majeure* event; therefore, the analysis focused on whether Paragon acted reasonably under the circumstances.

Accordingly, "[i]f those responsible for the [vessel] were reasonable in their anticipation of the severity of the impending storm and undertook reasonable precautions in light of such anticipation, then they are relieved of liability." *In re United States*, 425 F.2d at 995. "The highest degree of caution that can be used is not required" of the shipowner. *See The Grace Girdler*, 74 U.S. (7 Wall.) 196 (1868).

Crucially, the shipowner's conduct cannot be viewed through the lens of hindsight, or "through some sort of nautical rear view mirror." *See United Geophysical Co. v. Vela*, 231 F.2d 816, 818-19 (5th Cir. 1956); *see also United States v. Lykes Bros. S.S. Co.*, 511 F.2d 218, 225 (5th Cir. 1975).

Instead, the shipowner's actions are examined against information "known" at the time or that it "reasonably should have anticipated" at the time. *In re United States*, 425 F.2d at 995; *see Simmons v. Berglin*, 401 Fed. App'x 903, 908 (5th Cir. 2010) (rejecting "hindsight speculations about what could have been done"); *Lord & Taylor*, 108 F. Supp. 3d at 226 (rejecting plaintiff's speculations "based on a Monday-morning-quarterback assessment ... not on the information known to [the defendant]").[30]

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[30] Consistent with the prohibition on hindsight, courts generally begin their examination of a shipowner's actions from the point when it is reasonably certain a storm's landfall will affect the vessel's location, which usually coincides with the issuance of the first official storm watch or warning for that location, often 24-72 hours prior to landfall. *See, e.g., Fischer*, 508 F.3d 586; *Lord & Taylor LLC v. Zim Integrated Shipping Servs., Ltd.*, 108 F.

This makes sense. If courts examined the shipowner's actions against information which the shipowner had no way of knowing, or which did not exist, the shipowner's burden would be impossible, and the defense would be nullified.

> There is no vision which is as clear as hindsight. Images come into almost perfect focus through the evidentiary microscope of a lawyer's hindsight. After thousands of daily and weekly occurrences of maritime life are discarded, the lawyer can isolate a few incidents for examination with such a microscope to document things such as privity or knowledge. This process proceeds as if a reasonable person had no other responsibilities or phenomena or events to observe other than those incidents now carefully isolated and focused on through this hindsight perspective. If life were so simple, foreseeability under the law would be the equivalent of omniscience.

Supp. 3d 197 (S.D.N.Y. 2015); *Valley Line Co. v. Musgrove Towing Serv., Inc.*, 654 F. Supp. 1009 (S.D. Tex. 1987); *In re Marine Leasing Servs., Inc.*, 328 F. Supp. 589 (E.D. La. 1971), *aff'd*, 471 F.2d 255 (5th Cir. 1973); *Ladner v. Bender Welding & Mach. Co.*, 336 F. Supp. 1264 (S.D. Miss. 1971); *Atlanta-Schiffahrts v. United States*, 299 F. Supp. 781, 783 (E.D. La. 1969).

In re Complaint of Bankers Trust Co., 651 F.2d 160, 170 (3d Cir. 1981).

B. The Fifth Circuit's decision conflicts with this Court's precedent governing reasonable care and disregards well-established principles governing the *force majeure* defense, creating a split amongst the circuits.

The Fifth Circuit has placed the responsibility on the shipowner to exhibit clairvoyance in order to be considered reasonable, departing from this Court's precedent. The result is an elimination of the longstanding rule against hindsight analysis, and sharply conflicts with the standards established by the Eleventh Circuit and followed by other district courts.

The Fifth Circuit held that "Paragon has failed to show that it 'took reasonable precautions under the circumstances as known or reasonably to be anticipated.'" *See* App. A, p.p. 19a (citing *In re United States*, 425 F.2d 991, 995 (5th Cir. 1970)).

The Fifth Circuit reasoned that the district court "did not use 'hindsight' but rather applied the judgment that the other drillship owners employed at the time of the storm" and, furthermore, that "the district court's holdings about what a prudent shipmaster would anticipate ... are not contrary to law." *See* App. A, p.p. 19a.

In concluding Paragon failed to take reasonable precautions under the circumstances, the Fifth Circuit affirmed the district court's conclusions that Paragon was unreasonable on relying on a port-scheduled evacuation slot because it (1) "did not have a reasonable basis on which to gauge the strength of its mooring system"; (2) should have anticipated vessel breakdown and delays on Wednesday, August 23; (3) should have anticipated the Navy's evacuation on Thursday, August 24; (3) should have anticipated the Port's closure on Thursday, August 24; and (4) should have anticipated the storm's rapid intensification on Thursday, August 24, among other things.

While reviewing the issue the Fifth Circuit noted:

> Considering these facts, the District Court rejected Paragon's argument that the delays on Thursday morning were unforeseeable, because "prudent ship masters foresee such situations and factor them into their decision making timetable." The District Court held that a prudent shipmaster would recognize that Navy ships would have priority over commercial ships in an evacuation, and that "[a] prudent shipmaster cannot rely on the plan that assumes the best-case scenario with no sudden changes in circumstances."

App. A, p.p. 18.

It seems Fifth Circuit had its reservations in affirming the district court's conclusion but relented under the belief that it was factual in nature.

> As a reviewing court, we have a clear mandate. "Even though we might have weighed the evidence differently had we been sitting as trier of fact, we must accept the district court's findings as long as they are plausible in light of the record viewed in its entirety." *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1247 (5th Cir. 1990).

App. A, p.p. 19.

But this is not a matter of "weighing" the facts. The Fifth Circuit sanctioned the district court's reliance on facts *only knowable* through hindsight to reach its conclusion. As each of those findings necessarily relied on hindsight, the Fifth Circuit's endorsement of the district court's reasoning is erroneous as a matter of law.

In fact, a closer look at the district court's assignment of fault would show that virtually all of the elements were influenced by a standard of care that required an accurate prediction of categorically unknowable events that were under the control of third parties with a variable nature of the storm itself.

The district court's conclusion that Paragon should have made the decision to evacuate DPDS1 "no later than the afternoon [of] Monday, August 21" demonstrates the gravity of the Fifth Circuit's error. *See* App. B, p.p. 97a. Had Paragon made its decision on Monday and disaster had later struck in the Gulf, the district court could have utilized this same forecast to conclude that Paragon should have *waited* for a more certain forecast before making its decision.

It is the totality of the Fifth Circuit's approach which results in a complete cancellation of the *force majeure* defense by redefining the standard of reasonableness to require actions based on knowledge only ascertainable in hindsight, and after the events have already occurred.

The Fifth Circuit's standard for reasonable care in anticipation of a *force majeure* event is an application of hindsight, departure from analysis of every other circuit, and disruption of the fundamental standard for reasonableness applied in collision cases.

This case presents the opportunity for this Court to establish a uniform standard among the circuits that will apply to bedrock concepts of reasonableness, duty of care and the exceptionally important maritime defense of *force majeure*.

C. The Fifth Circuit's decision creates a Circuit split and will disrupt both the uniformity of general maritime law and stability of maritime commerce.

The Fifth Circuit's standard of "reasonable care" is unsound as a matter of maritime policy, and would create total instability and chaos in the maritime industry.

Against this Court's precedent, the Fifth Circuit not only required "[t]he highest degree of caution that can be used" from the shipowner, but has established a level of accurate prediction that is unsustainable. In this manner it has rejected this Court's standard of "reasonable care under the circumstances," eliminating the viability of the *force majeure* defense under any conceivable circumstance. *See The Grace Girdler*, 74 U.S. (7 Wall.) 196; *see also Fischer*, 508 F.3d at 594 (11th Cir. 2007) (explaining that the standard of care is "ordinary reasonableness").

According to the Fifth Circuit, a "reasonable" shipowner must foresee a potential storm's strength and path at landfall before the meteorologists do, must foresee every other vessel's mechanical breakdowns before their owners do, must foresee every potential delay in port traffic before the port authorities do, must foresee any evacuation of United States vessels before the United States Navy does, must foresee the closure of the port before the United

States Coast Guard does, must foresee the mandatory evacuation of a town before its mayor does, and must foresee the cancellation of its tow-out before its tug company does.

Moreover, the resulting conflict between the Fifth Circuit and Eleventh Circuit (both prominent in developing federal maritime law) warrants this Court's review. It not only divides the Gulf of Mexico in half, but isolates ports in the Fifth Circuit from the rest of the nation.

Hurricanes make landfall along the entire southern and eastern coasts of the United States (with increasing frequency) each year, and this lack of uniformity coupled with the uncertainty and unfairness created by the Fifth Circuit's standard will eventually lead to absurd consequences. For example, if a storm makes landfall over Mobile Bay, shipowners to the East will be held to a standard of ordinary reasonableness, whereas shipowners to the West will be held to a standard of virtual clairvoyance, and a requirement to immediately evacuate at the first indication of any potential tropical threat in order to avoid liability.

This will result in public chaos in ports and place shipowners at great risk, with the inevitable result of vessels attempting to outrun a storm with no idea where to go.

This is an unworkable standard which sets a dangerous precedent by promoting mass public chaos, placing vessels and seamen at grave risk.

CONCLUSION

Wherefore, Paragon prays that certiorari be granted.

Respectfully submitted,

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August 27, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-40209

PARAGON ASSET COMPANY, LIMITED,
AS OWNER OF THE DRILLSHIP DPDS1,

Plaintiff—Appellant

v.

AMERICAN STEAMSHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION, INCORPORATED,

Defendant—Appellee

v.

PARAGON OFFSHORE LIMITED,

Defendant—Appellant

PARAGON INTERNATIONAL FINANCE COMPANY,

Third Party Defendant—Appellant

Appendix A

PARAGON OFFSHORE DRILLING, L.L.C.,

Counter-Claimant—Appellant

v.

SIGNET MARITIME CORPORATION,

Claimant—Appellee

IN THE MATTER OF THE COMPLAINT OF
SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY,

Plaintiff—Appellee

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY,

Plaintiff—Appellee

v.

PARAGON ASSET COMPANY, LIMITED,

Counter-Claimant—Appellant

Appendix A

IN THE MATTER OF THE COMPLAINT OF
SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ARCTURUS,
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SIGNET MARITIME CORPORATION, AS OWNER
OF THE TUG SIGNET ARCTURUS, ITS ENGINES,
TACKLE, ETC., IN A CAUSE OF EXONERATION
FROM OR LIMITATION OF LIABILITY,

Plaintiff—Appellee

v.

PARAGON ASSET COMPANY, LIMITED,

Appellant

Argued: February 5, 2024
Decided and Filed: April 24, 2024

No. 23-40209 On Appeal from the United States
District Court for the Southern District of Texas,
Brownsville Division
Nos. 1:17-CV-203, 1:17-CV-247, 1:18-CV-35—
Fernando, MI Rodriguez, Jr. District Judge

Appendix A

OPINION

Before: HIGGINBOTHAM, SMITH, and HIGGINSON, Circuit Judges.

HIGGINSON, Circuit Judge:

This is an appeal of an Opinion and Order issued by the district court concerning liability in a series of maritime casualties caused by the breakaway of a drillship in Port Aransas, Texas during and after Hurricane Harvey. Appellant Paragon Asset Company ("Paragon") owned the vessel, the DPDS1—an unmanned and unpowered drillship—which was docked at Port Aransas prior to Hurricane Harvey's arrival to the area on August 25, 2017. After its evacuation effort failed, Paragon hired two tugs owned by Signet Maritime Corporation ("Signet") to apply power throughout the storm in an attempt to help keep the vessel moored to the dock.

On August 25, 2017, at the height of the storm, the DPDS1 broke from its moorings, alliding with both Signet tugs and sinking one. The DPDS1 then ran aground in the Corpus Christi ship channel, but on August 28, 2017 it refloated and allided with a nearby research pier owned by the University of Texas ("UT"). Applying maritime negligence law, the district court found Paragon alone to be liable for the August 25 breakaway. Because Signet had supplied a third tug to monitor the DPDS1's movement after the storm, and that tug failed to stop the vessel's allision with the UT pier, the district court concluded that Signet and Paragon were equally liable for the damages suffered by UT.

Paragon appeals, asking that we apply a "towage law" standard of duty to Signet's provision of its services to Paragon. Paragon further contests the district court's determination that a force majeure defense was not available to Paragon, and asks us to reverse the district court's determination regarding which contract between the parties governed Signet's services. Having reviewed the record and relevant law, we find that the district court did not err in its finding of facts or conclusions of law. Accordingly, we AFFIRM.

I.

On Wednesday, August 23, 2017, Paragon and Signet began discussions regarding the hiring of Signet tugs to tow the DPDS1 out to open sea before Hurricane Harvey made landfall. On Thursday, August 24, 2017, after delays and the closure of the port foiled the DPDS1's evacuation effort, Signet agreed to provide Paragon with two tugs, the ARCTURUS and the ENTERPRISE, to aid in keeping the DPDS1 moored to the Port Aransas dock during the storm. At around 11:00 P.M. on August 25, 2017, the DPDS1 broke free of its moorings and propelled the ARCTURUS and the ENTERPRISE into nearby oil rigs. The ENTERPRISE sank, and the ARCTURUS and the oil rigs sustained damage. The ENTERPRISE crew was rescued the next morning.

The DPDS1 continued into the Corpus Christi ship channel, where it remained grounded for three days. During this time, Paragon retained Signet to provide a tug to monitor the grounded vessel. On August 27, 2017, the

tug CONSTELLATION began monitoring the DPDS1, but because the DPDS1 had loose lines hanging from it, and because Hurricane Harvey was projected to return to Corpus Christi, the crew of the CONSTELLATION did so from a nearby dock rather than next to the vessel itself. On August 28, 2017, the DPDS1 refloated and allided into the UT research pier. The CONSTELLATION was unable to stop the allision with the UT pier, but afterwards it pinned the DPDS1 to the shore. Signet subsequently provided three more tugs to hold the DPDS1 to the shore until the drillship could be towed to another dock.

After a five-day bench trial, the district court found that Paragon alone was liable for the August 25, 2017 breakaway of the drillship, and rejected its force majeure defense as well as its argument that Signet assumed the risk by agreeing to help keep the vessel moored. In doing so, the trial court rejected Paragon's argument that it had no duty to Signet under maritime law of towage, holding that Signet did not undertake the tow of the DPDS1 or take control of it, so towage law was inapplicable. The district court held that, under maritime law of negligence, Paragon was liable for the breakaway incident because it unreasonably relied on reports about the strength of its mooring system, which it knew were not based in fact, and because Paragon's leadership failed to call for an evacuation when it became clear that was the prudent course of action. The district court found the parties—Paragon and Signet—each to be 50% liable for the damage to the UT research pier.

Finally, the parties debated whether a Master Charter Agreement ("MCA") or Signet's Tariff ("the Tariff") governed Signet's provision of tugboats to Paragon. The district court ruled in favor of the Tariff, finding that Signet had expressly refused to agree to the terms of the MCA for the provision of services, pointing to the course of dealing in the summer of 2017, when Paragon had engaged Signet tows to hold the drillship multiple times and had paid the Tariff rate. The district court rejected Paragon's arguments that the MCA governed, including its contention that the Tariff could not govern because it contained explicit language that it did not cover Signet's services to vessels "aground or in distress, including assistance to a deadship . . . , or when Services are performed during heightened Coast Guard port conditions."

Paragon appeals on three issues: first, it argues that the trial court should have applied towage law, thus shifting to Signet some duty owed to keep the drillship from harming others' property. Second, it argues that the trial court erred in rejecting its force majeure defense, "impermissibly" holding Paragon "to a standard of perfection and infallible judgment by viewing its actions through the lens of *post hoc* knowledge." Third, it argues that the trial court erred in finding that Signet's Tariff governed the interactions between the two parties, because Signet unilaterally and orally amended the Tariff. Rather, under general maritime and Texas law, the district court should have held the relationship to be "at law" or governed by the MCA, and Signet should not have been allowed to seek indemnity or attorney's fees from Paragon.

II.

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 262 (5th Cir. 2011) (italics omitted) (quoting *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)). We will first consider whether the district court incorrectly applied maritime negligence law, before turning to Paragon's arguments regarding the force majeure defense and the governing contract.

Paragon contends that the district court erred when it applied general maritime negligence law rather than towage law. Paragon argues not that it would be released from liability if the district court recognized Signet's activities on August 25, 2017 as a tow; rather, it asserts that the application of towage law would re-orient the inquiry about Paragon's duty to Signet and Signet's duty to Paragon so as to reduce Paragon's fault. At trial, Paragon situated its law of towage argument within a larger contention that Signet assumed the risk that the DPDS1 might break free when Signet agreed to the task of helping keep the DPDS1 at the dock—and, therefore, that Signet forfeited any right to recover from Paragon when it failed to mitigate the risk it was hired to guard against. The district court rejected this argument, and Paragon does not pursue its general assumption of risk argument on appeal.

Here, Paragon has retained its claim that the law of maritime towage should apply. The district court rejected

the towage law standard that Paragon proposed because "Signet never undertook the tow of the DPDS1, and at no point did Paragon relinquish custody of the DPDS1 to the Signet tugs." Helping keep the DPDS1 moored to the dock did not constitute a tow, the district court held, and "Paragon did not shift to Signet the duties that Paragon owed to ensure that the drillship was properly moored to prevent allision with objects within the scope of danger should the mooring system fail."

Instead, the district court found that the incidents during Hurricane Harvey should be governed by the standard for negligence articulated within general maritime law. "To establish maritime negligence, 'a plaintiff must demonstrate that there was [1] a duty owed by the defendant to the plaintiff, [2] breach of that duty, [3] injury sustained by the plaintiff, and [4] a causal connection between the defendant's conduct and the plaintiff's injury.'" *GIC Servs., L.L.C. v. Freightplus USA, Inc.*, 866 F.3d 649, 659 (5th Cir. 2017) (alteration in original) (quoting *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 376 (5th Cir. 2000)). A shipmaster has a "a special duty to take all reasonable steps consistent with safety to [a] ship and her crew, to avoid or minimize the chance of harm to others." *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 85 (5th Cir. 1960). The Supreme Court has stated that, if a ship drifts from her moorings and causes a collision, "she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major, which human skill and precaution, and a proper display of nautical skill could not have prevented."

The Louisiana, 70 U.S. (3. Wall.) 164, 169 (1865) (internal italics omitted).

The district court also cited our court's decision in *In re United State*s, 425 F.2d 991, 995 (5th Cir. 1970) to articulate the responsibility of a shipowner during a storm: "If those responsible for the [barges that broke free and caused allisions] were reasonable in their anticipation of the severity of the impending storm and undertook reasonable preparations in light of such anticipation, then they are relieved of liability." *Id.* And, specifically with regard to docked vessels, the trial court relied on the rule expressed in the *Carroll Towing* case:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.

United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Under the caselaw regarding maritime negligence, the district court concluded that Paragon was negligent: first, "company decision makers knew or should have known that they possessed inaccurate information about the mooring system installed to keep the DPDS1 docked," because the reports on the strength of the mooring system commissioned by Paragon reflected

projected combinations of mooring lines and ropes—not any real mooring system that had actually been put in place. Second, the district court found that Paragon company officials were unreasonable in their assessment of the strength and potential danger of Hurricane Harvey, and in their choice to wait until Wednesday, August 23, to choose to evacuate the drillship even though they received weather reports at 9:00 A.M. the morning of Monday, August 21 that showed Corpus Christi in the storm's cone of uncertainty. Testimony supported the trial court's factual finding that the DPDS1's evacuation would more likely have been successful if Charles Yester, Paragon's Senior Vice President of Operations, had called in the evacuation order earlier, and the trial court found that a reasonable captain would have planned for potential exigencies, including the sources of delay that accrued on Thursday before the port closed.

Paragon argues that the district court was mistaken in its reliance on the normal negligence standard for maritime torts. Rather, it argues that Paragon "owed Signet no duty to provide a vessel which would not break away during Hurricane Harvey, as this was the precise reason Signet undertook the job of holding it." Reasoning that the DPDS1 was a "dead" vessel, Paragon relies on caselaw that emphasizes the duty of a tug owner to guard against hazards, even those caused by the unseaworthiness of the vessel being towed. *See Bisso v. Waterways Transp. Co.*, 235 F.2d 741, 743 (5th Cir. 1956) ("To be sure, there was a strong current . . . but this was well known and its imminence was the reason the owners of [the vessel] agreed expressly with [the tug] to provide a local assisting tug of adequate power.").

The threshold question, therefore, is whether the relationship between Signet and Paragon involved a tow at all. As an initial matter, treatises and caselaw state generally that towage law is applicable when one vessel acts to "aid the propulsion or to expedite the movement of another vessel." 2 T. Schoenbaum, Admiralty and Maritime Law § 12:1 (West 6th ed. 2023); *see also Stevens v. The White City*, 285 U.S. 195, 200 (1932) ("The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is towage. Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to assist them in moving about harbors and docks.").

By contrast, Paragon cites four cases that it says stand for the proposition that "[t]owage law's application does not require a tug's provision of motive power to a vessel in transit" *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945); *Stevens v. E. W. Towing Co.*, 649 F.2d 1104 (5th Cir. 1981); *Tebbs v. Baker-Whiteley Towing Co.*, 407 F.2d 1055 (4th Cir. 1969); and *River Pars. Co. v. M/V FLAG ADRIENNE*, 2002 WL 1453826 (E.D. La. Jul. 2, 2002). Signet counters that each of these cases "involved an actual or contemplated voyage or movement" rather than an "assist" designed to keep a vessel from moving.

Signet is correct. Three of these cases—*Stevens*, *Tebbs*, and *River Parishes Co.*—involved accidents that happened while a tug was trying to fasten itself to the side of a vessel so that it could embark on a tug or tow of

a vessel. *See Stevens*, 649 F.2d at 1109; *Tebbs*, 407 F.2d at 1057; *River Parishes Co.*, 2002 WL 1453826, at *3. And in *Canadian Aviator*, the tow was not attached to the tug, but the tug was guiding it through waters when the tow was grounded. 324 U.S. at 228.

More importantly, each of these cases took place in a context that is dissimilar to the one at issue here: *Stevens* involved a personal injury of a deckhand on a tug, which occurred due to a shifting current and the negligence of tug employees. 649 F.2d at 110. In *River Parishes Co.* the tug grounded itself. 2002 WL 1453826, at *1. In *Tebbs* the tug was attaching to its tow and nudged the tow into another vessel. 407 F.2d at 1057. The tug in *Canadian Aviator* ran its tow aground. 324 U.S. at 217. Each of these cases, then, involves an action by the tug or its crew that resulted in an injury, allision, or grounding. None of these is analogous to what occurred here, where the tugs applied their power to the DPDS1 but could not hold the drillship after the DPDS1's own mooring system failed.

Furthermore, the other cases cited by Paragon to support its position—*In re TT Boat Corp.*, 1999 WL 123810, at *6–7 (E.D. La. Mar. 2, 1999) and *Bisso v. Waterways Transp. Co.*, 235 F.2d at 743—both involved a tug towing a vessel. In *TT Boat Corp*, a tug was towing a manned barge, and the barge allided with an offshore platform. *TT Boat Corp.*, 1999 U.S. Dist. LEXIS 2754, at *6–7. In *Bisso*, a tug was towing a vessel into the entrance of the Southwest Pass of the Mississippi River. 235 F.2d at 743. The tug attempted to swing its tow into the turn, and due to the current the tow continued straight, then

moved west, causing the tug and tow to be grounded. *Id.* In both instances, too, a tug was acting in its capacity as mover of other vessels and was in control of the navigation on a journey. These cases are not analogous to the facts here, where there was no journey—just the application of the force of the tugs to prevent the improperly moored DPDS1 from breaking free of the dock.[1]

Additionally, Paragon claims that the district court was inconsistent because, while it did not apply towage law to the August 25, 2017 events, it did apply towage law when it considered the August 28, 2017 incident involving the CONSTELLATION and the UT research pier. But this is not a correct characterization of the district court's opinion. The district court specifically stated that the "law of tug and tow does not govern" the second allision because "Signet did not undertake a tow of the DPDS1" when it agreed to monitor the DPDS1 and then hold it to the shore after it hit the UT research pier. The district court did draw on towage law cases to describe Signet's duties as "neither a bailee nor an insurer of the tow" but held that Signet remained "obligated to provide reasonable care and skill 'as prudent navigators employ for the performance of similar services.'" *King Fisher Marine Serv., Inc. v. The NP Sunbonnet*, 724 F.2d 1181, 1184 (5th. Cir. 1984) (quoting *Stevens*, 285 U.S. at 202)); Even if the employment of this terminology to describe Signet's duties to Paragon were erroneous, it was harmless because it did

1. The trial court pointed to the report of Signet's mooring expert, who concluded that given the wind conditions, the two tugboats reduced the tension of the mooring lines by only three percent.

not meaningfully change the district court's analysis of the responsibilities of Signet and Paragon under maritime negligence law, resulting in the trial court's finding each party 50% responsible for the damage to the UT pier.

Finally, Paragon positions the applicability of towage law as a factor that would diminish its liability meaningfully. That is not the case. As the district court noted, even if towage law applied, Signet would be unable to "complain about a condition of unseaworthiness or other weakness that caused the loss if it knew of the condition and failed to use reasonable care under the circumstances." *King Fisher*, 724 F.2d at 1184. But, as the district court found, Signet had no opportunity to determine whether the DPDS1's mooring system would be adequate to withstand the hurricane—so even a heightened duty for Signet would not result in a finding that Paragon was not negligent.

III.

Second, Paragon argues that the trial court erred in its holding that Paragon could not rely on a force majeure defense because its "delayed decision and inadequate mooring system represented unreasonably deficient actions by Paragon." Paragon argues that the trial court erred by holding it to a standard of "perfection" rather than reasonability, and by evaluating Paragon's decisions "through some sort of nautical rear view mirror." *United Geophysical Co. v. Vela*, 231 F.2d 816, 819 (5th Cir. 1956).

The district court correctly articulated and applied the standard for a force majeure defense, which may

be invoked by a showing that an "Act of God," such as a hurricane, occurred and that a shipmaster "took reasonable precautions under the circumstances as known or reasonably to be anticipated." *See In re United States*, 425 F.2d at 995. The district court also correctly noted that "the party asserting the defense bears the burden of proof." *See In re Marine Leasing Servs.*, 471 F.2d 255, 257 (5th Cir. 1973); *see also In re United States*, 425 F.2d at 995 ("The burden of proving inevitable accident or Act of God rests heavily upon the vessel asserting such defense.").

The parties did not dispute that Hurricane Harvey was an Act of God sufficient to activate a force majeure defense. However, with regard to the second factor—reasonable precautions, the trial court cited *Boudoin*, in which our court affirmed a district court's ruling that an appellee was liable for its vessel's breaking free of its moorings and causing damage to a nearby dock during Hurricane Audrey. 281 F.2d at 88. In that case, our court found that, even though Audrey was a hurricane, the appellee failed to meet its burden to show that "the tug master had no reason to anticipate that Audrey would strike with the fury which she had and where the [vessel] was moored" sufficient to excuse his failure to evacuate the vessel. *Id.*

Paragon argues that, while the tug master in *Boudoin* did not attempt to evacuate his vessel, Paragon did try to evacuate the DPDS1 and was foiled in its attempts to do so. However, the district court considered this argument and concluded that "Paragon's delay in deciding to tow the DPDS1 out to sea ultimately caused the drillship to

remain at the dock," particularly considering what it knew or should have known about the deficiencies of the mooring system. The district court found the following facts:

1. On August 2, 2017, Aldert Schenkel, Vice President of Engineering, recommended in an email that the DPDS1 should depart 3 days before an approaching storm that had a wind speed of 63 mph or more.

2. On Monday, August 21, Paragon received two weather reports. One, released at 4:00 A.M., reported that the tropical system would reach winds of 65 mph. A report later that morning put Port Aransas in the cone of uncertainty, though it anticipated maximum winds to be at 57 mph. At that time Schenkel (Vice President of Engineering) told Michael Koenig (Marine Operations Manager) that "we don't have to do anything yet" and they had about 24 hours to make a decision.

3. Koenig testified that he thought they should have "immediately" decided to move the vessel, but that he deferred to decisionmakers.

4. A weather report on Monday, August 21, at 4:00 P.M. stated the maximum wind speeds were predicted to be 70 mph.

5. At least one company, Rowan Companies, decided no later than Monday to evacuate and it contacted the Aransas-Corpus Christi Pilots Association to communicate its decision.

6. Paragon was aware that the Genesis Engineering reports estimating the strength of the mooring system were incorrect because it relied on a series of lines that were hypothetical and not actually in place on the vessel.

7. Captain Jay Rivera, of the Aransas-Corpus Christi Pilots Association, testified that a Monday evacuation order would result in a "pretty good chance and a high likelihood" that the DPDS1 would have been towed to sea before the arrival of Hurricane Harvey.

8. The DPDS1 was the only drillship, of five docked along the Texas Gulf Coast, that did not evacuate before Hurricane Harvey.

9. While Charles Yester, Senior Vice President of Operations, took some steps to prepare for an evacuation as early as Monday, he did not file the Deadship Tow Application or communicate with port authorities. Paragon did not issue its official order of evacuation until Wednesday.

Considering these facts, the district court rejected Paragon's argument that the delays on Thursday were unforeseeable, because "prudent shipmasters foresee such situations and factor them into their decision-making timetable." The district court held that a prudent shipmaster would recognize that Navy ships would have priority over commercial ships in an evacuation, and that "[a] prudent shipmaster cannot rely on a plan that assumes a best-case scenario with no sudden changes in circumstances."

As a reviewing court, we have a clear mandate. "Even though we might have weighed the evidence differently had we been sitting as trier of fact, we must accept the district court's findings as long as they are plausible in light of the record viewed in its entirety." *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1247 (5th Cir. 1990). The facts found by the district court are "plausible in light of the record," *see id.*, and in fact reflect in painstaking detail the accounts given in the testimony of Paragon's own officials. The DPDS1 was the only drillship, of five moored there, that did not successfully evacuate from Port Aransas before the storm. This indicates that the trial court did not use "hindsight" but rather applied the judgment that the other drillship owners employed at the time of the storm. The district court's holdings about what a prudent shipmaster would anticipate, and its determination that Paragon did not take "precautions under the circumstances as known or reasonably to be anticipated" are not contrary to law. Paragon has failed to show that it "took reasonable precautions under the circumstances as known or reasonably to be anticipated," *In re United States*, 425 F.2d at 995, and therefore a force majeure defense is not available to Paragon.

IV.

Finally, Paragon contends that the trial court erred in its ruling that the Tariff governed and asks that this court reverse the district court and hold that the MCA governed Signet's services to Paragon during Hurricane Harvey.

Appendix A

As background on this dispute, in June 2015 Paragon and Signet established the MCA to streamline future vessel-chartering negotiations. Each party was represented by in-house counsel: Jay Oliver, Assistant General Counsel for Paragon, and Scott Reid, General Counsel for Signet. The MCA served as a template for specific projects, allowing quick finalization of details like rates and locations. The MCA includes three documents: the document spelling out the agreement, along with two parts of the Baltic & International Maritime Council SUPPLYTIME 2005 Uniform Charter Party for Offshore Service Vessels ("BIMCO"). Part I of the BIMCO agreement was a form with 35 boxes to be filled in with details regarding each job, which would be completed by business representatives rather than counsel. Part II included contractual provisions tied to each of the boxes in Part I. The main document of the MCA states that the agreement "shall control and govern in all situations in which Owners [(Signet)] charter to Charterers [(Paragon)] a vessel or vessels, and the terms and conditions of this Agreement shall be deemed incorporated by reference." While "activities" and "voyages" are referenced in the MCA, hold-in-place services like those provided by Signet on August 24, 2017 are not.

In August 2016, Signet introduced a Tariff establishing terms and conditions for tug services in its Ingleside division, applicable to customers within the Corpus Christi port area.[2] As is discussed below, Signet billed Paragon

2. The district court found that Signet's competitors in Corpus Christi also published tariffs that showed set rates and conditions for services provided within the harbor.

according to the Tariff for services it provided earlier that year, in June of 2017, when the DPDS1 had drifted from its moorings and Signet sent tugs to hold it in place.

The parties agree that a maritime contract is reviewed de novo. *See Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 955 (5th Cir. 1984) ("A maritime contract . . . should be read as a whole and its words given their plain meaning unless the provision is ambiguous."). Paragon argues that Signet proposed using the Tariff during Hurricane Harvey without an arm's-length negotiation, and that no evidence supports the existence of an oral agreement between Signet and Paragon to apply the Tariff. Paragon argues that the only reference to the Tariff before Hurricane Harvey's landfall came from Signet's General Counsel, Scott Reid, in which he claimed that management agreed to use the Tariff. Even accepting that the Tariff is valid, Paragon contends, the only existing version was the Signet Ingleside Tariff posted on Signet's website and therefore Paragon did not have the ability to review it.

Most problematic, Paragon posits, are the terms in the Tariff that disallow unilateral, unwritten amendments and exclude the kind of services rendered during Hurricane Harvey. In this instance, Signet provided services to a deadship during heightened port conditions—and each circumstance was excluded from the Tariff, according to Section 5, which reads:

> This Tariff does not cover Services to vessels aground or in distress, including assistance to a deadship . . . , or when Services are performed during heightened Coast Guard port conditions.

Further, Paragon points to the contract language of § 21(a) and (b) of the Tariff. Section 21(a) gives Signet the right to "adjust terms or conditions" with "thirty (30) days' advance notice to Owners" and states that these adjustments "shall be in writing." And § 21(b) provides that the "Tariff shall not be amended, modified, or waived unless and until made in writing and signed by each party hereto." Paragon argues that the trial court overlooked the Tariff's prohibition against unilateral waivers under §§ 21(a) and (b). Paragon contends that the trial court's ruling is contrary to federal maritime and Texas law principles by allowing a unilateral waiver of a provision intended for one party's benefit and, in doing so, rendering a clause of the contract meaningless.

Finally, Paragon argues that the district court's decision undermines the MCA's significance as a blanket contract between the parties to be applicable to multiple transactions. Paragon contends that Signet's refusal to apply the MCA to the new services on the morning of August 24 occurred "at the 11th hour" when there was not "opportunity to discuss or negotiate." Further, Paragon maintains that negotiations between in-house counsels were ongoing, indicating an agreement on material terms. Paragon argues that despite not executing Section I of the MCA, the information was never in dispute between the parties and so it governed services Signet offered during Hurricane Harvey. It asserts that the MCA, established in June 2015, remained in effect and encompassed the services provided during that period. In seeking specific evidence that Signet agreed to provide services under the MCA, Paragon contends, the district court "ignored evidence that the MCA always governs."

Appendix A

In its Order and Opinion, the district court rejected Paragon's argument that the MCA should govern Signet's services during Hurricane Harvey, ruling that the MCA, signed in 2015, provided a "framework" for potential services but lacked specific performance obligations. The district court found that, because the terms of the MCA explicitly did "not obligate" Signet "to charter their vessels to Paragon," or vice versa, it was Paragon's task to prove at trial that Signet agreed the MCA would govern the services provided during Hurricane Harvey.

Based on trial testimony the district court concluded that negotiations between corporate counsels began on Wednesday, August 23, in anticipation of the tow Signet originally planned to complete before the DPDS1's evacuation was canceled. At that time, e-mails between the two representatives primarily focused on the essential terms within the MCA's Part II, such as insurance and indemnity provisions, emphasizing the uncommon risks posed by Hurricane Harvey. But the Coast Guard's closure of the port on the morning of August 24 and the failure of the DPDS1's evacuation led to a significant change in services: rather than towing it to the sea, the Signet tugs would now be hired to help keep the DPDS1 moored to the dock. At that point, the district court found, "Signet expressly refused" to provide the new services under the MCA. At trial, Barry Snyder—the President and owner of Signet—testified that, in a phone call with Schenkel, he told Schenkel that it would be "very dangerous" to use the MCA for the hold-in-place services. During a deposition, Schenkel testified that he could not remember if he had spoken with Snyder about whether the MCA would govern

the hold-in-place services. Accordingly, the district court held that Paragon could not demonstrate that Signet agreed that the MCA would govern Signet's assistance at the dock.

The district court cited other factors for its holding that the MCA did not govern Signet's services during Hurricane Harvey: First, while they discussed and agreed on the MCA terms for the tow-out services, after it became clear that Signet would instead provide hold-in-place services, the parties did not complete the job-specific MCA forms. This signaled an understanding that the MCA did not cover the new services Signet would provide. Second, the district court held that Paragon's focus on MCA's Paragraph 1.3—which stated the MCA "shall control and govern in all situations in which [Signet] charter[ed] to [Paragon] a vessel or vessels"—overlooked the broader context of the MCA, as Part II specified that its application was to "offshore activities" and "voyages." While towing the DPDS1 out to sea would have fallen under this contract, the district court held, the actual services rendered during Hurricane Harvey did not.

We agree with the district court that the parties' past conduct demonstrates that these services were governed by the Tariff, while MCA discussions arose when considering "offshore activities." For example, Signet billed Paragon according to the Tariff for the services it provided during the water surges in June of 2017, and no party presented evidence that there had been discussion under the MCA. After Hurricane Harvey, Signet tugs held the DPDS1 stationary on the shore of

the ship channel, and Signet billed Paragon for Tariff rates, while later talks about a tow to Brownsville for the drillship to be scrapped occurred under the MCA. This consistent pattern illustrated the parties' practical distinction between services governed by the Tariff and "voyages" or "offshore activities" that were conducted under the aegis of the MCA.

The course of dealing is also persuasive evidence that the Tariff did in fact govern Signet's provision of services during Hurricane Harvey. Federal maritime law permits oral agreements to incorporate the terms of a written document, such as the Tariff. *Kossick v. United Fruit Co.*, 365 U.S. 731, 734 (1961). And the course of dealing between Paragon and Signet—in which Signet provided services, Signet invoiced under the Tariff, and Paragon paid without complaint—established a common understanding consistent with industry customs. We agree with the district court that the language of Paragraph 5 of the Tariff explicitly excluding "assistance to a deadship" or services during "heightened Coast Guard port conditions" was for the benefit of Signet and could be waived unilaterally under federal maritime and Texas law. *See Stauffer Chem. Co. v. Brunson*, 380 F.2d 174, 182 (5th Cir. 1967) ("We recognize that alteration, modification or waiver of contract provisions may be implied from the acts and circumstances surrounding the performance of such contract."); *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 722 (Tex. App. 2004) ("A party can waive contract provisions that are in the contract for his benefit." (citing *Joiner v. Elrod*, 716 S.W.2d 606, 609 (Tex. App. 1986))).

The trial record supports the district court's conclusion that both parties understood that the Tariff would be the contract under which Signet's provision of services during Hurricane Harvey would be governed, despite contrary language that appeared within the Tariff—and that Paragon was not forced to accept these terms. Similarly, Paragon fails to show that the trial court misapplied contract law in its holding that Signet's waiver of its right to draft separate agreements in scenarios such as risky weather was permissible. Paragraph 5 of the Tariff was designed for Signet's benefit because it allowed flexibility in assigning tug services without individual negotiations and gave Signet the opportunity to provide alternate terms or ask for higher prices in case it provided riskier services. Because Signet expressly agreed to perform services under the Tariff on August 24, Signet waived the restrictions outlined in Paragraph 5 for that instance.

The district court also rejected Paragon's duress and unconscionability defenses, holding that *The Elfrida*, 172 U.S. 186, 192 (1898), does not support Paragon's claim of unconscionable bargains under extreme conditions. The Tariff's consistent terms, accepted by both parties in previous transactions, demonstrate its enforceability. Furthermore, Paragon's argument of immediate danger fails, as it sought Signet's services to support its mooring system, and it was not in a "helpless condition" when it hired Signet. The district court found that Paragon failed to demonstrate that the Tariff is a contract of adhesion because there was no significant one-sidedness or procedural unconscionability—both parties are "sophisticated commercial enterprise[s]" represented

by counsel. On August 24, Paragon's counsel, Jay Oliver, sent an email to Scott Reid in response to Reid's own email advising him that the commercial teams had agreed that the hold-in-place would take place under the Tariff. Oliver's email read "Thanks for the update—much appreciated." The district court concluded that the Tariff continued to govern services through the August 28 incident, with Signet's invoicing Paragon on August 31, 2017, and Paragon's paying without objection.

Upon examination of the law and the record, the trial court did not err in its holding that the Tariff rather than the MCA governed the provision of tugs during Hurricane Harvey. Important facts led the trial court, and lead us, to the conclusion that the parties all agreed that the Tariff governed: First, the uncontroverted testimony of Barry Snyder was that he and Schenkel agreed to the use of the Tariff.[3] Second, Scott Reid's August 24 message clearly stated that "[b]ecause we will not be towing, but instead will be holding the DPDS1 in place, Signet's work will be governed by our Ingleside Tariff." Paragon's General Counsel responded, "Thanks for the update—much appreciated." Third, course of dealing evidence showed that Signet billed Paragon according to the Tariff on multiple occasions for hold-in-place activities and that Paragon had paid these bills without complaint, while discussions about tows out of the harbor involved negotiations under the MCA. Fourth, Signet also billed Paragon under the Tariff on August 31, 2017, for

3. Schenkel testified that he could not remember the conversation.

the services it provided during Hurricane Harvey, and Paragon paid without objection.[4]

Taken together, the evidence presented at trial indicates that the Tariff rather than the MCA governed the hold-in-place services that Signet provided when it became clear that its tugs would no longer be towing the DPDS1 to Port Aransas after the failed evacuation.

V.

Having reviewed the facts and record, we find that the district court did not err in applying maritime negligence law, in holding that the force majeure defense was not available to Paragon, or in concluding that the Tariff governed the services that Signet provided during Hurricane Harvey. Therefore, we AFFIRM the rulings of the district court's Opinion and Order.

4. *See One Beacon Ins. Co.*, 648 F.3d at 266 (ruling against a litigant that "ratified their course of dealing [with the adverse party] by submitting an invoice for the work on the barge without objecting to the terms and conditions").

APPENDIX B — AMENDED ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, FILED AUGUST 17, 2022

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CONSOLIDATED

No. 1:17-cv-00203

PARAGON ASSET COMPANY LTD,
AS OWNER OF THE DRILLSHIP DPDS1

v.

GULF COPPER & MANUFACTURING
CORPORATION, *et al.*

No. 1:17-cv-00247

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY

Appendix B

No. 1:18-cv-00035

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ARCTURUS,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY

Filed: August 17, 2022

AMENDED ORDER AND OPINION[1]

Judge Rodriguez

On August 25, 2017, Hurricane Harvey made landfall near Corpus Christi as a Category 4 hurricane. In nearby Port Aransas, the drillship DPDS1 lay docked, with no crew, but with two tug boats alongside to help keep her in place during the storm. Shortly before 11:00 p.m., the DPDS1 broke free from her moorings. The drillship immediately propelled the two tug boats into adjacent semisubmersible oil rigs, damaging those vessels and sinking one tug boat and impairing the other. The DPDS1 itself moved into and grounded in the ship channel, but refloated three days later, traveling across the channel and

1. This Amended Order and Opinion supersedes the Order and Opinion (Doc. 461) that the Court issued on March 31, 2022. The Amended Order and Opinion takes into consideration the arguments that the parties presented in Signet's Motion to Supplement and Modify the Court's Order and Opinion (Doc. 463), Paragon's Motion to Amend or Clarify (Doc. 464-1), and the related briefing.

alliding with and damaging a research pier. The alleged damages total well over $10,000,000.

Three Complaints in Limitation ensued, filed by the respective owners of the DPDS1 (Paragon) and the two tug boats (Signet). Each party filed counterclaims, and the owner of the semisubmersible oil rigs (Noble) and the research pier (The University of Texas) filed claims for the damage to their property. Gulf Copper, which owned the pier to which the DPDS1 had been docked, also filed a claim for damage to that pier. And Paragon made claims against Signet's insurer, American Club.[2]

The parties completed extensive discovery and motion practice, and in the process settled the claims that Noble, the University of Texas, and Gulf Copper filed. In July and August of 2021, the Court held a five-day bench trial on the claims remaining between Paragon, Signet, and American Club. At trial, 19 witnesses testified, and the Court admitted over 1,200 exhibits.[3]

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2. Several parties possess a complex corporate structure, which the parties do not dispute and which they set out as Admissions of Fact within the Joint Pretrial Order. (Joint Pretrial Order ("JPO"), ¶¶ 1–4, 6, (Doc. 314, 35–40)) The Court adopts those admitted facts and for convenience will refer to the respective corporate parties as Paragon, Signet, American Club, Noble, Gulf Copper, and the University of Texas.

3. The parties also presented 16 witnesses by deposition. *See* P.Ex.45–P.Ex.56 (Docs. 446-1–12); S.Ex.331–S.Ex.334 (Docs. 431-2–5). The Court accepted the deposition excerpts as if the witnesses had testified at trial.

Appendix B

In this Order and Opinion, based on the voluminous trial record and the applicable law, the Court renders its findings of fact and conclusions of law as to the damages caused by the relevant events, and the comparative liability for those damages as between Signet and Paragon.

I. Findings of Fact

A. The History of the DPDS1

In 1979, the Dynamically Positioned Drillship Number 1 ("DPDS1") began operating as a 449-foot, Liberian flagged, deep water drilling ship. The vessel possessed thrusters that enabled it to remain dynamically positioned over a drilling site in deep water. Over the decades, various owners maintained and upgraded the drillship. For example, in 2008, the owners fully refurbished the vessel at an estimated cost of $350-500 million.

In 2010, Noble, Paragon's parent company at the time, acquired the DPDS1. Over the next few years, Noble added new equipment and otherwise improved the vessel in preparation for work off the Brazilian coast. Aldert Schenkel, Paragon's Vice President of Engineering, oversaw this work and stated that the DPDS1 "was in really good shape" at that time.[4]

In 2014, Noble spun off Paragon, which became the sole owner of the DPDS1. The drillship continued

4. Schenkel Dep. (Vol. II), 180:12–13, P.Ex.45 (Doc. 446-1, 129).

operations in Brazil. The following year, a downturn in the crude oil market decreased the demand for deep water drilling ships. As a result, Paragon decided to move the vessel to Port Arthur, Texas, and the drillship never again had commercial working ventures. By no later than mid-August 2017, Paragon intended to scrap the DPDS1.[5]

Between 2015 and 2017, the DPDS1 remained "cold stacked"—i.e., the vessel was essentially shut down without a crew onboard—at two separate locations in Texas: Port Arthur and Port Aransas. During these years, four Paragon employees held primary responsibility for the DPDS1's management and care: Charlie Yester (Senior Vice President of Operations), Aldert Schenkel (Vice President of Engineering), Michael Koenig (Marine Operations Manager), and Jason Petten (Technical Marine Manager). They each possessed significant experience in the maritime drilling industry, although they possessed limited experience preparing for hurricane season in the Gulf of Mexico.

B. Paragon and Signet Business Relationship

1. The Master Charter Agreement ("MCA")

In June 2015, Paragon and Signet began their business relationship by jointly creating a Master Charter Agreement (MCA) to govern at least some of their business dealings. Within the industry, companies who plan to repeatedly work together commonly use an MCA to

5. Koenig Day 2 Tr., 19:15–24 (Doc. 448).

"pre- negotiate such things as the indemnities, warranties, [and] governing law".[6] Each company assigned an in-house counsel—Jay Oliver, Assistant General Counsel for Paragon, and Scott Reid, General Counsel for Signet—to represent its respective interests in the negotiations.

The parties ultimately signed the MCA.[7] This successful conclusion, however, did not create an enforceable contract. Rather, the signed document solely provided a form to shorten the negotiation and drafting process when Paragon required vessel-chartering services for specific projects. The MCA established a standard base of legal terms for certain work that Paragon might contract in the future from Signet, and allowed the companies' respective commercial teams to finalize individual vessel hires more quickly by providing only the details needed for the vessel specifications, such as the rate, time, and pick up and redelivery locations. Reid testified that one of Signet's primary motivations for entering into the MCA was that the company viewed Paragon as a desirable customer in the Gulf of Mexico.

The MCA contained three sections: (1) a three-page manuscript outlining the intent of the agreement; (2) Part I of the Baltic & International Maritime Council (BIMCO) SUPPLYTIME 2005 Uniform Charter Party for Offshore Service Vessels; and (3) Part II of the BIMCO form, which contained detailed provisions that would govern all services provided. The BIMCO form functioned

6. Oliver Day 2 Tr., 297:8–18 (Doc. 448).

7. *Master Charter Agreement*, P.Ex.4 (Doc. 409-2).

as a towage contract. Part I contained 35 blank boxes that the parties filled with each job's specific commercial terms, such as the services to be provided, the vessel that would be supplied, the time and place of delivery, and the rates. Such terms varied from project to project, and the companies' business representatives, rather than in-house counsel, would agree upon them. Oliver testified that absent completion of Part I, "you don't have a charter."[8]

Within Part II, Section 1.3 indicated that the MCA "shall control and govern in all situations in which Owners [(Signet)] charter to Charterers [(Paragon)] a vessel or vessels, and the terms and conditions of this Agreement shall be deemed incorporated by reference".[9] At the same time, other sections of Part II noted that the contract applied to "offshore activities" and "voyages",[10] and no section referenced hold-in-place or in-harbor services.

2. The Signet Tariff

In August 2016, Signet published its tariff terms and conditions for the Ingleside division of its operations, a document referred to as the "Tariff".[11] The agreement applied to tug services that Signet provided to customers within the greater Corpus Christi port area.

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8. Oliver Day 2 Tr., 310:24–311:9 (Doc. 449).

9. *Master Charter Agreement*, P.Ex.4 (Doc. 409-2, 1).

10. *Id.* at 11 (Section 6(a)).

11. *Signet 2016 Ingleside Tariff*, S.Ex.1 (Doc. 414).

Appendix B

Tug companies in United States ports commonly use tariffs, which establish the terms of service, such as the applicable rate and indemnity obligations, so that all entities receive tug services within a specific port on equal terms. During the relevant period, Signet's competitors within the Greater Port of Corpus Christi maintained tariffs with set rates, terms, and conditions. Signet delivered its Tariff to customers every January and after significant modifications.

The parties did not provide evidence as to whether or when Signet delivered the Tariff to Paragon before August 2017. At the same time, Paragon does not dispute that it could have accessed the Tariff, as Signet had published it.

C. The DPDS1 in Port Arthur, Texas

In 2015, Paragon cold stacked the DPDS1 at the Gulf Copper berth in Port Arthur, Texas. The vessel had no permanent crew onboard, but a mooring crew and Paragon employees regularly performed inspections. The DPDS1 always remained afloat and maintained its navigational aids, including battery-operated lights. Paragon also installed a RigStat GPS system to track small movements by the rig and to detect any leakage on the vessel through level sensors on the bilges. At least once a week, Koenig would check on the DPDS1 to do "whatever needed to be done".[12]

In early 2017, however, the dock owners in Port Arthur decided to convert the dock's use. This decision forced Paragon to relocate the DPDS1.

12. Koenig Day 1 Tr., 162–63 (Doc. 448).

Koenig oversaw the site-selection process for the new location, and he ultimately chose to dock the DPDS1 at Port Aransas. He considered several potential sites along the Gulf Coast, factoring in water and land access points, potential hazards beneath the water's surface, the quality of the dock bollards, and the potential effect that adjacent ship traffic could have on devising a suitable mooring arrangement. He considered each site's proneness to hurricanes, weighing the potential berth's location and possible hurricane landfalls. This analysis included reviewing studies of the historical tracks of hurricanes approaching the Texas coastline. Koenig did not detail the specific historical information that he reviewed, but Signet's weather expert, Joseph Spain, testified that between 1951 and 2020, 23 hurricanes passed or made landfall within 50 nautical miles of Port Aransas. He explained that in a ten-year period, a 41.1% chance exists of a major hurricane striking the Texas coast, and that in his opinion, "in any given year," a vessel owner along this coastline "[has] to be prepared for a major hurricane."[13]

Paragon maintained a general written hurricane plan, but prepared such plans for individual vessels only if local laws required it. In Port Aransas, no laws or local authorities imposed such a requirement for a docked vessel.[14] Still, Paragon understood that when tropical weather activity posed a threat to a docked vessel,

13. Spain Day 5 Tr., 90:18–20 (Doc. 452).

14. In contrast, when Paragon docked a drillship in Puerto Rico, local laws required a written hurricane plan for the vessel, so Paragon prepared one. Koenig Day 2 Tr., 36:4–16 (Doc. 449).

Paragon had to choose between leaving the vessel docked during the storm or towing the vessel out to sea. In making this decision, Paragon would weigh the potential risks, benefits, and costs of each option.

To track potential threats, Paragon monitored tropical weather activity by receiving daily weather reports, principally from WeatherOperations ("WeatherOps"), which reported a storm's current intensity, conditions, location, and anticipated landfall. In addition, Paragon monitored the general and specific hurricane weather reports from the National Hurricane Center ("NHC").

Although Koenig testified about the analysis he undertook during the site-selection process, no Paragon representative testified about what the company learned from that assessment. For example, Schenkel could not recall any specific reports that Koenig (or anyone else at Paragon) generated from the analysis.[15]

Ultimately, Paragon decided to moor the DPDS1 at the Gulf Copper dock in Port Aransas. On May 30, Paragon had the DPDS1 towed to its new berth. Before the tow, Paragon hired Hugh Gallagher with Dutton's Navigation, an outside marine survey firm, to inspect the DPDS1. Gallagher certified that the drillship was in good condition for the tow.[16]

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15. Schenkel Dep. (Vol. I), 168:14–25, 172:22, 173:1–9, P.Ex.45 (Doc. 446-1, 44–45).

16. Gallager Dep., 81:1-8, P.Ex.50 (Doc. 446-6, 22).

D. Port Aransas, May–July 2017

For the move to Port Aransas, Paragon required the services of tug boats to tow the DPDS1 from Port Arthur to Harbor Island, near the port of Corpus Christi. Paragon negotiated with Signet under the MCA for the services of its tugs. The parties agreed on Part I of the BIMCO, but never executed the document for these services. Paragon ultimately chose another tow service provider, which towed the DPDS1 to Harbor Island. From that point, Paragon hired four Signet tugs to assist the DPDS1 to the Gulf Copper dock. For these services, the parties never discussed the MCA, and Signet invoiced Paragon in accordance with the Tariff.

On May 30, the DPDS1 arrived at her new berth. The vessel lay bow in to the slip, with the dock to her port, and with the Noble semisubmersible oil rigs moored across the slip to the DPDS1's starboard.

Schenkel, Koenig, and Petten designed the mooring system for the drillship at this location. To evaluate the strength of the system, Paragon hired the consulting company Genesis Engineering. The first evaluation occurred in late May, before the DPDS1 reached the Gulf Copper dock. Paragon provided Genesis with the line types, which included 10 three-inch Dyneema ropes and 10 three-inch polyester ropes. In general, different lines exhibit varying breaking strengths and elasticity. The Dyneema lines represented class two ropes, possessing higher breaking strength and lower elasticity. Class one

ropes, such as polyester lines, exhibit higher elasticity, but possess lower breaking strength. In addition, the tension on the ropes, and the evenness of the tension across all the lines, can impact the overall strength of a mooring system. For its initial report, Genesis applied assumed tension metrics. Although Paragon received the first Genesis report, it is apparent that Paragon never utilized the mooring system depicted in that analysis.

Shortly after docking the DPDS1 at the Gulf Copper dock, an issue arose regarding the mooring system. On at least five occasions between May 31 and June 6, large tanker vessels passing near the docked DPDS1 caused "surge incidents", in which a tanker vessels' passage caused the water level to rise and fall rapidly. Several mooring lines holding the DPDS1 in place parted, and metal mooring components called double bits or double bollards broke away from their welded bases on the vessel's deck. The DPDS1 never broke away from the dock, but on numerous occasions, Paragon hired Signet tugs to come alongside the vessel to ensure that it remained in place.

In response to the surge incidents, Paragon took steps to strengthen the mooring system, including installing new bollards and upgrading at least some of the mooring ropes from polypropylene to higher-quality Dyneema lines. Paragon also replaced all the bits on the drillship's port side, regardless of whether they had broken during the surge incidents. Additionally, Paragon installed chains, which were "heavy-duty steel wire/chain combinations"

that absorbed the energy of the surges.[17] Koenig explained that Paragon used "two different class[es] of rope" to create "a more balanced system".[18] He estimated that the overall improvements and the analysis cost approximately $500,000.

After Paragon completed the improvements, Petten conferred with Genesis to re-evaluate the mooring system. Paragon again informed Genesis of the line types, which consisted of thirteen lines, including six three-inch Dyneema lines, two wire-chain-wire combinations, and five three- inch polyester lines. In its June report, Genesis concluded that the mooring system could withstand sustained winds of approximately 75 miles per hour without exceeding industry recommended stress levels on each mooring line.[19] Standard mooring-marine guidelines recommend that the lines possess a minimum factor of safety ("FOS") of 2.0, which means that the tension on the rope is half of its minimum breaking strength.[20] As the

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17. Koenig Day 2 Tr., 203 (Doc. 449); Yester Day 2 Tr., 57 (Doc. 449); Schenkel Dep. (Vol. I), 71:21–72:23, (Vol. II),

229:3–230:11, P.Ex.45 (Doc. 446-1, 20, 142).

18. Koenig Day 1 Tr., 203:19–205:25 (Doc. 448) ("[I]f you're mooring up to stay for a while, like we were, that's important to have a balanced system and one that's analyzed by an engineering company.").

19. Genesis Engineering Report, June 26, 2017, S.Ex.160 (Doc. 423-13). Various sources utilize both knots per hour and miles per hour when reporting wind speeds. For consistency, the Court converts all wind speed measurements to miles per hour.

20. Greiner Day 4 Tr., 279:7-8 (Doc. 451).

factor of safety decreases, the probability that the mooring line will fail increases. The Genesis reports consistently reported conclusions based on a 2.0 FOS.

The improvements resolved the issue of the surge incidents.

In July, Genesis conducted another analysis, again relying upon the line types that Paragon provided. In this evaluation, Genesis assumed a mooring system composed of eleven lines, including four three-inch Dyneema lines, five three-inch polyester lines, and two wire- chain-wire combinations.[21] Not only did the total number of lines decrease by two as compared to the June report, but the placement of the lines between the available anchor points shifted. The record does not make clear what prompted Paragon to request this analysis, or whether the changes reflected actual modifications to the mooring system. In this July report, Genesis concluded that the depicted mooring system could withstand sustained wind speeds of approximately 77 to 80 miles per hour, which represents a low-level Category 1 hurricane.[22]

In early August, based on the Genesis reports, Paragon representatives communicated regarding the conditions that would require the DPDS1's evacuation.

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21. Genesis Engineering Report, July 3, 2017, S.Ex.161 (Doc. 423-14).

22. *See* Saffir-Simpson Hurricane Wind Scale (defining a Category 1 hurricane as possessing sustained winds between 74 and 95 miles per hour).

Petten concluded that the mooring analysis "show[ed] the facility could stay on location up to a Category 1 hurricane".[23] Koenig reached the same conclusion, and he intended to order the DPDS1's evacuation if a predicted storm threatened to exceed the mooring system's capacity.[24] Schenkel recommended a conservative approach: "[T]o be sure we leave port in time, the word 'hurricane' needs to be broadly interpreted as a severe storm."[25] He continued: "Due to the uncertainty in the predictions the DPDS1 should depart (10 days prior land fall) when a storm is approaching with a predicted wind speed of approx. [63+ miles per hour] which is equivalent to a BF 10 storm (range [55 to 63 miles per hour])."[26] Shortly after this communication, he followed up to clarify that the vessel would "leave port 3 days prior to landfall" and would spend 10 days offshore.[27]

Consistent with these email communications, Schenkel testified that Paragon always planned to tow the DPDS1 into the Gulf of Mexico in advance of a storm.[28] As a result, he was not concerned that the mooring system was incapable of withstanding more severe hurricane

23. Petten Day 2 Tr., 175:23–25 (Doc. 449).

24. Koenig Day 1 Tr., 147–49, 209 (Doc. 448).

25. Schenkel Email, S.Ex.271 (Doc. 429-10, 1–2).

26. *Id.*; Schenkel Dep. (Vol. I), 77:9–21, P.Ex.45 (Doc. 446-1, 21).

27. Schenkel Email, S.Ex.271 (Doc. 429-10, 1).

28. Schenkel Dep. (Vol. I), 193:1–21, P.Ex.45 (Doc. 446-1, 50).

conditions. In other words, Paragon had designed its system to withstand no more than the winds of a Category 1 hurricane, intending to evacuate the DPDS1 from the port in the event of a stronger storm.

At trial, Koenig and Yester described the competing risks involved in the decision to keep a drillship such as the DPDS1 in port or to tow it out to sea when a storm approached. Koenig emphasized the safety risks posed by towing a cold-stacked vessel like the DPDS1 out to sea. The tugboat crew would face inherent threats. For example, the fact that the drillship would have no crew meant that if a tow line became unattached while at sea, no one would be onboard to reattach the line. In addition, if the vessel collided with an offshore oil platform or another vessel in the Gulf of Mexico, the tugboat would need to cut loose from the vessel or potentially be damaged. In addition, the drillship itself could sink and hit a pipeline, causing environmental damage.

Yester explained that in general, he would "wait as long [as he could] to make the decision" of whether to remain in port or tow the DPDS1 out to sea, because of the unpredictable nature of tropical weather events, combined with the slow speed at which a vessel must be towed.[29] As he explained, taking a drillship to sea could inadvertently place the vessel directly in the storm's path.[30] In addition, towing a vessel out to sea entailed a cost ranging from $300,000 to $900,000.

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29. Yester Day 1 Tr., 65:1–2 (Doc. 448).

30. *Id.* at 64:13–66:19.

E. Hurricane Harvey

1. Thursday and Friday, August 17–18, 2017

On Thursday, August 17, the NHC issued an advisory for Potential Tropical Cyclone Nine, reporting that the storm had strengthened into Tropical Storm Harvey and lay east of the Caribbean Sea.[31] The WeatherOps report for the same day forecasted that the storm would travel in a westward direction and reach Honduras and Guatemala within three and four days, respectively. WeatherOps noted that "some model guidance does continue to strengthen the system to a low-end Category 1 Hurricane just before it reaches Belize."[32] At the same time, the report clarified that because of "low confidence in the intensity forecast beyond 36 hours", WeatherOps did not forecast that Tropical Storm Harvey would become a hurricane.[33]

On Friday, August 18, the WeatherOps report maintained Tropical Storm Harvey on a westwardly track, with little to no change in trajectory as compared to the previous day's forecast.[34] The report continued to

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31. NHC Potential Tropical Cyclone Nine Forecast/Advisory 1, P.Ex.13 (Doc. 410-14, 7).

32. WeatherOps Active Storm Advisory # 9, P.Ex.13 (Doc. 410-14, 13).

33. *Id.*

34. WeatherOps Active Storm Advisory # 10, P.Ex.13 (Doc. 410-14,21).

predict that the storm would not reach hurricane strength. The NHC advisory reported that "slow strengthening is possible during the next 48 hours."[35]

Both Paragon and Signet received these reports. Signet personnel believed that Tropical Storm Harvey's "current predictions should have her clear of all Signet Vessels" in the Port Aransas area.[36] Paragon employees noted the storm, but when they "left work Friday, it was, well, let's see Monday what's going on. Because it was on the other side of Mexico, . . . and we didn't know what was going to happen."[37]

2. Saturday and Sunday, August 19–20

At 4:00 p.m. on Saturday, August 19,[38] the NHC advised that Tropical Storm Harvey had weakened to a tropical depression.[39] WeatherOps predicted that the storm would make landfall over the Yucatan Peninsula and was unlikely to reach the Texas coast.[40] By late

35. NHC Tropical Storm Harvey Advisory 3A, P.Ex.13 (Doc. 410-14, 23).

36. Signet E-mail, P.Ex.13 (Doc. 410-14, 47).

37. Yester Day 1 Tr., 69:23–70:3 (Doc. 448).

38. Various exhibits utilize different time zones. For convenience, the Court converts all time references to Central Daylight Time.

39. NHC Tropical Depression Harvey Advisory # 10, P.Ex.13 (Doc. 410-14, 66).

40. WeatherOps Atlantic Tropical Daily Planner, P.Ex.13 (Doc. 410-14, 64).

Saturday evening, the NHC advised that the "Remnants of Harvey" had degenerated into a "Tropical Wave," and that the NHC would not release another public advisory on the system "unless regeneration occurs".[41] Similarly, the WeatherOps report indicated that "Harvey has weakened below tropical depression level and is no longer considered a threat."[42]

During the early hours of Sunday, August 20, WeatherOps continued to monitor the situation, noting that while the system had "weakened into an open wave", the "remnants may reintensify toward the end of the week over the Bay of Campeche".[43] By mid-morning, WeatherOps reported that the remnants had "become better organized" and that a "moderate potential [existed] for restrengthening into a minimal depression or tropical storm prior to reaching northern Honduras and the Yucatan peninsula."[44] The accompanying graphical "Forecast Track" depicted a path that would have the storm make landfall as a tropical storm near Tampico, Mexico, with the cone of uncertainty possibly reaching into

41. NHC Remnants of Harvey Advisory # 11, P.Ex.13 (Doc. 410-14, 71).

42. WeatherOps Active Storm Advisory – Tropical Depression Harvey 18, P.Ex.13 (Doc. 410-14, 72).

43. WeatherOps Atlantic Tropical Daily Planner, P.Ex.13 (Doc. 410-14, 75).

44. WeatherOps Significant Tropical Disturbance Advisory – Harvey 9, P.Ex.13 (Doc. 410-14, 76).

deep south Texas, but not as far north as Port Aransas.[45] Yester testified that he understood that the cone of uncertainty meant that the storm's track could fall within any portion of the cone.[46] Six hours later, the next report communicated similar information.[47]

That Sunday evening, WeatherOps reported that the storm remained likely to develop, at most, into a tropical storm.[48] For the first time, however, the long range (i.e., 120-hour) cone of uncertainty included the Port Aransas area.[49] The new projection meant that a tropical storm could make landfall near the DPDS1 by the end of the week. Koenig testified that at some point over the weekend, the storm "got my attention and I started letting [Schenkel] and [Yester] know that we needed to watch [] the weather [] and consider moving the DPDS1 out of port."[50]

The storm also captured the attention of at least one other vessel owner, Noble, which had two drill ships

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45. WeatherOps Tropical Disturbance Harvey Advisory # 19, P.Ex.13 (Doc. 410-14, 77).

46. Yester Day 1 Tr., 139:5–21 (Doc. 448).

47. WeatherOps Tropical Disturbance Harvey Advisory # 20, P.Ex.13 (Doc. 410-14, 80).

48. WeatherOps Tropical Disturbance Harvey Advisory # 21, P.Ex.13 (Doc. 410-14, 83).

49. *Id.*

50. Koenig Day 1 Tr., 227:1–15 (Doc. 448); *see also* Yester Day 1 Tr., 80–81 (Doc. 448).

docked further south in Port Isabel, Texas. On Sunday, the WeatherOps projected track for the weather system placed Port Isabel slightly outside the cone of uncertainty's northern boundary, with the storm's landfall projected for Friday, August 25, south of Tampico, Mexico, with maximum sustained winds of 70 miles per hour.[51] Based on its severe weather plan, Noble immediately began evacuating its drill ships.[52]

3. Monday, August 21

By 10:00 a.m. on Monday morning, WeatherOps had released two more reports, which proved significant. The storm remained a tropical disturbance and was "generally not well- organized".[53] In the 4:00 a.m. report, WeatherOps predicted that on August 25, Harvey would reach maximum wind speeds of 65 miles per hour.[54] Six hours later, WeatherOps reduced this forecast, indicating that maximum winds on August 25 would reach only 60 miles per hour.[55] In both reports, the forecasted track

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51. WeatherOps Tropical Disturbance Harvey Advisory # 20, P.Ex.13 (Doc.410–14, 80).

52. Report for the SIGNET ARCTURUS, S.Ex.29 (Doc. 416-3, 5–9).

53. WeatherOps Tropical Disturbance Harvey Advisory # 23, P.Ex.13 (Doc. 410-14, 89).

54. WeatherOps Tropical Disturbance Harvey Advisory # 22, P.Ex.13 (Doc. 410-14, 86).

55. WeatherOps Tropical Disturbance Harvey Advisory # 23, P.Ex.13 (Doc. 410-14, 89).

had shifted significantly northward, placing Port Aransas well within the long-term cone of uncertainty. At the same time, the predicted landfall remained in northern Mexico.[56]

At 11:05 a.m. that morning, Schenkel communicated to Koenig that while concern existed, they had time before making a definitive decision regarding the DPDS1:

> The storm Harvey is moving in and get[ting] closer to the DPDS1 (within 96 hours) than anticipated and will be at [60 miles per hour] within 96 hours (reduced over the last 6 hours). The max allowable wind speed for the DPDS1 [to tow out to sea] was set at [72 miles per hour] and notice period for readiness 72 hours. We have to make a decision within the next 24 hours about the next step since the speed is close to the acceptable speed of [63 miles per hour] to start preparing departure. It seems we don't have to do anything yet.[57]

A few minutes later, Yester forwarded the WeatherOps reports to Schenkel, opining that he did not "see where we are in any danger unless something causes a drastic

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56. WeatherOps Significant Tropical Disturbance Advisory – Harvey # 24, S.Ex.74 (Doc. 419-8, 41–46) ("The GFS and ECMWF are in rather good agreement, bringing Harvey as a tropical storm to a position just south of Brownsville by Friday afternoon.").

57. Schenkel Email, S.Ex.271 (Doc. 429-10, 4).

turn to the North."[58] Koenig disagreed, testifying that based on these reports, he recommended that morning that Paragon evacuate the DPDS1.[59] Paragon chose to wait before making a definitive decision.

At the same time, Yester "decided to start whatever process it took to get port clearance and tugboats and everything ready to go" to prepare for the possibility that the storm would take a turn to the North.[60] He recognized that he had to start the process as soon as possible because it required two to three days to obtain the necessary approvals and secure the required logistical support. Late that morning, he called Patrick McTigue of Signet to reserve tugs to tow the DPDS1 into the Gulf of Mexico in the event that Paragon decided to evacuate the vessel. Koenig testified that Signet was going to be the only vendor to assist the DPDS1 with an evacuation, meaning that Signet would provide both the harbor tow and offshore tow services. McTigue provided a "Scope of Work Estimated Cost Analysis" shortly after Koenig called him.[61] The same day, Koenig began to fill out the applications for the United States Coast Guard and port authorities and contacted Dutton's Navigation to have a surveyor visit the vessel to obtain a certification approving the towing gear and towing arrangement. He took these

58. Yester Email, P.Ex.17-A-Part 1 (Doc. 410-31, 252).

59. Koenig Day 2 Tr., 41:11–13 (Doc. 449).

60. Yester Day 1 Tr., 71:7–9 (Doc. 448).

61. Signet's "Scope of Work Estimated Cost Analysis", P.Ex.17-A-Part 1 (Doc. 410-31, 1–2).

steps "while we were seeing the storm progress and people above [him]" made the decisions regarding the vessel.[62]

That afternoon, at 4:00 p.m., WeatherOps released its next report, forecasting that Harvey would make landfall "just south of Brownsville" on Friday, August 25, with maximum winds of 70 miles per hour.[63] Corpus Christi lay well within the cone of uncertainty. The projected track had shifted to the north, and WeatherOps explained that certain factors "may result in additional northward adjustments."[64]

Six hours later, in its final report for Monday, WeatherOps indicated "[n]o significant changes . . . regarding the track or intensity forecast".[65] The report forecasted that Harvey would "make landfall over northern Mexico or the Lower Texas Coast as a strong tropical storm or hurricane between 72 and 96 hours."[66] The maximum sustained wind speeds for Friday, August 25 were still predicted to be 70 miles per hour. Paragon representatives do not appear to have commented upon either of these latest revised forecasts.

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62. Koenig Day 1 Tr., 230:20–23 (Doc. 448).

63. WeatherOps Tropical Disturbance Harvey Advisory # 24, P.Ex.13 (Doc. 410-14, 93).

64. *Id.*

65. WeatherOps Tropical Disturbance Harvey Advisory # 25, P.Ex.13 (Doc. 410-14, 96).

66. *Id.*

At least one company, Rowan Companies, decided by no later than Monday to evacuate the Port Aransas port. Rowan contacted Captain Jay Rivera, the presiding officer of the Aransas- Corpus Christi Pilots Association, to express the company's intent to evacuate.[67]

4. Tuesday, August 22

The early Tuesday morning report from WeatherOps made significant changes to the storm's forecasted track and strength. The storm remained a "Tropical Disturbance", but was now expected to strengthen into a Category 1 hurricane with sustained wind speeds of 75 miles per hour by Friday, August 25.[68] The most likely path had again shifted northward, projecting landfall just south of Corpus Christi as a tropical storm. The system also had slowed, so that landfall was predicted for early morning on Saturday, August 26.

At around 6:00 a.m. that morning, Yester forwarded the report to Koenig and Schenkel, asking, "What Now?"[69] Schenkel responded at 6:51 a.m., noting that the storm's intensity had increased, but opining that "the storm . . . might move up North East even more and clear the DPDS1 on the clean side within 84 hours (might know within 6 to

67. Rivera Day 3 Tr., 256:19–257:16 (Doc. 450) (testifying that the initial call occurred on either Sunday or Monday).

68. WeatherOps Tropical Disturbance Harvey Advisory # 26, P.Ex.13 (Doc. 410-14, 99).

69. Yester Email, P.Ex.17-A-Part 1 (Doc. 410-31, 253).

12 hours)."[70] He asked about certain preparations: "Mike [Koenig] is talking to Signet for Tug and port Captain about the preparations (yes/no?)."[71] A few minutes later, Koenig responded, commenting that "[t]he forecaster is confident the track will go more to the north. This puts the DPDS1 on the clean side."[72] When referencing "clean side", Yester meant that in Port Aransas, the DPDS1 would be on the storm's west wall, which would deliver less intense winds and surges.[73] In essence, Yester read the forecast as predicting that the storm would make landfall well north of Port Aransas, with the center of the storm passing to the east. As moving the DPDS1 out to sea meant traveling eastward—i.e., into the stronger side of the storm—"we would have a bit of a hard time finding anywhere to go", he testified.[74] In addition, given that the storm's winds blew in a counterclockwise rotation, Yester's interpretation of the WeatherOps report meant that "the winds would be pushing the vessel against our bulkhead and not pulling it away from the bulkhead, which would be good news for us if that's what happened."[75] Yester responded to both of these emails separately. To Schenkel, he recommended that "[w]e should start some preparations but hold off for another 12–24 hours, unless [Koenig] has another

70. Schenkel Email, P.Ex.17-A-Part 1 (Doc. 410-31, 254).

71. *Id.*

72. Koenig Email, P.Ex.17-A-Part 1 (Doc. 410-31, 253).

73. Yester Day 1 Tr., 83:15–20 (Doc. 448).

74. *Id.* at 83:25–84:1.

75. *Id.* at 84:3–7.

view."[76] Simultaneously, in a message to both Koenig and Schenkel, he merely noted, "OK–we'll see what happens."[77]

At 10:00 a.m., WeatherOps released Advisory # 27, again shifting the forecasted path slightly northward. The "consensus forecast" was "for a strong tropical storm or category one hurricane to reach the central Texas coast Friday."[78] Three hours later, WeatherOps released Advisory # 27A, which reported that "recently available forecast guidance continues to indicate significant intensification on Thursday and Friday."[79]

At 1:00 p.m. on Tuesday, the Coast Guard Captain for Port Aransas set "Port Condition WHISKEY" for the ports of Brownsville, Corpus Christi, and Victoria. This alert level meant that the Coast Guard anticipated sustained gale force winds (39 to 54 miles per hour) at the port from a tropical or hurricane force storm within 72 hours. Signet advised its captains that "several of our customers are making plans to activate their Hurricane Response Plans within the next 24 to 36 hours" and directed captains to "ensure all crew members are made aware of these potential operations and all vessels are readied should the orders begin to come in."[80]

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76. Yester Email, P.Ex.17-A-Part 1 (Doc. 410-31, 253–54).

77. *Id.* at 255.

78. WeatherOps Tropical Disturbance Harvey Advisory # 27, P.Ex.13 (Doc. 410-14, 105).

79. WeatherOps Tropical Disturbance Harvey Advisory # 27A, P.Ex.13 (Doc. 410-14, 108).

80. Gibson Email, P.Ex.23 (Doc. 439-43).

At 4:00 p.m., WeatherOps projected that the storm would make landfall in 72 hours (i.e., Friday afternoon) as a Category 1 hurricane with sustained wind speeds of 80 miles per hour and with the center of the storm striking just north of the Corpus Christi area.[81] Shortly after this report issued, a Signet employee reported that "Sector Corpus Christi has been notified that they are in Condition X-Ray (48 hours) and vessel traffic is starting to leave the area."[82]

5. Wednesday, August 23

On Wednesday at 4:00 a.m., WeatherOps reported "[a] slight shift northward in the forecast track . . . where the center makes landfall over the Middle Texas Coast. The intensity forecast still has Harvey becoming a tropical storm or possibly a hurricane over the western Gulf prior to landfall."[83]

About four hours later, Yester formally notified Paragon employees of the decision to evacuate the DPDS1: "Due to the impending arrival of Tropical Storm 'Harvey'

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81. WeatherOps Tropical Disturbance Harvey Advisory # 28, P.Ex.13 (Doc. 410-14, 111).

82. Johnson Email, P.Ex.13 (Doc. 410-14, 113). Hurricane Port Condition X-RAY means that the weather advisories indicate sustained gale force winds (39 to 54 miles per hour) from a tropical or hurricane force storm are predicted to impact the port within 48 hours.

83. WeatherOps Tropical Disturbance Harvey Advisory # 30, P.Ex.13 (Doc. 410-14, 124).

we are compelled to move the DPDS1 out of its mooring to open water."[84] He reported that Paragon intended to "move the rig this evening or tomorrow morning, depending upon timing of port clearance and harbor tugs to assist with the movement."[85] Schenkel responded almost immediately, asking Paragon employees to "inform DNV about the planned move".[86] He echoed Yester's message that the vessel's departure would occur "this afternoon or early in the morning", with Signet tugs assisting with the dead tow.[87] Over the next few hours, Paragon's employee, Ray Carrera, notified various agencies and companies about Paragon's decision, although he noted his "sense . . . that this storm will not be too bad."[88]

By late morning, Paragon learned that the DPDS1's departure would not occur that day due to ship traffic, but was "planned for tomorrow at first day light."[89] A few hours later, the anticipated departure time was delayed again, to Thursday afternoon.

At some point on Wednesday, in-house counsel for Paragon and Signet began discussions regarding the contract that would govern Signet's provision of tug

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84. Yester Email, P.Ex.17-A-Part 2 (Doc. 410-32, 2).

85. *Id.*

86. Schenkel Email, P.Ex.17-A-Part 2 (Doc. 410-32, 1).

87. *Id.*

88. UT Email, P.Ex.28-D (Doc. 441-31, 1).

89. Koenig Email, P.Ex.17-A-Part 1 (Doc. 410–31, 3).

services for towing the DPDS1 out to sea. Signet's counsel (Reid) and Paragon's counsel (Oliver) exchanged various e-mails throughout the day, focusing on finalizing the terms of Part I and Part II of the Master Charter Agreement. The negotiations fixated on the insurance and indemnification provisions within Part II. By late afternoon, Paragon had accepted Signet's revisions to Part II, "except for the modifications we made to your proposed insurance revisions."[90] Paragon acknowledged that the amendments to Part II of the MCA placed greater exposure on Paragon and would cause it to be responsible for any damage to a Signet tug in a salvage-type operation or loss to third-party property, and any costs associated with cleanup. The terms of the insurance were also amended to require Paragon to name Signet as an additional insured on its insurance policies.[91] By late afternoon, Signet "agree[d] that the changes to the insurance addendum are acceptable".[92] Late in the evening, Paragon requested that Signet prepare Part I and Part II for signature.

During the afternoon, the situation regarding the DPDS1's tow out worsened. Port authorities gave priority to U.S. Navy vessels "departing en-masse from [Corpus Christi]",[93] and Tropical Storm Harvey "appear[ed] to be

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90. Oliver Email, P.Ex.17-A-Part 2 (Doc. 410-32, 9).

91. Modified Part I, *Master Charter Agreement*, AC.Ex.9, (Doc. 436-7, 5).

92. Oliver Email, P.Ex.17-A-Part 1 (Doc. 410–31, 272).

93. Snyder Email, P.Ex.17-A-Part 2 (Doc. 410-32, 11).

headed straight to" the area.[94] Signet advised Paragon that it would attempt to tow the DPDS1 out to sea after the priority vessels departed, "if the port has not been closed" by that time.[95] If the port closed, Signet would ask Captain Gibson, one of its local tug boat operators, "to put a tug or two onto DPDS1 to hold her to the dock at Gulf Copper", but the ultimate decision would remain the captain's, as another company had a right of first refusal for his services.[96] At 5:12 p.m., Schenkel forwarded Signet's communication to Yester, warning him that the DPDS1 "might not be able to leave the port anymore".[97] He noted that they had "to work on a plan B which consist[ed] of keeping the rig at the current berth and using 2 Signet tugs to stabilize the rig."[98] Later that evening, Koenig responded that "[d]epending on the forecast in the morning it might be best to stay in the berth with two tugs rather than go outside and possibly be in the middle of the storm."[99]

6. Thursday, August 24

At 4:00 a.m. on Thursday morning, the NHC issued an official Storm Surge and Hurricane Warning for the

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94. *Id.*

95. *Id.*

96. *Id.*

97. Schenkel Email, P.Ex.17-A-Part 2 (Doc. 410-32, 10).

98. *Id.*

99. Koenig Email, P.Ex.17-A-Part 2 (Doc. 410–32, 10).

Port Aransas area. In this advisory, the NHC forecasted Harvey to strengthen into a hurricane for the first time.[100]

Less than an hour later, Signet's counsel confirmed that he would "generate the BIMCO agreement for today's tow".[101] It is unclear whether Signet actually prepared the final form of the contract, but the parties agree that neither side signed such a document.

And by early morning, the issue became moot. Around 8:00 a.m., Signet's Captain Gibson informed Snyder that he had just been advised that the DPDS1 would not be allowed to leave the port; the Coast Guard was closing the Port of Corpus Christi. Captain Gibson agreed "with the need to have hold tugs at Harbor Island with the [DPDS1] to keep her alongside at Gulf Copper."[102] Minutes later, Snyder informed Paragon of the development. And at 9:30 a.m., Paragon communicated to stakeholders that the DPDS1 "*will not* be towed out and will remain in port."[103]

Shortly after these communications, Snyder e-mailed his Signet colleagues that the company desired to provide the new services under the Tariff: "We need to pass

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100. NHC Tropical Storm Harvey Advisory # 15, P.Ex.13 (Doc. 410-14, 173); NHC Tropical Storm Harvey Intermediate Advisory # 15A, P.Ex.13 (Doc. 410-14, 177).

101. Reid Email, P.Ex.17-A-Part 1 (Doc. 410-31, 273).

102. Gibson Email, P.Ex.17-A-Part 2 (Doc. 410-32, 23).

103. Carrera Email, P.Ex.17-A-Part 2 (Doc. 410–32, 13) (emphasis in original).

onto [Paragon's representatives] we'll operate under our tariff for this."[104] Later that morning, Snyder spoke with Schenkel to discuss the situation. According to Snyder, Schenkel requested that Signet provide two z-drive tug boats to remain with the DPDS1 during the hurricane.[105] Snyder agreed, but expressly indicated that the services would be performed under the Tariff. At trial, Snyder recounted the exchange they had on the matter:

> And [Schenkel] said, Barry, is that the best you can do, I don't care to use the tariff, I'd prefer to use the old contract.
>
> I said, absolutely not, sir, it's very dangerous to use that.
>
> He said, all right, is that the best you can do?
>
> I said, yes, Aldert, we've been friends a long time, this is protecting both of us.
>
> He said, all right, get it done.[106]

Schenkel testified that he could not recall the phone conversation with Snyder, and that it may or may not have occurred.[107]

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104. Snyder Email, S.Ex.125 (Doc. 421-22, 30).

105. Schenkel Day 5 Tr., 202:3-6 (Doc. 452). A "z-drive" refers to a propulsion system that can rotate 360 degrees, enabling the tug boat to direct thrust in any direction. *Id.* at 140:16–18.

106. Snyder Day 5 Tr., 203:1–10 (Doc. 452).

107. Schenkel Dep. (Vol. I), 57:1–18, P.Ex.45 (Doc. 446-1, 16).

After the phone call, Snyder instructed Signet's attorney (Reid) to communicate with Paragon's counsel (Oliver) about using the Tariff for the revised assignment. That afternoon, Reid e-mailed Oliver, advising him that "[b]ecause we will not be towing, but instead will be holding the DPDS1 in place, Signet's work will be governed by our Ingleside Tariff ", which he attached to the message.[108] Reid noted his understanding that the companies' respective commercial teams had agreed to this contractual arrangement. In response, Oliver wrote, "Thanks for the update—much appreciated."[109]

By hiring Signet's services, Paragon believed that the tug boats pushing the DPDS1 against the mooring side would "reduce the tension on the mooring lines". In addition, if the DPDS1 broke lose, "there would be two tugboat[s] tied to the ship that could sort of keep it under some kind of control", and could help keep the drillship from alliding with other objects and vessels in the port.[110]

In addition to hiring the Signet tugs, Paragon also bolstered the DPDS1's mooring system. Koenig was at the dock that morning, and he consulted with the surveyor he had previously contacted—Hugh Gallagher of Dutton's Navigation—whose task changed from certifying the DPDS1 for a tow out to inspecting the mooring system

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108. Reid Email, S.Ex.125 (Doc. 421-22, 32).

109. Oliver Email, S.Ex.125 (Doc. 421-22, 33).

110. Koenig Day 1 Tr., 244-45 (Doc. 448); *see also* Yester Day 1 Tr., 73-74 (Doc. 448).

for a hold-in-place operation. Koenig and his crew of six to eight men "used everything he could find" to strengthen the mooring system.[111] They located three additional lines in a nearby warehouse and added them, using Koenig's pick- up truck to tighten the lines.[112] As to the condition of these new ropes, Gallagher testified that they looked like weaker polypropylene lines, were deteriorated, and would part easily due to their condition.[113] Koenig conceded that the mooring lines had some chaffing and were "used", and that degradation reduced their effectiveness.[114]

Paragon also provided information about a mooring arrangement to Genesis for an updated analysis. Based on that data, the revised Genesis analysis concluded that the mooring system could withstand wind speeds of up to 78 miles per hour. This result represented a small increase in the mooring system's strength as compared to the July mooring analysis.[115] The new report, however, reflected a materially different mooring system, composed of thirteen Dyneema lines and two wire-chain-wire combinations.[116]

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111. Koenig Day 1 Tr., 240–43 (Doc. 448).

112. *Id.* at 241:7–11.

113. *Id.* at 240:8–14; Gallagher Dep., 50:3–51:15, P.Ex.50, (Doc. 446-6, 15).

114. Koenig Day 2 Tr., 94:23–25 (Doc. 449).

115. Genesis Engineering Report, August 24, 2017, S.Ex.162 (Doc. 423-15, 3); Genesis Engineering Report, June 26, 2017, S.Ex.160 (Doc. 423-13, 3).

116. Genesis Engineering Report, August 24, 2017, S.Ex.162 (Doc. 423-15, 3).

In essence, the report assumed that Paragon had replaced multiple polyester lines with Dyneema lines, which have a higher breaking strength, but less elasticity.

In the end, between May 26 and August 24, Genesis analyzed four different mooring systems for the DPDS1. Each mooring arrangement contained a different number of lines, varying line types, and shifting arrangements among the anchors. The trial record, however, casts doubt on the accuracy of any of those reports. While Genesis appears to have applied its software correctly when preparing the reports, it also relied solely on data that Paragon provided. And ample evidence revealed the inaccuracy of that data. For example, in all four reports, Paragon represented that the mooring arrangement included three-inch Dyneema Proton-8 ropes, which Koenig identified to Paragon's mooring expert, Christopher Brown, as blue lines in available photographs. Brown testified, however, that Proton-8 ropes at the time were available only in yellow, suggesting that Koenig misidentified those lines.[117] The distinction is material because each type of rope possesses unique mechanical properties and will react distinctly under stress.

The evolution of the mooring systems in the Genesis reports also reveals the absence of a rigorous design process. For example, the initial report in May contemplated 20 lines securing the DPDS1 to the dock, but

117. The Breakaway of the DPDS1, Report of Christopher Brown, P.Ex.17-L-1 (Doc. 424-43, 7); Brown Day 2 Tr., 235:6– 22 (Doc. 449).

the record reflects that Paragon never utilized that many lines to moor the drillship. The next two reports from June and July depicted differing numbers of lines and arrangements. The June report evaluated a system with five three-inch Dyneema ropes, five three-inch polyester ropes, and two wire-chain-wire combinations.[118] The following month's report analyzed a system with one less three-inch Dyneema rope, and the remaining ropes in a slightly differing arrangement on the available anchors.[119] No evidence explained why Paragon changed the lines, whether it did so, or whether either report reflected reality. Finally, the August report—representing Paragon's understanding of the mooring arrangement on the eve of Hurricane Harvey—stated that Paragon used thirteen three-inch Dyneema ropes, two wire-chain- wire combinations, and no polyester ropes.[120] According to this final report, Paragon at some point in July and August removed all of the polyester ropes mooring the DPDS1 and replaced them with new Dyneema ropes. No Paragon witness testified about such a wholesale change to the mooring system, and such a system would be inconsistent with the analyses of both Paragon's and Signet's experts, based on photographs taken after the breakaway occurred. Those photos confirmed that the mooring system at the time of Hurricane Harvey included at least some

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118. Genesis Engineering Report, June 26, 2017, S.Ex.160 (Doc. 423-13).

119. Genesis Engineering Report, July 3, 2017, S.Ex.161 (Doc. 423-14).

120. Genesis Engineering Report, August 24, 2017, S.Ex.162 (Doc. 423-15).

polyester ropes. Not surprisingly, the parties' experts agreed that the final August 24 report did not reflect the actual composition of lines that secured the DPDS1 when Hurricane Harvey made landfall.[121] Don Barnes, another Paragon expert, agreed that it was "logical" for a vessel owner to know the size and composition of the lines in its mooring system.[122] Paragon does not appear to have possessed such knowledge.

In addition, throughout these months, Paragon never provided Genesis with metered measurements for the line tensions. As to the August 24 report, Gallagher testified that he believed the lines were "very tight" and that it was "reasonable to assume" that the tension figures in the reports were accurate, but he also conceded that he based the line tensions solely on observations, rather than actual measurements.[123]

Given Paragon's lack of accurate data about the lines used in its mooring system and the tension on those lines, the Court finds that in connection with its decision process related to Hurricane Harvey, Paragon possessed no reliable information about the strength of its mooring system.

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121. Petten Day 2 Tr., 193:20–196:9 (Doc. 449); Barnes Day 2 Tr., 104: 11 – 105:22 (Doc. 449); Brown Day 2 Tr., 264:23–266:12 (Doc. 449); Greiner Day 4 Tr., 61:19–61:25 (Doc. 449).

122. Barnes Day 2 Tr., 105:23–107:9 (Doc. 449).

123. Gallagher Dep., 159:11–19, P.Ex.50 (Doc. 446-6, 42).

7. Friday, August 25

a. The Breakaway

Around 8:00 a.m. on August 25, two Signet tugs, the SIGNET ARCTURUS and the SIGNET ENTERPRISE, arrived at the Gulf Copper dock to assist the DPDS1. The ENTERPRISE crew boarded the DPDS1 to "visually look at [the moorings] and then help get the other [] tugs tied up."[124] Captain Grant Taylor of the ARCTURUS understood that his job was to "hold the ship to the dock during the storm."[125] He did not discuss the feasibility of the job or any potential problems with completing this mission with Snyder or Captain Dale Decker of the ENTERPRISE.[126]

Both vessels' captains provided status updates to Signet and Paragon throughout the day. As the hurricane approached Corpus Christi, they consistently reported that the mooring arrangement continued to hold the DPDS1. Around 6:00 p.m., the captains reported winds of 80 to 104 miles per hour, although they noted that other vessels in the area blocked the anemometer, so they were providing estimated wind speeds.[127] At that time, the winds blew from the north- northwest, almost directly at

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124. Taylor Dep., 26:20–23, P.Ex.53 (Doc. 446-9, 9).

125. *Id.* at 27:16.

126. *Id.* at 28:15–21, 169:9–20, 190:13–191:18.

127. SIGNET ARCTURUS Email, P.Ex.17-A-Part 1 (Doc. 410-31, 287–90).

the bow of the vessel.[128] Each captain reported that "all is well".[129]

As evening fell, however, the hurricane neared, conditions worsened, and the wind direction rotated in a counterclockwise direction. At 8:42 p.m., the wind speeds peaked at 111 miles per hour, with gusts up to 129 miles per hour, and had shifted to a 45% angle off the port bow of the DPDS1.[130]

At 10:25 p.m., Schenkel confirmed to Koenig that based on the RigStat system onboard the DPDS1, "the wind speed has dropped suddenly at Port Aransas." He concluded that "the eye of the storm passes."[131] At

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128. Estimated Wind Direction at the Gulf Copper Dock, Wrisk Consulting, S.Ex.133-2 (Doc. 422-12, 5).

129. SIGNET ARCTURUS Email, P.Ex.17-A-Part 1 (Doc. 410-31, 287–90).

130. Estimated Wind Direction at the Gulf Copper Dock, Wrisk Consulting, S.Ex.133-2 (Doc. 422-12, 25). The weather analysis that Wrisk Consulting performed, which Paragon's and Signet's weather experts credited, reported slightly different wind speeds than the NHC. For example, for 9:00 p.m., Wrisk Consulting reports sustained wind speeds of 106 miles per hour, with gusts up to 130 miles per hour, whereas the NHC reported sustained wind speeds of 92 miles per hour, with gusts up to 120 miles per hour. *Id.* at 28; NHC Hurricane Harvey Tropical Cyclone Update, P.Ex.13 (Doc. 410-14, 320). The Court accepts the wind speeds in the Wrisk Consulting report and concludes that any discrepancies reported by the NHC do not affect the legal conclusions.

131. Schenkel Email, P.Ex.17-A (Doc. 410-31, 294).

10:48 p.m., the approximate time of the breakaway, the hurricane's sustained wind speed at the ANPT2 weather station near the Gulf Copper dock was 92 miles per hour, with gusts of 115 miles per hour.[132] By that time, the hurricane's winds came from the southwest, at an almost 90% angle to the DPDS1's bow.[133] In essence, the winds blew directly perpendicular to the entire portside of the vessel, pushing it away from the dock. Gallagher, the Genesis consultant who inspected the DPDS1 the day before, testified that such a wind represented a "worst case scenario", as the DPDS1 would "present the largest sail area" under such conditions, placing maximum pressure on the mooring lines.[134] At 10:26 p.m., Snyder informed Paragon that the tug boats were "extremely busy holding onto DPDS1 in [132 miles per hour] gusts and from what I am hearing, 96-100 mph sustained."[135] At 10:44 p.m., the ARCTURUS emailed to both Paragon and Signet representatives: "Can't really tell much. Visibility is next to nothing."[136] That was the final communication before the breakaway.

Captain Taylor recalled that as night fell around 7:30 p.m., and the storm intensified, all he could do was

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132. Estimated Wind Direction at the Gulf Copper Dock, Wrisk Consulting, S.Ex.133-2 (Doc. 422-12, 42).

133. *Id.*

134. Gallagher Dep., 41:10–42:15, P.Ex.50 (Doc. 446-6) (stating that a beam wind was a "worst case scenario"); *see also* Schenkel Dep. (Vol. II), 88:21–90:1, P.Ex.45 (Doc. 446-1).

135. Snyder Email, P.Ex.17-A (Doc. 410-31, 297).

136. Koenig Email, P.Ex.17-A-Part 1 (Doc. 410-31, 296).

increase the power on the tug boat. The ENTERPRISE and ARCTURUS at the time ran their engines at 75–80% capacity, as the tug boats could not be run at 100% for any period of time without overheating.[137] The captains of both vessels recalled that the darkness and conditions reduced visibility almost completely. At some point between 10:44 p.m. and 11:00 p.m., as Captain Taylor was reading his instruments, "the ship just took off backwards and it felt like we were flying forwards".[138] He immediately told the ENTERPRISE "to go to full power."[139] Captain Decker confirmed receiving the message to "give it everything you got."[140] He continued, "[T]he next thing I know I'm looking up and I see this—wall come up in the lights of the rig, like, they finally came into the flood lights where I could see the rig and then we hit."[141] Captain Taylor described the moment as "chaos", and recalled that the bow of the DPDS1 "came out a bit further", that the ARCTURUS then "went up against the [Noble] rigs", and the DPDS1 "just took off and it was going."[142]

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137. Decker Day 4 Tr., 209:10–15 (Doc. 451).

138. Taylor Dep., 49:16–17, P.Ex.53 (Doc. 446-9, 14); *see also* JPO, Admissions of Fact ¶ 6.24 (Doc. 314, 36) ("At some point around that time, between 10:30p.m. and 11:00 p.m., the DPDS1 broke free of her moorings.").

139. Taylor Dep., 50:13–14, P.Ex.53 (Doc. 446-9).

140. Decker Day 4 Tr., 210:14–19 (Doc. 451).

141. *Id.*

142. Taylor Dep., 50:20–51:1, P.Ex.53 (Doc. 446-9, 15).

The ENTERPRISE and ARCTURUS both allided with the Noble semisubmersible oil rigs docked parallel to the DPDS1. The ENTERPRISE sank, and the ARCTURUS sustained considerable damage. Fortunately, while the ENTERPRISES's crew spent hours in the water and on a powerless tug in the midst of a powerful hurricane, they were successfully rescued the next morning and did not sustain significant physical harm.

The DPDS1 moved into the Corpus Christi ship channel and eventually grounded on the north side near St. Joseph Island.

b. The Cause of the Breakaway

The parties dispute the cause of the DPDS1's breakaway from the Gulf Copper dock. In general, Signet contends that Paragon relied upon an unreasonably inadequate mooring system to keep the DPDS1 moored. Paragon responds that its mooring system was adequate, that a microburst occurred directly over the DPDS1, and that no reasonably designed mooring system could have kept the DPDS1 in place through such an event. When determining the cause of the breakaway, two factors prove particularly relevant: (1) the strength of the mooring system; and (2) the weather conditions near the DPDS1.

With respect to the mooring system's strength, the parties' experts on the matter—Christopher B. Brown for Paragon and Bill Greiner for Signet—relied exclusively on indirect evidence regarding the type, size, and condition of the lines that held the DPDS1. They had no access to

the actual lines, as both the lines that remained on the DPDS1 and the lines that remained on the dock after the hurricane were discarded. And as previously explained, the Genesis reports were not a trustworthy source as to the composition and arrangements of the lines holding the DPDS1. As a result, the experts attempted to reconstruct the mooring system based on photographs that Gallaher and the dock's general manager took before and after the storm, an analysis of the August 24 Genesis report, drawings of the DPDS1, and an affidavit by Koenig. Ultimately, the experts reached consensus as to the likely size and composition of the mooring lines, but disagreed about the condition of those lines at the time of the breakaway.

Paragon's expert, Brown, concluded that the DPDS1's mooring arrangement was actually more robust than what Genesis reported. He calculated the strength of a mooring system with eighteen lines, which included the three lines that Koenig added on August 24, and opined that the mooring system, coupled with the Signet tugs, would have withstood sustained wind speeds of 110 miles per hour, which was significantly higher than the 80 miles per hour estimate that Genesis reported.[143] When the DPDS1 broke away from the dock, the hurricane's sustained wind speeds were approximately 92 miles per hour, with gusts of 115 miles per hour.[144] Based on this data, Brown reasoned that

143. The Breakaway of the DPDS1, Report of Christopher Brown, P.Ex.17-L-1 (Doc. 424-43, 2).

144. Estimated Wind Direction at the Gulf Copper Dock, Wrisk Consulting, S.Ex.133-2 (Doc. 422-12, 42).

the mooring system should have held. As a result, and also relying on data from Paragon's weather expert, Brown concluded that a tornado or wind burst "likely resulted in exceptional mooring loads being placed on the mooring arrangement that it could not withstand."[145]

Signet's mooring expert, Greiner, challenged Brown's conclusions. Greiner testified that Brown's computer model simulations assumed ideal conditions, such as accurate wind coefficients, accurate mooring line pretensions, and new or like-new mooring components. He noted that in actuality, many lines in the available photographs showed significant degradation, and that the high stiffness of the Dyneema ropes and wire-chain-wire combinations would prove detrimental in a hurricane. As a result, he opined that Paragon's mooring system possessed a very small margin of safety against mooring line failure.[146] In addition, he concluded that the Signet tug boats reduced the tension on the mooring lines by less than 3% because the thrust of the tugboats, acting close to the water line, could not counter the effect of the perpendicular wind on the port side of the DPDS1.[147]

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145. The Breakaway of the DPDS1, Report of Christopher Brown, P.Ex.17-L-1 (Doc. 424-43, 1).

146. Greiner Day 4 Tr., 26:12 –29,4 (Doc. 451); Third report of Bill Greiner dated September 12, 2020, S.Ex.223 (Doc. 426-29, 3); First report of Bill Greiner, March 1, 2019, S.Ex.221 (Doc. 426-27, 4).

147. First Report of Bill Greiner dated March 1, 2019, S.Ex.221 (Doc. 426-27, 18–21); Third Report of Bill Greiner dated September 30, 2020, S.Ex.223 (Doc. 426-29, 4).

As to weather conditions, Paragon offered the testimony of its expert, Dr. David Mitchell, who opined that a "lightning wind", or microburst, represented the most likely cause of the breakaway. He explained that a mesocyclone is a supercell thunderstorm "embedded in the larger eye wall" of a hurricane, and that such a supercell can create a microburst–i.e., a lightning wind.[148] Signet's meteorological expert, Joseph Spain, described a microburst as "an intensely descending column of air that originates from inside a mesocyclone within a severe thunderstorm."[149] Both Dr. Mitchell and Dr. Spain agreed on various facts:

- Mesocyclones are typically 2 to 6 miles in diameter;
- Microbursts are less than two and a half miles wide and have peak winds lasting less than 5 minutes;
- Radar can detect mesocyclones, but not microbursts
- Most mesocyclones do not produce microbursts; and
- Data from the KCRP WSR-88D radar in Corpus Christi can identify, at five minute intervals,

148. Mitchell Day 3 Tr., 106:9–14 (Doc. 450).

149. Spain Day 5 Tr., 54:22–24 (Doc. 452).

> the presence or absence of mesocyclones in the general area of the Gulf Copper dock.[150]

The experts disagreed, however, as to whether a microburst occurred at or near the Gulf Copper dock at the time of the breakaway. Dr. Mitchell highlighted that the breakaway occurred well after Hurricane Harvey reached its maximum sustained wind speeds of 111 miles per hour, with gusts of 131 miles per hour.[151] At the time of the breakaway, the hurricane's sustained winds near Port Aransas were 92 miles per hour, with gusts up to 115 miles per hour.[152] Dr. Mitchell reasoned that as the DPDS1 did not break away during the height of the storm, the lower wind speeds at the moment of the breakaway could not have caused the mooring system to fail. Rather, he concludes, a sudden and much stronger burst of wind must have caused the event. A microburst represents the most likely cause of such a wind burst.

In contrast, Dr. Spain opined that no data directly evidenced a microburst at any point at the Gulf Copper dock, and that the probability that a microburst occurred is "less than one percent".[153] For example, he explained

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150. Mitchell Day 3 Tr., 145–148, 163 (Doc. 450); Spain Day 5 Tr., 53–56 (Doc. 452).

151. Mitchell Day 3 Tr., 99:15–17 (Doc. 450).

152. Mitchell Day 3 Tr., 142:20–143:2 (Doc. 450); Spain Day 5 Tr., 39:17–40:1 (Doc. 452).

153. Spain Day 5 Tr., 68:14–70:23 (Doc. 452).

that for the time period of 10:30 p.m. to 11:00 p.m. on August 25, the seven composite radar reports show that the closest mesocyclone to the Gulf Copper dock was too distant for even a mesocyclone with an above-average-diameter to have impacted the DPDS1.[154]

Based on the trial record, the Court finds that the most likely cause of the DPDS1's breakaway stemmed from hurricane winds of about 92–96 miles per hour exceeding the mooring system's capacity. The evidence does not support the occurrence of a microburst near the DPDS1 at the time of the breakaway. Rather, the winds, at the moment when they blew almost directly perpendicular to the port side of the vessel, pushed the DPDS1 away from the dock and applied greater force against the DPDS1 than the mooring lines could withstand. Although the reported wind speeds were higher at an earlier point that evening, they also blew at an angle relative to the DPDS1, reducing the effective strain on the mooring system. At the time of the breakaway, the wind speed coupled with its direction (perpendicular to the port side) overwhelmed the mooring system, even with the Signet tugs attempting to push the DPDS1 toward the dock.

8. Saturday, August 26, through Monday, August 28: The Ship Channel

Within half an hour of breaking away from the Gulf Copper dock, the DPDS1, unmanned and without power,

154. *Id.* at 59–63.

quickly drifted across the Corpus Christi ship channel and grounded near St. Joseph Island.[155]

The morning after the breakaway, Schenkel stated that "we will leave the rig on the beach over the next [few] days anticipating the storm will hit the rig again within 72 hours."[156] Paragon and Signet discussed whether Signet tug boats could help monitor the DPDS1 at her grounded location. During these discussions, Paragon requested that Signet provide its services under the MCA. But Signet again stated that the in-harbor ship assist services would "continue to be governed by our tariff ".[157]

Snyder testified that Paragon asked Signet to "keep an eye on" the DPDS1 and "monitor where she was going".[158] Koenig agreed that Signet would "keep an eye on" the DPDS1, but he recalled more specificity—i.e., that Signet would "keep one of their tugs at our ship watching over [the vessel]."[159] The Signet tug would "stay there and monitor the ship and stay close by to it", in order to "to prevent that [DPDS1] from drifting."[160] In addition, at night, the Signet tug could keep a light on the DPDS1 to

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155. Roy Aff., P.Ex.19-B (Doc. 439, 2); JPO, Admission of Fact ¶ 44 (Doc. 314, 39).

156. Schenkel Email, S.Ex.89 (Doc. 420-8, 1).

157. Oliver and Reid Emails, S.Ex.126 (Doc. 422, 1–3).

158. Snyder Day 5 Tr., 214:4-13 (Doc. 452).

159. Koenig Day 1 Tr., 251:24-252:2 (Doc. 448).

160. *Id.* at 252:5-13.

alert passing vessels and prevent them from alliding with the DPDS1. Schenkel recalled that he or Koenig spoke with Snyder because they "wanted to have a tug close by to at least to report whether the rig was moving or not".[161]

Rear Admiral Joel Whitehead testified that maintaining a tug boat aside the DPDS1 "was a prudent thing to do", and believed that the port captain may have required as much.[162] He expected that the Signet tug boat would have remained "close" to the DPDS1 to be able to hold it in place. As he read the tug boat's log books, an entry to "Hold DPDS1" was consistent with his understanding of what the port captain required and what Paragon prudently would have hired Signet to do.[163]

Signet assigned the tug boat CONSTELLATION to the job. Captain Tringali maneuvered the vessel close to the DPDS1, but then reported that lines dangling off the vessel rendered it impossible for the tug boat to safely come alongside the DPDS1 and remain there to keep the drillship from moving. As a result, the CONSTELLATION did not station itself next to the DPDS1, but remained at a nearby dock. The tug boat's crew enjoyed line of sight of the DPDS1 during the day, and monitored the DPDS1 at night by radar. The crew could respond to any movement within 20 minutes due to the short distance between the

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161. Schenkel Dep. (Vol. II), 145:6–8, P.Ex.45 (Doc. 446-1, 120).

162. Admiral Whitehead Day 3 Tr., 202:20-22 (Doc. 450).

163. *Id.* at 202-203; Marine Operation Log, P.Ex.27 (Doc. 441-8).

dock and the DPDS1's stranded location. On the morning of Sunday, August 27, Signet confirmed that until Paragon personnel were able to travel to Harbor Island, Signet would monitor the DPDS1. The parties agree that during this time, the DPDS1 could be detected visually, by radar, and by GPS.

On the Saturday and Sunday after Hurricane Harvey made landfall, the weather reports anticipated that the storm had the "potential to move back into the gulf next week."[164] And around 4:00 a.m. on Monday, August 28, the NHC warned that Tropical Storm Harvey was moving back toward the coast. The reports indicated that "rain accumulations of 5 to 15 inches" were expected to fall on the middle Texas coast, and that "[t]he combination of a dangerous storm surge and the tide will cause normally dry areas near the coast to be flooded by rising waters moving inland from the shoreline."[165] At mid-morning, the CONSTELLATION traveled by the DPDS1, visibly inspected the vessel, and returned to the Gulf Copper dock.[166] The drillship was "hard aground, had a starboard list, [and] broken lines".[167]

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164. WeatherOps Tropical Daily Planner – Atlantic – Saturday, August 26, 2017, P.Ex.13 (Doc. 410-14, 398–99).

165. NHC Tropical Storm Harvey Advisory # 32A, P.Ex.13 (Doc. 410-14, 503–04).

166. *Deck Log*, P.Ex.27 (Doc. 441-11, 2).

167. Capt. Upton Day 4 Tr., 252:3–6 (Doc. 451).

At 6:00 p.m., Captain Upton relieved Captain Tringali on the CONSTELLATION. Captain Tringali briefed the incoming captain, telling him that "we were keeping an eye on the drilling rigs, the Signet ENTERPRISE, the Signet ARCTURUS, and the drillship."[168] The DPDS1 could be seen from their vantage point during the day with binoculars, but there were no lights in the channel, so it was "pitch black" at nightfall.[169] Captain Upton testified that at night, he had to rely solely on radar to monitor the ship, and he would check the radar "every 30 to 60 seconds."[170]

Around 7:00 p.m. on Monday evening, the DPDS1 refloated when Hurricane Harvey's return to the Gulf of Mexico caused the water level in the channel to rise and the wind speeds to increase, as predicted by the weather advisories early that morning.[171] RigStat data recorded the DPDS1's movements, reflecting that the vessel refloated and drifted across the channel from approximately 7:00 p.m. to 11:00 p.m.–i.e., over a four-hour period.[172]

The CONSTELLATION's crew failed to detect the DPDS1's initial movements, and did not become aware that the DPDS1 was drifting until the United States Coast

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168. *Id.* at 250:18–235.

169. Capt. Tringali Day 3 Tr., 290:3 (Doc. 450).

170. Capt. Upton Day 4 Tr., 250:24–251:3 (Doc. 451).

171. Koenig Day 1 Tr., 279–81 (Doc. 448).

172. Roy Aff., Paragon Trial Tx. P.Ex.19-B (Doc. 439).

Guard notified Signet Captain Josh Macklin, one of the two points of contact between the Coast Guard and Signet at that time, who attempted "two or three times" to contact Captain Upton.[173] Captain Macklin finally reached Captain Upton, who reported that he was "chasing it down."[174] Captain Upton testified that even after getting the call, he did not see any movement by the DPDS1 reflected on the radar.[175]

In the end, the CONSTELLATION was unable to prevent the DPDS1 from alliding with the University of Texas's research pier on the south side of the channel, resulting in significant damage to the pier. After the allision, Captain Upton maneuvered the CONSTELLATION up to the DPDS1's portside and pinned the DPDS1 against the shore. In the ensuing days, Signet provided Paragon with three tugs to maintain the DPDS1 in place until the drillship could be towed to another dock.

As has been noted, Paragon equipped the DPDS1 with Rigstat GPS, which reported the vessel's exact location and movement. The Rigstat device sounded an alarm if the DPDS1 moved. Schenkel and another Paragon employee, Richard Sporn, became aware that the DPDS1 had experienced initial movements on the morning of August

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173. Capt. Macklin Dep., 48-50, 57:20–24, P.Ex.54 (Doc. 446-10, 14–17).

174. *Id.* at 53:4.

175. Capt. Upton Day 4 Tr., 253:5–19 (Doc. 451).

28.[176] Despite this knowledge, at no time during that day did they notify Signet, the Coast Guard, the local Pilot's Association, or the Port of Corpus Christi that the Rigstat device was suggesting movement by the DPDS1.

9. Relocating the DPDS1

Once Hurricane Harvey fully cleared the area, Paragon began the process to move the DPDS1 to the Gulf Marine Fabricators graving yard at Port Aransas.[177] Paragon relied on three Signet tugs to keep the DPDS1 in place on the ship channel shore during the week after the allision. Signet invoiced for those service applying the Tariff rate, and Paragon paid the invoices in full.[178] In late September, Crosby Tugs, LLC towed the DPDS1 from the Gulf Marine Fabricators Dock to the International Shipbreaking Dock at the Port of Brownsville.[179] Shortly thereafter, Paragon had the drillship dismantled.[180]

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176. Schenkel Dep. (Vol. II), 110:21 111:13, P.Ex.45 (Doc. 446-1, 112); Schenkel Email, S.Ex.91 (Doc. 420-10) ("Richard, the trim and list suddenly started changing. Please check location. Sent me recent file with coordinates.").

177. Matthews Daniel Interim Report, P.Ex.10-B (Doc. 409-46, 19).

178. Signet Invoice 517935, S.Ex.293 (Doc. 433-4).

179. Signet and Paragon Stipulations of Fact, S.Ex.244 (Doc. 427-16).

180. Matthews Daniel Interim Report, P.Ex.10-B (Doc. 409-46, 8).

II. Procedural History and Alleged Damages

The Court possesses jurisdiction under the admiralty and maritime laws of the United States. *See* 28 U.S.C. § 1333; FED. R. CIV. PROC. 9(h). Venue lies in this judicial district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

A. Complaints in Limitation

In September 2017, Paragon filed its Complaint in Limitation. Signet filed an Answer and counterclaims.

In December 2017, Signet filed a Complaint in Limitation as owner of the ENTERPRISE. Three months later, Signet filed a Complaint in Limitation as owner of the ARCTURUS. In each matter, Paragon submitted a claim along with an Answer and Counterclaims.

On March 7, 2018, the Court consolidated the three limitation actions into this proceeding. Those three cases have proceeded in tandem and were tried as a consolidated matter.

Three other parties filed claims: (1) Noble Drilling (U.S.) LLC; Noble Bob Douglas LLC; and Noble Drilling NHIL LLC; (2) Certain Underwriters and Insurers of the University of Texas as the Owner of the Port Aransas Research Pier and The University of Texas as Owner of the Marine Science Institute; and (3) Gulf Copper & Manufacturing Corporation and Gulf Copper Ship

Repair, Inc. Each of these entities entered into settlement agreements with Paragon and Signet and were dismissed from this matter.

In November 2017, at the inception of this case, the Court approved the value of Paragon's interest in the DPDS1 and its pending freight in the amount of $150,000, and added $18,000 in interest to reflect a total limitation fund of $168,000.[181] Paragon deposited this amount into the registry of the Court. This amount was based on the post-casualty fair market value of the DPDS1, as the vessel lay in the ship channel. In March 2019, Signet moved to increase Paragon's limitation fund on the grounds that the DPDS1 was sold for approximately $2.5 million six weeks after the incident.[182] The Court denied the motion, finding that the actual sales price did not controvert the limitation value of $150,000.[183]

The Court also made findings as to the limitation fund in the limitation actions that Signet filed as the owner of the ENTERPRISE and the ARCTURUS. As to the ENTERPRISE, the Court approved the value of Signet's interest in the tug and its pending freight in the amount

181. Amended Order Approving Plaintiff in Limitation's Ad Interim Stipulation for Value Directing Issuance of Notice and Restraining Prosecution of Claims (Doc. 9).

182. Signet's Motion for an Order to Increase Paragon Asset Company Ltd.'s Limitation Fund (Doc. 108).

183. Order (Doc. 173).

of $536,738.58, with interest at a rate of 6% per annum.[184] As to the ARCTURUS, the Court approved the value of Signet's interest in the tug and its pending freight in the amount of $11,536,738.58, with interest at a rate of 6% per annum.[185]

In July 2018, Paragon initiated a Third-Party Complaint against the American Club, which filed an Answer.[186] The American Club served as the protection and indemnity (P&I) marine insurer for Signet at all times relevant to this lawsuit. On February 14, 2017, the American Club issued a Certificate of Entry with respect to the ENTERPRISE and the ARCTURUS for the 2017/18 policy year. Paragon alleges that under the MCA, Signet bore responsibility to identify Paragon as an insured under Signet's insurance policy with the American Club. American Club responds that as the Tariff and not the MCA applies to the services that Signet provided, the American Club bears no insurance obligation as to Paragon.

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184. Signet Maritime Corporation as the Owner of the Tug SIGNET ENTERPRISE v. Liability, Civil Case No. 1:17cv247 (Order Doc. 6, Dec. 19, 2017).

185. Signet Maritime Corporation as the Owner of the Tug SIGNET ARCTURUS v. Liability, Civil Case No. 1:18cv035 (Order, Doc. 7, Feb. 28, 2018).

186. JPO, Admission of Fact ¶ 32 (Doc. 314, 37). (*See* Docs. 1., 10, 11, 74, 89, 92, 299, 300, 201, 372, and 373).

B. Alleged Damages

Five vessels and two structures sustained damages: Paragon's DPDS1, Signet's tug boats the ARCTURUS and the ENTERPRISE, the Noble semisubmersible oil rigs DANNY ADKINS and JIM DAY, the University of Texas's research pier, and the Gulf Copper pier. The parties entered into settlements as to Noble, the University of Texas, and Gulf Copper, and Paragon. The Court makes no findings as to the amount of the damages to the DANNY ADKINS, the JIM DAY, or the piers.

With respect to the DPDS1 and the two tug boats, Paragon and Signet each seek various categories of alleged damages. As to the DPDS1, Paragon seeks $4,135,401.00 in damages, comprised of the following:

Category	Amount[187]
Tugs for Tow to Yard & from Yard to Port of Brownsville	$1,072,473.00
Regulatory Survey/Engineering Fees	$ 9,953.00
Reactivation Survey by Insurance Agents	$ 12,099.00
Project Management Team Labor	$2,871.00
Shipyard Labor	$2,934,642.00
Consulting Fees for Third Party Engineering Companies	$103,363.00

187. Paragon's and Signet's Revised Stipulations of Fact as to Their Contentions Regarding Damages (Doc. 392, 2–4).

As to the ARCTURUS, Signet seeks $2,364,059.87 in damages, comprised of the following:

Category	Amount[188]
Salvage costs	$ 37,055.74
Surveyor expenses	$ 54,225.74
Repair costs	$ 1,517,311.08
Loss of charter hire damages	$ 755,467.31

As to the ENTERPRISE, Signet seeks $6,969,373.51 to $7,469,373.51 in damages, comprised of the following:

Category	Amount[189]
Wreck removal services	$1,735,607.78
Surveyor expenses	$41,412.17
Fair market replacement costs	$5,150,000.00 – $5,650,000.00
Loss of charter hire damages	$42,353.56

III. CONCLUSIONS OF LAW

Paragon and Signet each claim that the other's negligence proximately caused the damages resulting from the DPDS1's breakaway from the Gulf Copper dock when Hurricane Harvey made landfall. In particular, Signet argues that Paragon unreasonably failed to act

188. *Id.*

189. *Id.*

with sufficient speed to evacuate the DPDS1 from the port, and having failed to do so, that Paragon utilized an inadequate mooring system to keep the vessel at the dock during the storm. In response, Paragon contends that it acted reasonably when considering whether to tow the DPDS1 out to sea, and that unpredictable weather conditions and port events thwarted its efforts. In addition, Paragon argues that Signet's tug boats failed to fulfill their contractual obligations with respect to the DPDS1.

The two parties devote significant argument to whether the MCA or the Tariff governs Signet's provision of tug boat services during Hurricane Harvey. This issue primarily impacts the indemnity issues that the parties have raised. The Court will first determine the apportionment of liability as between Paragon and Signet, and will then turn to whether the MCA or the Tariff governed during the relevant events.

A. Apportionment of Liability

Since 1975, courts in admiralty actions have applied the concept of comparative fault to determine the respective liability for damages among the parties: "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly

to measure the comparative degree of their fault." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975); *see In re Omega Protein, Inc.*, 548 F.3d at 370 ("In admiralty cases, federal courts allocate damages based upon the parties' respective degrees of fault."). When making this determination, a court applies a negligence analysis.

1. Maritime Negligence

"The elements of a maritime negligence cause of action are essentially the same as land- based negligence under the common law." *Withhart v. Otto Candies, LLC*, 431 F.3d 840, 842 (5th Cir. 2005). To establish maritime negligence, "a plaintiff must demonstrate that there was (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) injury sustained by the plaintiff; and (4) a causal connection between the defendant's conduct and the plaintiff 's injury. *GIC Servs., L.L.C. v. Freightplus USA, Inc.*, 66 F. 3d 649, 659 (5th Cir. 2017). The element of causation requires that the negligence be "a substantial factor" in the injury, although "[t]he term 'substantial factor' means more than 'but for the negligence, the harm would not have resulted.'" *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992) (quoting *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir. 1975)). In addition, the foreseeability of the damages can affect the proximate-cause determination. *See In re Signal Int'l, LLC*, 579 F.3d at 490 n.12.

In the seminal decision *The Louisiana*, the Supreme Court articulated that a shipmaster must "use reasonable skill and care to prevent mischief to other vessels,

and the liability is the same whether his vessel be in motion or stationary, floating or aground. . . . In all these circumstances the vessel may continue to be in his possession and under his management." *The Louisiana*, 70 U.S. 164, 169 (1865); *see also Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 85 (5th Cir. 1960) ("[A shipmaster] has . . . a special duty to take all reasonable steps consistent with safety to [his] ship and her crew, to avoid or minimize the chance of harm to others."). The shipmaster owes the duty to those who would be foreseeably injured should the shipmaster fail to take reasonable steps to keep its vessel from harming others or their property. *See* Prosser and Keeton on Torts, Duty § 53 (5th ed. 1984); Harper, James & Gray, The Law of Torts, Scope of Duty in Negligence Cases § 18.2 at 655 (2d ed. 1986) ("Duty . . . is measured by the scope of the risk that negligent conduct foreseeably entails."). Of particular relevance to the present case, the Fifth Circuit has explained that "[a]llision with fixed structures is one of the principal risks of a vessel, moored inland, that breaks from its negligently executed moorings." *In re Signal Int'l, LLC*, 478 F.3d at 492.[190]

In cases involving storms, a court determines whether the vessel owner "took reasonable precautions under the circumstances as known or reasonably to be anticipated". *Petition of U.S.*, 425 F.2d 991, 995 (5th Cir. 1970). The

190. Neither Paragon nor Signet challenge that the property owners involved in this consolidated action fall within the entities "foreseeably injured" from the DPDS1 breaking away from the dock.

shipmaster must act reasonably in the assessment of "the severity of the impending storm" and must undertake "reasonable preparations in light of such anticipation". *Id.* A court holds the shipmaster to the standard of reasonableness of prudent people familiar with the ways and vagaries of the sea. *Id.* With respect to docked vessels, three factors prove particularly relevant to determine the scope of the duty that the shipmaster owes:

> "Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions."

United States v. Carroll Towing Co., 159 F.2d 169, 174 (2d Cir. 1947).

In the present matter, the Court identifies two discrete events for which liability must be apportioned: (1) the initial breakaway of the DPDS1 and the damages that Paragon, Signet, Noble, and Gulf Copper incurred immediately after that breakaway; and (2) the re-floating of the DPDS1 on August 28 and the damages caused by the allision of the drillship with the University of Texas research pier.

2. The Breakaway of the DPDS1

The Court concludes that Paragon failed to take reasonable precautions under the circumstances as known or that it reasonably could have anticipated before Hurricane Harvey made landfall in Port Aransas. A key factor as to whether Paragon acted reasonably is evaluating Paragon's assessment of the probability that the DPDS1 would break away from the dock in light of the anticipated strength of the storm. As to this factor, Paragon's assessment proved unreasonable on two important data points–the mooring system's strength, and the hurricane's projected path, anticipated force, and arrival date.

As to the first data point, the trial record demonstrates that when Paragon considered whether and when to tow the DPDS1 out to sea as Hurricane Harvey approached, company decision makers knew or should have known that they possessed inaccurate information about the mooring system installed to keep the DPDS1 docked. In other words, Paragon had no reliable basis to determine whether the mooring system could withstand a tropical storm, much less a hurricane.

Between May and June 2017, Paragon contracted Genesis to assess various mooring systems. Paragon relied on those analyses to conclude that it should tow the DPDS1 out to sea if a tropical system threatened to strike the Port Aransas area with anticipated wind speeds of at least 63 miles per hour. Paragon's reliance on the Genesis analysis, however, proved unreasonable. The

initial Genesis report analyzed a 20-line system, but the record does not even suggest that Paragon ever used that many lines to moor the drillship. As for the final, August 24 report, experts from both parties agreed that Paragon provided inaccurate information to Genesis. The experts compared the mooring lines that Genesis assumed for its analysis—and which Paragon provided—against the available information about the lines actually used during the hurricane. They identified material discrepancies between the data that Paragon reported to Genesis, and the lines that most likely moored the DPDS1. In particular, on August 24, Paragon asked Genesis to assume a mooring system with thirteen 3-inch Dyneema lines and two wire-chain-wire combinations. The record reflects that Paragon never utilized such a system, and that the actual lines included at least some weaker polyester lines. In addition, Paragon also asked Genesis to assume certain tension values for the lines, but conceded that it never measured the tension, rendering any assumed values suspect. In short, both sides' experts agreed that on August 24, Genesis assessed a mooring system that did not exist. In fact, no evidence clearly demonstrates that *any* of the Genesis reports reflected a mooring system that Paragon actually used.

Paragon knew—or should have known—that it provided faulty information to Genesis. While some data points have inherent uncertainties, such as the impact of normal wear and tear on mooring lines over time, other information is relatively easy to confirm, such as the type of line used and its size. As shipmaster, Paragon held the best position to understand the system meant to keep the

DPDS1 at the dock. But it failed to obtain such data and, as a result, had no reasonable grounds to rely upon any of the Genesis evaluations.[191]

One of a shipmaster's primary responsibilities is to restrain a docked vessel adequately, so that the vessel does not break away from the dock and impact nearby property. *See Carroll Towing Co.*, 159 F.2d at 172. Vessel owners can use a variety of restraining devices to fulfill this duty. The shipmaster does not have to create a perfect system, but must install a reasonable system considering the risks of a breakaway at that location. Fulfilling that duty requires that a vessel owner possess an adequate understanding of the installed system. Absent an accurate understanding of the mooring system actually in place, a vessel owner has no basis on which to conclude whether its mooring system can withstand an incoming storm. In essence, a shipmaster without an accurate understanding of its own mooring system leaves the results to chance. In the current matter, Paragon took this chance, and in doing so, fell short of fulfilling its duties under maritime law.

As to the second data point, Paragon also acted unreasonably when assessing the strength and anticipated arrival of Hurricane Harvey. It is instructive to recall Paragon's own assessment regarding the conditions that would require towing the DPDS1 out to sea. On August 2, Schenkel had communicated his view on this issue: "[T]o be sure we leave port in time, the word 'hurricane'

191. No evidence indicates that Paragon gathered such information, but then intentionally provided different data to Genesis.

needs to be broadly interpreted as a severe storm."[192] He recommended that "the DPDS1 should depart ([3] days prior land fall) when a storm is approaching with a predicted wind speed of approx. [63+ miles per hour]".[193]

In late August, Paragon disregarded Schenkel's own recommendation. Monday, August 21, proved the critical moment. By 9:00 a.m. that morning, WeatherOps had released two reports. The 4:00 a.m. report predicted that the tropical system would reach 65 mile per hour winds, striking northern Mexico on Friday. Six hours later, the WeatherOps report placed Port Aransas well within the storm's long-term cone of uncertainty, although the predicted landfall remained in northern Mexico. That report reduced the anticipated maximum winds to 57 miles per hour. Two hours later, and based on these reports, Schenkel communicated to Koenig that while concern existed, they had time before making a definitive decision regarding the DPDS1: "It seems we don't have to do anything yet."[194] He estimated that they had 24 hours to make a decision, "since the speed is close to the acceptable speed of [63 miles per hour] to start preparing departure." Yester viewed that morning's reports with even greater optimism, messaging that he did not "see where we are in any danger unless something causes a

192. Schenkel Email, S.Ex.271 (Doc. 429-10, 1–2).

193. *Id.*; *see also* Schenkel Dep. (Vol. I), 77:9–21, P.Ex.45 (Doc. 446-1, 21).

194. Schenkel Email, S.Ex.271 (Doc. 429-10, 4).

drastic turn to the North."[195] In contrast, Koenig testified that his recommendation that morning was to "take the DPDS1 out".[196] He agreed that Paragon should have made the decision to evacuate "immediately".[197] Instead, the decisionmakers decided "to wait and watch the weather for a little bit longer to see if we really need to carry out that plan or not."[198]

Schenkel and Yester reached their conclusions despite Port Aransas being within the cone of uncertainty, and despite the fact that one report that morning had predicted maximum wind speeds exceeding the 63 miles per hour benchmark. While the second report decreased the estimated maximum wind speed to 57 miles per hour, the two reports, taken together, in no manner communicated the absence of "any danger". And six hours later, the next WeatherOps report erased any doubts. Issued around 4:00 p.m., this report forecasted that the system would make landfall in northern Mexico on Friday, August 25, with 70 mile per hour winds.[199] The Corpus Christi area remained well within the cone of uncertainty. Schenkel and Yester do not appear to have communicated about this report, but based on Schenkel's August 2 recommendation, this new information would have decidedly indicated that Paragon

195. Yester Email, P.Ex.17-A-Part 1 (Doc. 410-31, 252).

196. Koenig Day 2 Tr., 41:13 (Doc. 449).

197. *Id.* at 43:13–15.

198. *Id.* at 42:11.

199. WeatherOps Tropical Disturbance Harvey Advisory # 24, P.Ex.13 (Doc. 410-14, 93).

should tow the DPDS1 out to sea. Rather than make such a decision, however, Paragon took no concrete steps in response to the updated information.

Not only did Paragon's decision to wait run counter to Schenkel's earlier guidance, it also was based on a faulty premise—i.e., that the Genesis evaluation was accurate. It was not, and Paragon should have known as much. Given that Paragon did not have a reasonable basis on which to gauge the strength of its mooring system, the only reasonable decision would be to immediately evacuate the DPDS1 once the Port Aransas area fell within the cone of uncertainty for any type of major storm, and certainly including a tropical storm. That moment arrived by no later than the afternoon on Monday, August 21. Paragon has provided no compelling justification for a delay beyond that point.

Paragon's reactions to the Monday reports unquestionably delayed the evacuation of the DPDS1, and more likely than not made the difference between towing the DPDS1 out to sea and having the drillship ride out the storm at its dock. First, Schenkel's and Yester's perspectives demonstrated a lack of urgency and full appreciation for the dangers that the tropical system posed. At important junctures, they interpreted the weather reports in an overly optimistic manner. For example, on Monday, they focused on the 9:00 a.m. report, which contained the lowest forecasted maximum winds, instead of the prior and subsequent reports with higher forecasted maximum winds. The next day, they chose to believe that the tropical system would continue on a

northward path, making landfall well north of Corpus Christi and placing the DPDS1 on the "clean side" of the storm, even though the Gulf Copper dock lay squarely within the cone of uncertainty. Their interpretation of the reports led them to reject Koenig's recommendation to immediately issue an evacuation order and delayed urgent actions. For example, to obtain a certain departure time with the port authorities, Paragon had to issue an evacuation order. Until then, even if Signet communicated its readiness to tow out the drillship, Paragon could not ensure an available departure time. Paragon did not issue the evacuation order until Wednesday. By then, many factors lay beyond its control, but only due to Paragon's own delayed response. Captain Jay Rivera testified that if Paragon had placed an evacuation order on Monday, there would have been a "pretty good chance and a high likelihood" that the DPDS1 would have been towed out to sea before Hurricane Harvey's arrival.[200] Yester agreed that if Paragon had issued the evacuation order on Tuesday, the DPDS1 "might have gotten out".[201] A reasonable shipmaster would understand the urgency to make an evacuation decision, as the "chances [get] smaller as time passes."[202] Instead of acting with urgency, Paragon chose to wait, hoping for a favorable outcome, despite the unambiguous dangers that the reports communicated.

In addition, the experience of Rowan strongly suggests that had Paragon made the definitive decision

200. Capt. Rivera Day 3 Tr., 283:12 (Doc. 450).

201. Yester Day 1 Tr., 109:9–13 (Doc. 448).

202. Capt. Rivera Day 3 Tr., 283:23 (Doc. 450).

on Monday morning to evacuate its drillship, it is probable that Paragon would have succeeded in doing so. Rowan moored two drillships near the DPDS1 at the Port of Corpus Christi. On Monday morning, Rowan decided to evacuate those vessels, and ultimately succeeded in doing so.[203] Paragon could have followed a similar course. Notably, of the five drillships docked along the Texas Gulf Coast, the DPDS1 was the only one not evacuated before Harvey made landfall. Both Noble and Rowan successfully evacuated two of their respective docked drillships. Paragon relies on Yester's testimony that on Monday morning, he "decided to start whatever process it took to get port clearance and tugboats and everything ready to go",[204] in case Paragon chose to evacuate the drillship. While Yester appears to have taken some steps, he did not file the Deadship Tow Application or communicate effectively with the port authorities. He agreed that on Monday or Tuesday, he could have issued an order of evacuation, and then rescinded it if the weather forecast improved. But he did not take this route. At best, on Tuesday, he issued an internal "order to get ready to go", rather than the official order of evacuation, which Paragon did not issue until Wednesday.[205]This delay precluded Paragon from obtaining a definitive departure zone for the drillship.[206]

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203. *Id.* at 300:3–21 (Doc. 450).

204. Yester Day 1 Tr., 71:7–9 (Doc. 448).

205. *Id.* at 108:25–109:1 (Doc. 448).

206. In addition, Paragon did not direct its in-house counsel to begin negotiating with his counterpart at Signet until Wednesday.

Paragon also argues that it acted in a timely manner, but that other factors thwarted its decision to evacuate the DPDS1. In particular, Paragon highlights the Navy's decision on Thursday, August 24, to evacuate several of its vessels, as well as another company's vessels having priority over Paragon's for leaving the port. While it is true that these circumstances arose on Thursday, it is equally true that prudent shipmasters foresee such situations and factor them into their decision-making timetable. A prudent shipmaster docked at a port that houses naval vessels should anticipate that the Navy may evacuate before a threatening storm, and that those vessels command priority over commercial vessels. A prudent shipmaster ascertains whether other vessel owners possess port priority, so as to ensure that it properly weighs the additional time required to evacuate its own vessels. In addition, Paragon notes that other unexpected circumstances arose, such as mechanical problems that delayed the departure of another vessel and the unanticipated rapid intensification of the storm.[207] Such occurrences, however, fall within matters that can arise in the normal course of implementing hurricane evacuation plans. A prudent shipmaster cannot rely on a plan that assumes a best-case scenario with no sudden changes in circumstances. Paragon appears to have been surprised by these developments, but any surprise only underscores

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This delay further reveals a wait-and-see approach, rather than a level of urgency proportional to the increasing threat from the storm.

207. Paragon's Motion to Amend or Clarify (Doc. 464-1, 17–18).

that Paragon failed to appreciate and take into account factors that reasonable shipmasters would consider.

a. Paragon's Defenses

Paragon relies on three primary defenses to reduce or negate its responsibility for the damage that the DPDS1 caused after it broke away from the dock. The Court finds each argument unpersuasive.

i. Signet's Negligence

Paragon first contends that Signet did not exercise reasonable care when providing tug boat services to the DPDS1 at the dock, and that Signet's negligence led to the damages to the various vessels and piers. The trial record, however, undermines this argument. No evidence demonstrated that the Signet tugs ENTERPRISE and ARCTURUS rendered services negligently. The tug boats possessed z-thrust propulsion systems, which enabled them to direct thrust in any direction. With such systems, the tug boats could push the DPDS1 against the dock irrespective of whether the tug boats themselves were stationed perpendicular to the drillship. During the storm, the tug boats reported that as the storm intensity increased, the captains of the two vessels increased the thrust level. At the time of the breakaway, the captains ran their tug boats at 80% thrust capacity. No witness testified that this thrust level was unreasonable. On the contrary, Captain Taylor testified that no tug boat captain operates the vessel at 100% capacity for any length of time,

due to the stress that doing so places on the engine.[208] In short, the evidence at trial demonstrated that Signet's captains operated their tug boats reasonably under the circumstances and did not contribute to the DPDS1 breaking away from the dock.

ii. Force Majeure Defense

Paragon also argues that Hurricane Harvey represented an Act of God that negates any liability that Paragon may otherwise bear.

General maritime law provides for a force majeure defense to liability. A party asserting such a defense must satisfy two elements: (1) the weather was heavy; and (2) the shipmaster "took reasonable precautions under the circumstances as known or reasonably to be anticipated." *Petition of U.S.*, 425 F.2d at 995. The standard of reasonableness mirrors the analysis for negligence–i.e., "that of prudent men familiar with the ways and vagaries of the sea". *Id.* The party asserting the defense bears the burden of proof. *In re Marine Leasing Servs.*, 471 F.2d 255, 257 (5th Cir. 1973).

In the current matter, no party disputes that Hurricane Harvey brought heavy weather to Port Aransas. The Fifth Circuit and its district courts have repeatedly found that storms like Hurricane Harvey qualify as Acts of God. *See, e.g., Boudoin*, 281 F.2d at 88 (concerning Category 3 Hurricane Audrey, which made

208. Taylor Dep., 40:12–25, P.Ex.53 (Doc. 446-9, 12).

landfall with "[w]inds of over 100 mph, driving rain and a storm tide of over 10 feet above mean sea level"); *Petition of U.S.*, 425 F.2d at 993–94, 996 (describing Category 3 Hurricane Betsy's 120-150 mph winds as "vengefully furious" and "of unprecedented force"); *Pioneer Nat. Res. USA, Inc. v. Diamond Offshore Co.*, 638 F. Supp. 2d 665, 690 (E.D. La. 2009) (describing Category 3 Hurricane Ivan as "a classic 'Act of God'"); *Valley Line Co. v. Musgrove Towing Serv., Inc.*, 654 F. Supp. 1009, 1012 (S.D. Tex. 1987) (involving Category 3 Hurricane Alicia). And courts have concluded that Hurricane Harvey itself represented an Act of God. *See Landgraf v. Nat'l Res. Conservation Serv.*, No. 6:18-CV-0061, 2019 WL 1540643, at *2 (S.D. Tex. Apr. 9, 2019); *see also In re Downstream Addicks*, 147 Fed. Cl. 566 (2020).

Paragon fails, however, to establish that it "took reasonable precautions under the circumstances as known or reasonably to be anticipated" in the days before the hurricane made landfall. On the contrary, the Court has found that Paragon's delayed decision and inadequate mooring system represented unreasonably deficient actions by Paragon. As a result, Paragon cannot rely on the force majeure defense.

The Fifth Circuit's opinion in *Boudoin* proves instructive. In that case, a tug captain secured his barge to a dock situated in the direct path of Hurricane Audrey, which made landfall less than two days later. During the hurricane's passage, the ship broke free of its moorings, resulting in damage to a nearby dock. The Fifth Circuit acknowledged that the storm was "surely" an Act of God,

but concluded that the shipmaster could not rely on the force-majeure defense because he failed to evacuate the vessel–i.e., he did not take the reasonable precaution under the known circumstances to move the vessel upstream. *Boudoin*, 281 F.2d at 88; *see also Crescent Towing & Salvage Co. v. M/V CHIOS BEAUTY,* No. CIV. A. 05-4207, 2008 WL 3850481 (E.D. La. Aug. 14, 2008) (rejecting the defense because the shipmaster's negligence in response to the threat of Hurricane Katrina was a contributing cause to the resulting damages: "The defendants either chose to ignore . . . information or misinterpreted it. In either case defendants did so at their peril."). In the same manner, Paragon's delay in deciding to tow the DPDS1 out to sea ultimately caused the drillship to remain at the dock. And Paragon's inadequate mooring system rendered the DPDS1 vulnerable to the force of Hurricane Harvey, leading to its foreseeable breaking free of its moorings.

iii. Assumption of Risk

With respect to the damage to Signet's tug boats, Paragon argues that Signet willingly undertook to place those tugs at DPDS1's side to help keep the vessel from becoming unmoored during Hurricane Harvey. In doing so, Signet understood that the storm represented a grave threat of causing the drillship to break free. As any damage to Signet's tug boats stemmed from the very danger that Signet agreed to guard against–i.e., the breakaway of the DPDS1–Signet cannot seek recovery from Paragon as to that damage.

Maritime law recognizes that contracted parties cannot recover for harm suffered from "dangers which

the contractor was hired to correct". *Duplantis v. Zigler Shipyards, Inc.*, 692 F.2d 372, 374–75 (5th Cir. 1982). The defense typically arises in the context of shipyard contractors performing services for shipowners. In those situations, courts have denied recovery to contracted individuals who suffered injury when addressing the very problem the contractor was hired to remedy. *See, e.g., Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1033 (5th Cir. 1977) ("[T]he duty to provide a safe place to work does not extend to protect employees of an independent contractor from dangers the contractor was hired to correct."). In *Hess*, the contractor agreed to remove residual gasoline and vapors from a vessel. An explosion during the removal process injured one of the contractor's employees. Because the shipmaster had not controlled the removal process, the shipmaster owed no duty to protect the contractor's employee engaged in the dangerous process that the work entailed. *Id.* at 1036; *see also Casaceli v. Martech Int'l, Inc.*, 774 F.2d 1322, 1331 (5th Cir. 1985) (concluding that a shipmaster owed no duty to a diver hired to repair a fouled propellor in muddy waters with significant debris, when the diver died after his air hose snagged on the debris); *Scindia Steam Nav. Co. v. De Los Santos,* 451 U.S. 156, 172 (1981) (articulating the principles that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions" on the vessel, and that the shipowner is entitled to rely on an independent contractor to perform its work with reasonable care).

Paragon concedes that these cases concern a distinct context, but urges their "logical application" to the present

matter. The Court declines to do so. In *Hess*, *Casaceli*, and similar cases, the contractors' employees suffered harm when working directly with the dangerous component that the work entailed. The employees had some level of control over their work so as to mitigate the known danger. For example, the diver in *Casaceli* could take precautions against his air hose becoming entangled with the known dangers of diving, such as debris. The employee in *Hess* controlled the gas-removal process to help avoid explosions caused by the removal process itself. The worker in *Scindia* could avoid remaining underneath a loaded pallet when moving wheat bags. In these scenarios, the employees undertook dangerous work and possessed means to reduce or avoid the inherent danger. When the employees' mitigation efforts proved insufficient and harm ensued, the employees could not recover from the shipmaster. In contrast, in the present case, Signet agreed to help keep the DPDS1 moored to the dock, but had no control over whether the mooring system would suffice. Paragon contracted Signet to help strengthen the overall system keeping the DPDS1 in place, but the presence of Signet's tug boats neither weakened the mooring system nor contributed to its failure. As a result, the line of cases represented by *Scindia*, *Casaceli*, and *Hess* does not apply to the present context.

In essence, Paragon argues that it owed no duty to Signet, as opposed to the owners of fixed structures in the area, because Signet willingly undertook the job to assist with holding the DPDS1 at the dock. In making this argument, Paragon relies primarily on the law regarding vessels under towage. Under the law of tug and tow, the

towing contractor "must know all conditions essential to the safe accomplishment of the undertaking or voyage", including assessing "the nature of the undertaking it assumes", and becoming "sufficiently knowledgeable about its vessel, its customer's ship and the interaction of the two upon the sea."[209] In this matter, however, Signet never undertook the tow of the DPDS1, and at no point did Paragon relinquish custody of the DPDS1 to the Signet tugs. As a result, the law of tug and tow does not apply. Rather, the principles of general maritime negligence control, and under those authorities, Paragon owed a duty to those who would be foreseeably injured should Paragon as shipmaster fail to take reasonable steps to keep the DPDS1 from harming others' property. By contracting Signet to assist in keeping the DPDS1 at the dock, Paragon did not shift to Signet the duties that Paragon owed to ensure that the drillship was properly moored to prevent allision with objects within the scope of danger should the mooring system fail. And Signet did not waive the right to seek compensation should Paragon's negligence damage the Signet tugs involved in the hold-in-place operation. Even if the law of tow and tug applied, Signet at most would have waived the ability to "complain about a condition of unseaworthiness or other weakness that caused the loss if it knew of the condition and failed to use reasonable care under the circumstances." *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1184 (5th Cir. 1984). Here, Signet had no opportunity to determine whether the DPDS1's mooring system would

209. Paragon's Motion to Amend or Clarify (Doc. 464-1, 13–14).

prove adequate to withstand Hurricane Harvey. Although Signet could see the mooring system, a mere visual inspection would not place the company on notice of the system's strength in tempestuous conditions.

b. Resulting Allocation of Liability

The Court concludes that Paragon's negligence caused the DPDS1 to break away from the dock, resulting in foreseeable damages to the Gulf Copper dock, the Signet tug boats, and the Noble semisubmersible oil rigs. As a result, the court allocates full responsibility on Paragon for those damages. In addition, to the extent that the DPDS1 suffered damage from the initial breakaway, Paragon is solely responsible for those damages.

c. Limitation of Liability

The Limitation of Liability Act provides that "the liability of the owner of a vessel for any claim, debt, or liability . . . arising from . . . any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner . . . shall not exceed the value of the vessel and pending freight." 46 U.S.C. § 30505(a)–(b); *see also SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 473 (5th Cir. 2022). Whether a vessel owner is entitled to limitation is a two-step inquiry: (1) What "acts of negligence or conditions of unseaworthiness caused the accident"? and (2) Did the vessel owner have privity or knowledge of those negligent acts or unseaworthy conditions? *Farrell Lines Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976). "[I]f the vessel's

negligence or unseaworthiness is the proximate cause of the claimant's loss, the [ship owner] must prove it had no privity or knowledge of the unseaworthy conditions or negligent acts." *Trico Marine Assets Inc. v. Diamond B Marine Servs. Inc.*, 332 F.3d 779, 789 (5th Cir. 2003).

When a corporation owns the vessel, "knowledge . . . is judged not only by what the corporation's managing officers actually knew, but also by what they should have known." *Id.* at 789–90. That is, if the unseaworthy "condition could have been discovered through the exercise of reasonable diligence" by a managing agent, a corporate owner is deemed to have knowledge of it and cannot limit its liability. *In re Omega Protein, Inc.*, 548 F.3d 361, 371 (5th Cir. 2008) (quoting *Brister v. A.W.I., Inc.*, 946 F.2d 350, 356 (5th Cir. 1991)). "Managing officers" includes executive officers, managers, vessel captains, or other employees who had authority over the sphere of activities in question.'" *In re Signal Int'l, LLC*, 579 F.3d 478, 496 (5th Cir. 2009) (quoting *Petition of Kristie Leigh Enters. Inc.*, 72 F.3d 479, 481 (5th Cir. 1996)). The Fifth Circuit has articulated a number of non-exhaustive factors that courts may consider to determine whether an employee is a managing agent, including the scope of the employee's authority regarding the relevant field of operations, "the relative significance of this field of operations to the business of the corporation, and the duration of the employee's authority. *In re Hellenic Inc.*, 252 F.3d 391, 397 (5th Cir. 2001).

"Seaworthiness is defined as reasonable fitness to perform or do the work at hand." *Farrell Lines, Inc.*, 530

F.2d at 10 n.2. As both the seaworthiness analysis and the negligence analysis rely on the reasonableness standard, a finding of negligence will overlap with a finding of unseaworthiness. *Id.* Proper equipment, such as proper mooring lines, are an indicator of seaworthiness. *Id.* at 12.

Applying these principles to the trial record, the Court concludes that Paragon is not entitled to limitation of liability. First, the design of the DPDS1's mooring system and Paragon's decision regarding evacuation fell within Schenkel, Koenig, and Yester's scopes of authority, all of whom qualify as Paragon's managing agents. As previously described, Paragon acted negligently by delaying its decision to evacuate and by mooring the drillship with an inadequate system, which rendered the DPDS1 unseaworthy. Second, Paragon possessed privity or knowledge of these negligent acts, as its managing agents—Yester, Koenig, and Schenkel—knew or should have known that the DPDS1's mooring system was incapable of withstanding the conditions of the incoming storm, and by their delay in ordering the DPDS1's evacuation until Wednesday, August 23.

3. The Allision with the Research Pier

On August 28, the DPDS1 refloated, moved across the ship channel, and allided with the University of Texas research pier. As to this casualty, the Court concludes that both Signet and Paragon acted unreasonably, and that each party's respective negligence contributed to the allision.

A shipmaster must "use reasonable skill and care to prevent mischief to other vessels, and the liability is the same whether his vessel be in motion or stationary, floating or aground. . . ." *The Louisiana*, 70 U.S. at 169; *see also Boudoin*, 281 F.2d at 85 ("[A shipmaster] has . . . a special duty to take all reasonable steps consistent with safety to this ship and her crew, to avoid or minimize the chance of harm to others."). In the present case, Paragon had a duty to take reasonable precautions to ensure that the DPDS1 did not move from its grounded position, or that if it did, that it would not allide or collide with nearby vessels and property. In large measure, Paragon contracted with Signet to satisfy this duty. Paragon possessed no vessels of its own that could aid the DPDS1, and Signet's tug boats remained available to assist. As for Signet, "[a]lthough a tug is neither a bailee nor an insurer of the tow it is obligated to provide reasonable care and skill 'as prudent navigators employ for the performance of similar services.'" *King Fisher Marine Serv., Inc.*, 724 F.2d at 1184 (quoting *Stevens v. The White City*, 285 U.S. 195, 202 (1932)).[210]

As a starting point, the Court concludes that Signet agreed to not only maintain a tug boat in the general vicinity of the DPDS1 to monitor it, but to also take measures to control the drillship should it re-float. Signet disputes this issue, claiming that it agreed to solely monitor the DPDS1, and that it did so from a dock situated about a mile away, from which the CONSTELLATION's

210. In connection with these events, Signet did not undertake a tow of the DPDS1. As a result, as with the events of August 25, the law of tug and tow does not govern.

crew had a line-of-sight to the DPDS1 during the day, and radar for nighttime monitoring. According to Signet, the CONSTELLATION could mobilize and reach the DPDS1 within about 20 minutes. The trial record, however, reveals that Signet's duty went beyond merely monitoring the drillship. Although Snyder testified that Signet only agreed to "keep an eye on" the DPDS1 and "monitor where she was going", Koenig recalled that Signet would "keep one of their tugs at our ship watching over [the vessel]", so as to "to prevent [the DPDS1] from drifting."[211] The CONSTELLATION's log book confirms that Captain Tringali understood his duty to be to "Hold DPDS1", consistent with Koenig's testimony. The Court accepts Koenig's testimony as evidencing the agreement's scope.

In any event, the CONSTELLATION neither reasonably monitored the DPDS1 nor took any measures to prevent it from alliding with other vessels and property. During the evening of Monday, August 28, the DPDS1 refloated and moved approximately one mile across the ship channel over a period of four hours. While the CONSTELLATION's Captain testified that he monitored the radar regularly, he failed to notice the DPDS1's movement. He became aware that the DPDS1 had refloated only when the Coast Guard notified Signet. By then, it was too late. Once the Captain received notification, he immediately attempted to intercept the DPDS1, but the tug boat arrived after the drillship allided with the University of Texas research pier. Once at the scene, the CONSTELLATION successfully pinned the DPDS1 to the shore to prevent it from moving again.

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211. Koenig Day 1 Tr., 252:5–13 (Doc. 448).

These facts demonstrate that Signet failed to properly monitor the DPDS1 and did not take reasonable actions to prevent the allision with the research pier. Had the CONSTELLATION remained next to the DPDS1 or effectively monitored the radar, the tug boat would have undoubtedly reached the drillship before it allided with the research pier, and the CONSTELLATION could have taken steps to prevent the allision. As a starting point, the weather forecasts rendered foreseeable that the DPDS1 would refloat. In particular, after Hurricane Harvey traveled inland, WeatherOps and the National Hurricane Center issued reports predicting that the hurricane would return to the Texas coast, bringing turbulent weather, heavy rainfall, and rising waters in the Port Aransas area. These forecasts placed Signet and Paragon on notice that the DPDS1 would likely refloat once the water level rose. In light of such information, Signet, as a prudent tug boat owner, should have ensured accurate and constant monitoring of the DPDS1, from a position that would enable the tug boat to prevent the drillship from alliding with other vessels. As it turned out, the CONSTELLATION's inadequate monitoring of the DPDS1 provided the tug with no opportunity to even attempt to alter the drillship's course before the allision.

Signet responds that loose wires on the DPDS1 rendered it unsafe for the tug boat to get close to the drillship when it lay grounded, and that, as a result, it would have been impossible for the CONSTELLATION to prevent the DPDS1 from refloating and alliding with other property. The trial record, however, negates this argument. Swiftly after the allision, the CONSTELLATION successfully

located a safe location on the DPDS1 that enabled the tug boat to pin and maintain the drillship immobile. As the DPDS1's movement across the ship channel proved relatively slow—i.e., covering about a mile over a four-hour period—had the CONSTELLATION monitored the DPDS1 adequately, the tug boat would have had ample opportunity to locate a safe area on the drillship that the tug boat could utilize to alter the drillship's trajectory to avoid any allision.

At the same time, Paragon also bears responsibility. The company reviewed the weather forecasts leading up to the allision indicating that conditions would render it likely for the DPDS1 to refloat. And the parties agree that at all times, Paragon maintained access to the Rigstat GPS, which reported the DPDS1's exact location and movement and sounded an alarm if the DPDS1 moved. Schenkel and another Paragon employee first became aware that the DPDS1 had experienced initial movements on the morning of August 28. Despite this knowledge, at no time during that day did Paragon notify Signet, the Coast Guard, the local Pilot's Association, or the Port of Corpus Christi that the Rigstat device was suggesting movement by the DPDS1.

Had Paragon notified Signet of the DPDS1's movement, Signet could have mobilized the CONSTELLATION to either prevent the DPDS1 from moving further, or to guide the DPDS1 to a safe location. As shipmaster, Paragon maintained a duty to take reasonable steps to prevent its drillship from harming other's property. Although it contracted with Signet, doing so did not absolve Paragon

of all responsibility, especially when Paragon remained in a position to assist Signet by providing important information that could have aided the CONSTELLATION. *See King Fisher Marine Serv., Inc.*, 724 F.2d at 1184 (explaining that "a tug is neither a bailee nor an insurer of the tow"); *Zurich Ins. Co. v. Crosby Tugs, L.L.C.*, 46 Fed. App'x. 732, *1 (5th Cir. 2002) (unpublished) ("A tug is neither a bailee nor an insurer of its tow. . . ."). Paragon inexplicably chose to not convey that data to Signet. In failing to do so, Paragon acted unreasonably as shipmaster.

Both Signet and Paragon, had they fulfilled their respective duties properly, could have prevented the DPDS1's allision with the University of Texas research pier. At the moment that the DPDS1 lay grounded in the ship channel, the critical need was to prevent it from moving, and, if that could not be prevented, to keep it from alliding with others' property. Signet and Paragon each possessed a duty to take reasonable actions to prevent such an allision, and each had the means to enable the CONSTELLATION to intercept the DPDS1 in a timely manner. Neither fulfilled its duty. The Court concludes that each party was equally responsible for the allision with the research pier. As a result, the Court allocates 50% responsibility on each party for the damage to the University of Texas's property.

B. Governing Contracts

Having determined the allocation of liability as between Paragon and Signet for each of the two distinct

occurrences between August 25 and 28, the Court turns to whether the parties entered into a written contract for the services that Signet provided. Paragon claims the MCA governs, while Signet argues that its Tariff controls. Each contract contains differing insurance obligations and indemnity provisions that could impact the parties' ultimate responsibility for the damages that occurred after the DPDS1 broke away from the Gulf Copper dock.

General rules of contract law apply to maritime contracts. *Marine Overseas Servs., Inc. v. Crossocean Shipping Co.*, 791 F.2d 1227, 1234 (5th Cir. 1986). Whether a contract is a maritime contract depends on the "nature and character of the contract" and "whether it [references] maritime service or maritime transactions."[212] *Norfolk Southern Railway Co. v. Kirby*, 542 U.S. 14, 24 (2004) (citations omitted). Courts apply federal common law to resolve maritime disputes, and state contract law may be used to supplement federal law where it is not inconsistent with admiralty principles. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 866 (5th Cir. 2015); *see also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–65 (1986) ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.").

The Restatement (Second) of Contracts, which is recognized as instructive by both federal and Texas

212. The parties do not dispute that the MCA and the Tariff each represent a maritime contract.

law, defines a contract as a "promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." Restatement (Second) of Contracts § 1 (1981). A contract is formed when at least two parties reach a "meeting of the minds" on all essential terms of the contract. *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). "The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind." *In re Capco Energy, Inc.*, 669 F.3d 274, 280 (5th Cir. 2012) (citations omitted); *see also Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.,* 480 S.W.2d 607, 609 (Tex. 1972). Essential terms are those that "parties would reasonably regard as 'vitally important ingredient[s]' of their bargain." *Fischer*, 479 S.W. 3d at 237 (quoting *Neeley v. Bankers Tr. Co.*, 757 F.2d 621, 628 (5th Cir. 1985)). In general, the scope and nature of the services to be performed would be an essential term.

"Whether a signature is required to bind the parties is a question of the parties' intent." *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018). To ascertain the parties' intent at the time of contracting, courts must "consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). Signatures are not required where the parties have agreed to the essential terms of a contract and "there is no evidence of an intent to require both signatures as a condition

precedent to it becoming effective as a contract". *Perez v. Lemarroy*, 592 F. Supp. 2d 924, 930 (S.D. Tex. 2008).

1. The Master Charter Agreement

Paragon contends that the MCA governs Signet's provision of tug boat services related to the DPDS1 during Hurricane Harvey. Signet responds that the two companies never reached a meeting of the minds as to this contract. Based on the trial record and the applicable law, the Court concludes that Paragon and Signet did not agree that the latter would provide tug boat services under the MCA to help keep the DPDS1 at the dock during Hurricane Harvey.

Both parties accept that in 2015, they signed the MCA. That document, however, did not represent a binding contract for any specific performance of services. Rather, the MCA provided a framework through which the two companies could contract for specific services. *See Great Circle Lines, Ltd. v. Matheson & Co.*, 681 F.2d 121, 125 (2d Cir. 1982) (describing the first stage of a charter agreement as negotiating the "bare-bones" of the contract). By its own terms, the MCA did "not obligate [Signet] to charter their vessels to [Paragon], nor [] obligate [Paragon] to hire any vessel or vessels owned by [Signet]".[213] As a result, at trial, Paragon had to prove that Signet specifically agreed that the MCA would govern for the charter of tug boat services actually provided.

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213. *Master Charter Agreement*, P.Ex.4 (Doc. 409-2, 1).

Appendix B

Beginning on Wednesday, August 23, Paragon's and Signet's respective corporate counsel began discussions regarding Signet's anticipated tow out of the DPSD1. Consistent with the framework that the MCA provided, they exchanged e-mails focused on Part II of the MCA. In particular, Signet requested revisions to the standard insurance and indemnity provisions. This focus stemmed from the uncommon risks that Hurricane Harvey presented for the anticipated tow out services. As a result, the insurance and indemnity provisions represented an essential term that the parties negotiated. Late that evening, their communications reflected an agreement on all material terms, and Paragon requested that Signet's counsel prepare the BIMCO. Importantly, at that moment, both counsel understood that Signet's services would entail towing the DPDS1 out to sea. That understanding continued the following morning around 5:00 a.m., when Signet's counsel agreed to "generate the BIMCO agreement for today's tow".[214]

About three hours later, Signet's Captain Gibson informed Snyder that the Coast Guard was closing the Port of Corpus Christi and that the DPDS1 would not leave the port. At that moment, the parties' agreement regarding the MCA became moot, as any agreement had envisioned towing the DPDS1 out to sea. The project shifted to keeping the DPDS1 at the dock, which represented a material change in the nature of the services that Paragon requested from Signet. The two services—i.e., towing the drillship out to sea and maintaining the DPDS1 at her

214. Reid Email, P.Ex.17-A-Part 1 (Doc. 410-31, 273).

dock—entailed different risks, duties, and obligations. And neither Paragon nor Signet considered the two options interchangeable.

Given that the services that Paragon sought to purchase from Signet materially changed on the morning of August 24, Paragon had to demonstrate that Signet agreed to provide the new services under the MCA. And as to this point, the evidence is unambiguous: Signet expressly refused to do so. On the morning of Thursday, August 24, Snyder (Signet) spoke with Schenkel (Paragon). Schenkel expressed Paragon's preference "to use the old contract"—i.e., the MCA. Snyder responded directly: "I said, absolutely not, sir, it's very dangerous to use that."[215] While Schenkel does not remember this conversation, he does not contest that it occurred, and the Court finds that it did. As a result, Paragon cannot demonstrate that Signet agreed that the MCA would govern the provision of tug boats to assist in keeping the DPDS1 at the dock during Hurricane Harvey.

Other factors further demonstrate that Signet did not agree to provide tug boat services under the MCA. First, the parties never completed the BIMCO on the morning of August 24, despite Signet's counsel's agreement to do so. While the MCA did not require a signed Charter Order, the fact that the parties expressly anticipated signing the document for the planned tow out operation, and then never followed through with the signatures, indicates that both parties understood that the MCA was no longer

215. Snyder Day 5 Tr., 203:1–10 (Doc. 452).

relevant to the new services that Signet would provide. Signet emphasizes that the absence of a signed BIMCO automatically meant that the MCA could not control. The MCA, however, did not require as much. On the contrary, the MCA expressly contemplated that "[u]pon reaching an agreement to charter a vessel from Signet", the parties "may issue" a Charter Order, which included the BIMCO (Part I) and that contained the agreed terms.[216] This language within the MCA unambiguously reflects that the parties could reach "an agreement" before they issued a Charter Order, and that the MCA did not require the issuance, much less the signing of, a Charter Order for the MCA to apply. Still, while the MCA did not require a signed Charter Order, the absence of a signed document, in the context of the parties' negotiations, demonstrates that Paragon understood that the MCA would not control for the services that Signet ultimately provided.

Second, the MCA's own language runs counter to Paragon's attempt to enforce it as an agreement. Paragon focuses on Paragraph 1.3 of the MCA, which indicated that the document "shall control and govern in all situations in which [Signet] charter[ed] to [Paragon] a vessel or vessels".[217] Paragon also explains that under the MCA's language, the contract would "control and govern, absent a separate written charter specifically made applicable." This argument, however, fails to take into account the entire MCA. "A maritime contract . . . should be read as a whole and its words given their plain meaning unless the

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216. *Master Charter Agreement*, P.Ex.4 (Doc. 409-2).

217. *Id.*

provision is ambiguous." *Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 955 (5th Cir. 1984). Part II of the BIMCO clarified that the MCA applied to "offshore activities" and "voyages."[218] In the present case, the anticipated towing of the DPDS1 out to sea involved a "voyage" to an "offshore" location—i.e., the Gulf of Mexico. In contrast, assigning tug boats to help keep the DPDS1 at its docked location involved no voyage, much less one offshore. The first project fell within the plain meaning of the MCA's terms, but the latter project did not.

And third, the parties' conduct proves illustrative. In spring and early summer 2017, Signet provided tug boat services to Paragon for the DPDS1 on several occasions. In particular, Signet's tug boats helped keep the DPDS1 from breaking away from its dock when passing vessels caused water surges. For these services, Signet's invoices to Paragon applied pricing consistent with the Tariff, and Paragon paid those invoices without objection. No party presented evidence that for the provision of these services, the parties discussed the MCA or sought the completion or signature of the BIMCO. In contrast, in August, when Paragon contemplated towing the DPDS1 out to sea, the parties initiated discussions specific to the MCA. In addition, another example arose in September, after Hurricane Harvey cleared the area. Signet provided tugs to hold the DPDS1 stationary in its grounded position on the ship channel shore, until it was towed to a shipyard for repairs. Later, Signet and Paragon discussed the possibility of Signet towing the drillship to Brownsville,

218. *Id.* at 11.

Texas, to be scrapped. For the initial in-port services, the parties never discussed the MCA and Signet invoiced Paragon under Tariff rates. For the tow to Brownsville, the parties prepared a BIMCO form under the MCA.[219] As with previous engagements, for in- harbor services, the parties applied the Tariff with no mention of the MCA. For the voyages, the reverse occurred.

For these reasons, the Court concludes that Paragon and Signet did not agree that the MCA would govern when Signet provided tug boat services to help keep the DPDS1 at the dock during Hurricane Harvey.

2. The Tariff

The Court's conclusion that Signet and Paragon did not agree to operate under the MCA for the services that Signet actually provided does not necessarily require the determination that the Tariff governed. Signet and Paragon could have reached no agreement on any written contract. At trial, Signet bore the burden to demonstrate that the parties reached a meeting of the minds to operate under the Tariff 's terms. And based on the record and the applicable law, the Court concludes that they did.

As an initial matter, the Court has found that on Thursday, August 24, Paragon's and Signet's principals discussed and agreed that Signet would provide tug boats to help keep the DPDS1 in place, under the terms of the Tariff. Snyder provided clear testimony on this issue;

219. BIMCO Form, P.Ex.17-A-Part 2 (Doc. 410-32, 101).

Schenkel did not dispute that the discussion occurred. In addition, about two hours before that conversation, Snyder e-mailed his Signet colleagues that Signet desired to provide the services under the Tariff: "We need to pass onto [Paragon's representatives] we'll operate under our tariff for this." While Paragon did not see that e-mail, the communication corroborates Snyder's recollection of his conversation with Schenkel about two hours later and lends credibility to his testimony regarding their discussion.

The oral nature of the agreement poses no difficulties to Signet. Maritime law recognizes the validity of oral contracts. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 734 (1961); *John W. Stone Oil Distributer, L.L.C. v. Penn Maritime, Inc.*, 2018 WL 6018804, No. 17-4942 c/w 17-5700 (E.D. La. Nov. 16, 2018). Under federal maritime law, an oral agreement can incorporate the terms of a written document, such as the Tariff, by reference. *See, e.g., Complaint of Moran Philadelphia*, 175 F. Supp. 3d 508, 522 (E.D. Pa. 2016) (concluding that a written Schedule of Rates, Terms, and Conditions was incorporated into an oral towage contract). While the record does not reflect that Signet sent the Tariff to Paragon before August 2017, Signet published the document. Within the maritime industry, courts have recognized the enforceability of published tariffs. *See, e.g.*, *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 268 (5th Cir. 2011) (finding that contract terms posted on a website were incorporated by reference because the terms were easily accessible to the party and unambiguously incorporated into the agreement); *John W. Stone Oil Distributor,*

L.L.C., 2018 WL 6018804, at *8 (enforcing a tug company's tariff even though the other party did not sign a copy of the document). Additionally, "[c]ertain long- standing customs of the shipping industry", such as the use of tariffs, "are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract." *Great Circle Lines, Ltd.*, 681 F.2d at 125.

The course of dealing between Paragon and Signet further supports the enforceability of the Tariff for the services that Signet provided. A course of dealing is "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.'" *One Beacon Ins. Co.,* 648 F.3d at 265 (quoting Restatement (Second) Contracts § 223 (1981)). Courts may infer that the parties "were aware of and consented to [] additional contractual terms" based on as few as three or four transactions. *One Beacon Ins. Co.,* 648 F.3d at 265 (concluding that eight prior transactions between the parties established a course of dealing); *see also Royal Ins. Co. v. Sea-Land Serv., Inc.*, 50 F.3d 723, 727 (9th Cir. 1995) (relying on three invoices as evidence of a course of dealing).

In the present matter, between May and June of 2017, Signet provided tug boat services on at least five occasions to assist the DPDS1 at the Gulf Copper dock, and Signet invoiced Paragon for these services in accordance with the Tariff. Paragon paid for those services without objection. Although the invoices did not explicitly reference the Tariff, it is reasonable to infer that Paragon was aware

that the charges were based on the Tariff 's terms, as that practice is consistent with maritime industry customs. The Court finds that these previous transactions established a course of conduct between the parties. In August 2017, when Snyder asked Schenkel to accept the Tariff, Snyder could rely on those previous transactions to establish that Paragon understood and assented to the full terms for the contract, even if the two men did not discuss all those terms in their conversation.

Paragon advances various arguments against the formation and enforceability of the Tariff, but none of those arguments prevail.

First, Paragon contends that under Paragraph 5 of the Tariff, the agreement did "not cover Services to vessels aground or in distress, including assistance to a deadship . . . , or when Services are performed during heightened Coast Guard port conditions."[220] Under federal maritime law and Texas law, however, a party may unilaterally waive a provision of a contract that is solely intended for that party's benefit. *See, e.g., Shute v. Thompson*, 82 U.S. 151 (1872); *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 722 (Tex. App.—Dallas 2004, no pet.). "Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35 (Tex.

220. *2016 Signet Ingleside Tariff*, S.Ex.1 (Doc. 414, 5). The Court previously concluded that the DPDS1 was not a deadship under the Limitation of Shipowners' Liability Act. *Paragon Asset Co. Ltd. V. Gulf Copper & Manufacturing Corp., et al.*, 519 F. Supp. 3d 424, 429 (S.D. Tex. 2021).

1987); *see also Bott v. J.F. Shea Co.*, 388 F.3d 530 (5th Cir. 2004) (finding that the subcontractor's conduct implicitly waived a contractual requirement to name a party as an additional insured on its insurance policy). A party can implicitly waive a contract provision through its conduct, so that conduct inconsistent with one contract term will not necessarily negate that the parties mutually assented to the agreement's essential terms. *See Stauffer Chem. Co. v. Brunson*, 380 F.2d 174 (5th Cir. 1967).

In the current matter, Paragraph 5 of the Tariff exists for Signet's sole benefit. Signet provided services to vessel owners within the harbor based on the published and understood terms of the Tariff. A vessel owner would request services, and Signet would assign tug boats to that project. The ability to conduct business in this manner, without having to negotiate a contract for each occasion, facilitated fluid business relationships. But Paragraph 5 of the Tariff protected Signet by ensuring that the contract did not automatically apply when the requested services entailed riskier operations, such as tug boat services for a deadship or during heightened Coast Guard port conditions. On August 24, Signet chose to waive this provision when it expressly agreed to perform the services under the Tariff.

Paragon also argues that the Tariff cannot govern because it represents a contract of duress, or alternatively, a contract of adhesion. In the Fifth Circuit, "[t]he party seeking to establish economic duress must show that a wrongful threat was made which was of such character as to destroy the free agency of the party to whom the

threat was directed." *Palmer Barge Line, Inc. v. S. Petroleum Trading Co.*, 776 F.2d 502, 505 (5th Cir. 1985). For example, "a showing of imminent financial distress coupled with the absence of any reasonable alternative to the terms presented by the wrongdoer may be sufficient to establish economic duress." *Id.*

Paragon relies on various decisions in support of its economic-duress defense, including: *The Elfrida*, 172 U.S. 186, 192 (1898); *Magnolia Petroleum Co. v. Nat'l Tranps. Co.*, 286 F. 40, 42 (5th Cir. 1923); and *Blue Water Marine Servs. v. M/V Natalita III*, 2009 U.S. App. LEXIS 29119 (11th Cir. Sept. 8, 2009). But those decisions do not support Paragon's position. In *The Elfrida*, the Supreme Court established that a salvage contract "will not be set aside unless corruptly entered into, or made under fraudulent representations, a clear mistake or suppression of facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or when their enforcement would be contrary to equity and good conscience". 172 U.S. at 192. Paragon argues that as the DPDS1 was in "immediate danger" on August 24, Paragon should not be bound to the Tariff.

This argument fails, however, for at least two reasons. First, in *The Elfrida*, the Supreme Court recognized that in "most of the cases where the contract was held void, the facts showed that advantage was taken of an apparently helpless condition to impose upon the master an unconscionable bargain." *Id.* at 196; *see also Magnolia Petroleum Co.*, 286 F. at 42 ("The refusal of the master of the Greer to render assistance, and his threat to leave

the Bolikow unless his exorbitant demand was acceded to, amounted to moral compulsion, and the contract, which he procured by the methods adopted, is not protected or made binding and valid by the rule laid down in *The Elfrida*".). In essence, the defense of economic duress protects against one party taking advantage of extreme conditions to force otherwise unacceptable terms on another party. Under such circumstances, courts will void the unconscionable terms. In the present matter, however, the Tariff does not constitute "an unconscionable bargain." In fact, Paragon and Signet had conducted business on numerous occasions under the Tariff. This course of conduct demonstrates that the Tariff contained terms that both sides had accepted for tug boat services within the harbor. Second, it is not apparent that Paragon viewed itself as in a "helpless condition" when it agreed to the Tariff. According to Paragon, on August 24, it believed that its mooring system would withstand Hurricane Harvey's anticipated wind speeds. Paragon contracted for Signet's services not because it believed that absent such services the DPDS1 would surely come unmoored, but to provide additional support for that mooring system.

Similarly, Paragon cannot demonstrate that the Tariff represents a contract of adhesion that the Court should find unenforceable. As a general matter, "adhesion contracts are not automatically void. Instead, the party seeking to avoid the contract generally must show that it is unconscionable." *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir. 1992). Unconscionability may be procedural or substantive. To show that an agreement is procedurally unconscionable, a

party must show more than an imbalance of power or time pressure. *Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002). As for substantive unconscionability, "[t]he test . . . is whether, 'given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'" *In re Palm Harbor Homes, Inc.,* 195 S.W. 3d 672, 678 (Tex. 2006) (quoting *In re FirstMerit Bank*, 52 S.W. 3d 749, 757 (Tex. 2001)); *see also Hafer v. Vanderbilt Mortg. & Fin., Inc.*, 793 F. Supp. 2d 987, 1004 (S.D. Tex. 2011) (finding that an arbitration agreement between a mortgage and finance corporation and the homeowner was not so one-sided to render the terms unconscionable). With respect to procedural unconscionability, in the present matter, no imbalance of power existed between Paragon and Signet, each of which represented a sophisticated commercial enterprise. And the mere fact that the approaching hurricane created an urgent need did not render an agreement to the Tariff unconscionable. As to substantive unconscionability, no evidence demonstrates that the Tariff 's provisions were significantly one-sided. On the contrary, on August 24, when Paragon's in-house counsel received an e-mail indicating that the business representatives had agreed to apply the Tariff to the engagement, he merely replied, "Thanks for the update–much appreciated."[221] As the lawyer for Paragon, bound to represent the company's best interests, he expressed no concerns—either to Signet or internally at Paragon—about applying the Tariff. And his

221. Oliver Email, S.Ex.125 (Doc. 421-22, 33).

reaction is not surprising. Paragon and Signet previously had conducted business under the Tariff, which itself represented a standard agreement within the industry that was meant to facilitate fluid engagement between Signet and vessel owners. In fact, Paragon does not object to the Tariff 's substantive terms, but seeks to void the agreement because certain provisions within the Tariff concerning indemnity and insurance favor Signet, based on the events that ultimately unfolded. But this fact does not render the contract's terms unconscionable.

Not only do Paragon's attacks on the formation and enforceability of the Tariff fail, but its conduct also demonstrates that it ratified the agreement. Under Texas law, "if a party acts in a manner that recognizes the validity of a contract with full knowledge of the material terms of the contract, the party has ratified the contract and may not later withdraw its ratification and seek to avoid the contract." *Malin Intern. Ship Repair & Drydock, Inc. v. Oceanografia*, 817 F.3d 241, 250 (5th Cir. 2016). A party can ratify an agreement by accepting the services or benefits of a contract and paying invoices pursuant to that agreement. *Id.*; *see also Sitco Enterprises, LLC v. Tervita Corp.*, 2018 WL 3032579 (S.D. Tex. 2018) (finding that performance of contract obligations, such as payment of invoices, ratifies the contract and subjects that party to liability); *Chopra & Assocs., PA v. U.S. Imaging, Inc.*, 2014 WL 7204868, at *3 (Tex. App.—Houston [14th Dist.] Dec. 18, 2014) ("A party cannot avoid an agreement by claiming there was no intent to ratify after that party has accepted the benefits of the agreement."). In the current case, Signet invoiced Paragon for the services of the ENTERPRISE, the ARCTURUS,

and the CONSTELLATION, reflecting charges consistent with the Tariff rates. Paragon approved and paid those invoices in full.

The Court also concludes that the Tariff continued to control the services that Signet provided through the August 28 incident. The day after the DPDS1's breakaway on August 25, Signet verbally agreed to assign a tug boat to assist with the drillship, now grounded in the ship channel. On Sunday, August 27, Paragon's counsel requested that Signet provide the services under the MCA. Signet responded that the in-harbor ship assist services would "continue to be governed by our tariff ".[222] Paragon does not appear to have contested the matter, and Signet eventually invoiced for the services based on Tariff rates. Paragon paid those invoices without objection.

For these reasons, the Court concludes that the Tariff governs Signet's provision of tug boat services in connection with the DPDS1 during the August 25 and August 28 events.[223]

C. American Club

American Club requests a take-nothing judgment in its favor because Paragon is not an insured or an additional

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222. Reid Email, S.Ex.126 (Doc. 422, 3).

223. This finding applies to all Paragon entities that are parties in this case. *See* JPO, Admission of Fact ¶ 39 (Doc. 314, 38) ("Any actions or inactions of employees within [the Paragon entities] are attributable to the liability of the Paragon Asset Company Ltd. And Paragon DPDS1 *in rem*.").

insured under the Protection and Indemnity Insurance Contract with Signet. Paragon contends that it enjoys coverage under the P&I Insurance Contract because Signet agreed under the MCA to provide such coverage. In the alternative, Paragon argues that it qualifies for coverage under the Additional Assureds and Waiver of Subrogation Clause of the P&I Insurance Contract.[224]

As previously indicated, the Tariff governs in this action. This conclusion proves fatal to Paragon's argument regarding American Club, as absent the MCA's application, Paragon presents no argument indicating that American Club would have any obligations as to Paragon. As a result, American Club bears no liability as to Paragon for any of the damages at issue in this lawsuit.[225]

D. Damages

The Court turns now to the measure of damages and the impact of the Tariff's provisions regarding the parties' liability for those damages. This analysis turns largely on the following findings: (1) With respect to the initial breakaway of the DPDS1, Paragon bears full responsibility for the damages to the Gulf Copper dock, the

224. *Confidential Protection and Indemnity Insurance Contract*, AC.Ex.3 (Doc. 437, 9).

225. American Club also contends that even if Paragon qualified as an insured under the P&I Insurance Contract, Paragon failed to provide prompt notice of the casualty, as the policy required. The Court does not reach this alternative argument, given its conclusion that the Tariff controls in this matter.

Noble semisubmersible oil rigs, the Signet tug boats, and the DPDS1 itself; (2) As to the damages to the University of Texas research pier, Signet and Paragon each bear 50% responsibility; and (3) The Tariff governs as to Signet's provision of services from August 25 through 28.

Signet and Paragon have entered into settlement agreements with Noble, the University of Texas, and Gulf Copper. The parties have not requested that the Court enter findings as to the amount of damages to those parties' property.

1. The DPDS1

The Court has concluded that Paragon bears full responsibility for the DPDS1's initial breakaway, and that Paragon and Signet each bear 50% responsibility for the drillship's allision with the research pier. Based on these findings, Paragon cannot recover for any damages to the drillship that stemmed solely from the initial breakaway. Signet, however, is liable for 50% of the damages to the DPDS1 occasioned by the allision with the research pier.

Paragon bore the burden to establish its recoverable damages. *See Gaines Towing & Transp., Inc. v. Atlantia Tanker Corp.*, 191 F.3d 633, 635 (5th Cir. 1999) ("[A] defendant cannot be held liable for damages that he has not been shown to have caused".). But Paragon presented no evidence segregating the damages to the drillship, which could have suffered damage at any number of points. For example, in the breakaway from the dock, the drillship forced the Signet tug boats into the Noble semisubmersible

oil rigs. The ensuing contact between the vessels likely damaged the DPDS1. Also, the drillship grounded in the ship channel with a noticeable list, indicating that it may have taken on water through an opening caused by the breakaway or the grounding itself. Signet would have no liability as to any damages to the DPDS1 through the initial grounding in the ship channel. As to the allision with the research pier, although it is likely that the allision damaged the drillship, Paragon presented no evidence identifying the damages attributable solely to this event. As a result, Paragon cannot recover any damages from Signet as to such damages.

In addition, Paragon requests damages that do not stem from the breakaway or the allision with the research pier. For example, Paragon includes as damages the expenses related to the towing of the DPDS1 from Corpus Christi to Brownsville to be scrapped. But Paragon cannot recover such damages, as the purposes of compensatory damages in tort cases "is to place the injured person as nearly as possibly in the condition he would have occupied if the wrong had not occurred." *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 304 (5th Cir. 1976). Here, the record demonstrates that before Hurricane Harvey, Paragon had already decided to scrap the DPDS1, and to do so by October 2017. This evidence reveals that the scrapping of the DPDS1 did not arise from the events surrounding Hurricane Harvey, but was a decision that Paragon reached before the casualty. And no evidence indicates that the casualty increased the cost of scrapping the DPDS1, or decreased its value as a vessel to be scrapped.

2. The ENTERPRISE

As to the ENTERPRISE, Signet seeks $6,969,373.51 to $7,469,373.51 in damages, comprised of the following:

Category	Amount
Wreck removal services	$1,735,607.78
Surveyor expenses	$41,412.17
Fair market replacement costs	$5,150,000.00 – $5,650,000.00
Loss of charter hire damages	$42,353.56

The parties agree that after the casualty, the ENTERPRISE was a constructive total loss– i.e., the damage to the vessel was repairable, "but the cost of repairs exceed[ed] the fair market value of the vessel immediately before the casualty." *Gaines Towing & Transp.*, 191 F.3d at 635. "If a loss is deemed a constructive total loss, damages are the ship's value at the time of collision, less salvage." *Zanzibar Shipping, S. A. v. R.R. Locomotive Engine No. 2199*, 533 F. Supp. 392, 394 (S.D. Tex. 1982); *see also Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 521 (5th Cir. 2013) ("A plaintiff whose property has been destroyed by the tortious acts of another is generally entitled to recover the market value of the property at the time of its loss." (cleaned up)).

The owner of a vessel considered a constructive total loss may also recover consequential damages, including for wreck removal services and surveyor expenses. *Sunglory Mar. Ltd. v. Phi, Inc.*, No. CV 15-896, 2016 WL 852476, at

*2 (E.D. La. Mar. 4, 2016); *see also Truong v. St. Paul Fire & Marine Ins. Co.*, 345 F. App'x 948, 953 (5th Cir. 2009) (unpublished) (stating that recovery costs for a vessel that is a total constructive loss should include expenses "necessary to deliver the ship from its peril to a port of safety"). The owner recovers surveyor expenses "only for surveys which estimated the damages or repair costs," but not for surveys related to designing repair work. *Zanzibar Shipping, S.A.*, 533 F. Supp. at 398.

"The established rule is that in a case of total loss, the owner is not compensated for the loss of use of the boat." *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 382 (5th Cir. 1990) (citing *King Fisher Marine Serv., Inc.*, 724 F.2d at 1185).

Applying these principles to the requested damages, Signet may recover $1,735,607.78 for wreck removal services and $41,412.17 for surveyor expenses. But Signet may not recover its alleged damages for loss of charter.

As to fair market value, the parties agree that the recoverable amount is the fair market value minus $500,000 from the sale of the ENTERPRISE in December 2018. Signet claims that the fair market value of the ENTERPRISE is between $5,650,000 and $6,150,000, based primarily on the testimony of Barry Snyder, who stated that based on his experience and knowledge of the industry, the ENTERPRISE on August 25, 2017, had a fair market value of at least $6,150,000.[226] In support of

226. Snyder Day 5 Tr., 221:19 (Doc. 452).

his belief, Snyder pointed to the sale of the INTREPID, which was the ENTERPRISE's sister ship. That vessel sold in 2019 for $6,150,000, and Snyder testified that only "minimal" changes in the relevant market occurred between August 2017 and the date of the INTREPID's sale.

Paragon argues that the correct value is $4,100,000. In reaching this figure, Paragon relies on two reports. First, in October 2017, American Club retained Dufour, Laskay and Strouse to determine the value of the ENTERPRISE. Using the cost approach, the Laskay Report calculated $4,100,000 as the theoretical fair market value of the ENTERPRISE in working condition at the time of the casualty.[227] Second, in connection with the litigation, Paragon retained Peter Roberts as a valuation expert. He opined that the Laskay Report accurately valued the ENTERPRISE at $4,100,000.[228]

The Court accepts the valuations by Laskay and Roberts. Snyder disagreed with the Laskay Report, but did not provide any compelling arguments that called into question that report's conclusions. In addition, in reaching his own opinion, Snyder relied on one sale (i.e., the INTREPID in 2019) and his general knowledge and experience. The Court finds the reports by Laskay and

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227. Dufour, Laskay & Strouse, Inc., Signet ENTERPRISE Appraisal Report, S.Ex.146 (Doc. 423, 2).

228. Supplementary Report on Damages claims to Signet Maritime Tugboats Arcturus & Enterprise, P.Ex.17-I (Doc. 424-18, 10).

Roberts more amply supported and, as a result, more reliable.

Reducing the fair market value by the $500,000 from the sale of the ENTERPRISE, Signet is entitled to recover $3,600,000 for the constructive total loss of that vessel.

3. The ARCTURUS

As to the ARCTURUS, Signet seeks $2,364,059.87 in damages, comprised of the following:

Category	Amount
Salvage costs	$ 37,055.74
Surveyor expenses	$ 54,225.74
Repair costs	$ 1,517,311.08
Loss of charter hire damages	$ 755,467.31

When a damaged vessel in a maritime accident is not a total loss, the owner is entitled to recover "the reasonable cost of repairs necessary to restore it to its pre-casualty condition and actual profits lost during the detention necessary to make repairs." *Gaines Towing and Transp., Inc.*, 191 F.3d at 636–37 (citing *The Tug June S v. Bordagain Shipping Co.*, 418 F.2d 306, 307 (5th Cir. 1969)). The claimant must establish the amount of repair costs "with reasonable certainty that the damages claimed were actually or may be reasonably inferred to have been incurred as a result of the collision." *Marine Transp. Lines, Inc. v. M/V Tako Invader*, 37 F.3d 1138,

1140 (5th Cir. 1994) (citations omitted); *see also United States v. John Stapp, Inc.*, 448 F. Supp. 2d 819, 824–25 (S.D. Tex. 2006) (explaining that the party seeking repair costs must prove the reasonableness of the amount). As to loss of charter hire damages, the vessel owner must establish that the vessel was capable of being engaged in profitable commerce during the repair period. *See Delta S.S. Lines Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1001 (5th Cir. 1984) (explaining that the correct figure for lost profit is the revenue less expenses).

Signet claims that the cost of repairing the ARCTURUS totaled $1,517,311.08. Paragon challenges this amount, arguing that $454,221.78 is unrecoverable because it stemmed from unreasonable steps that Signet took during the repairs, such as failing to conduct a detailed inspection of the vessel when initially dry docked.[229] Based on the trial record, however, the Court concludes that Signet has demonstrated that it incurred repair costs of $1,517,311.08 as a result of the DPDS1 breaking away, and that those costs were reasonable and necessary. For example, the Chief Engineer for the ARCTURUS, Loren Smith, testified that when Signet initially dry docked the vessel, various representatives from Signet, the Coast Guard, Rolls-Royce (the maker of the Z-drive), and the American Bureau of Shipping (ABS) visually inspected the vessel, including opening up the top of the Z-drive. Based on their collective discussion and inspection, they collectively "decided not to open up the hub because we

229. Paragon's and Signet's Revised Stipulations of Fact as to Their Contentions Regarding Damages (Doc. 392, 6).

had no indication of any damage internally."[230] Doing so may have uncovered the internal damage to the Z-Drive at that moment, but would have required substantial time and costs. Although a vessel owner can inspect all possibly damaged areas after a casualty, Smith explained that "it's just not good engineering practice just to start tearing apart stuff."[231] Here, based on the available data, Signet acted reasonably when not ordering a full inspection of the Z-drive. Later, after the first sea test, Signet realized that issues persisted, and that an internal analysis would be required. At that time, the repair dock was no longer available for an extended period, and as a result, Signet dry docked in that location solely for the short period necessary to make temporary repairs so that the ARCTURUS could then proceed to an available repair dock in Pascagoula. This series of events explains the three separate dry docks for the ARCTURUS, and the sequence of repairs was not unreasonably undertaken. Other evidence demonstrated that the damages to the tug boat arose from the DPDS1 breaking away, and supported the amount paid for the repairs. As a result, Signet is entitled to recover $1,517,311.08 in repair costs. And related to the repairs, Signet also has demonstrated entitlement to the $37,055.74 expended in salvage costs and $54,225.74 incurred for surveyor expenses.

Finally, Signet requests $755,467.31 for loss of charter hire, relying principally on an analysis by Stephen Key, Signet's Vice President for Corporate Accounting and

230. Smith Dep., 117:18–23, S.Ex.334 (Doc. 431-5).

231. *Id.* at 185:9–11.

Treasury. As to this category of damages, Paragon argues that Signet incorrectly bases the requested amount on "gross, unreduced revenue and utilization calculations" and fails to account for various market factors, such as whether "Signet's Ingleside operations returned to normal operations prior to the completion of repairs to the tug."[232]

Based on the trial record, the Court concludes that Paragon's arguments have significant force, and that Signet has not proven its requested damages by a preponderance of the evidence. First, to the extent that Key calculated gross revenue, that amount would not be recoverable. The law affords vessel owners lost profits, not lost revenue. And the $755,467.31 that Signet requests represents "implied lost revenue", not profits. In his testimony, Key confirmed that when calculating this amount, he did not take into account operating expenses, maintenance and repairs, and similar factors that would be deducted to arrive at actual profits.[233] In fact, a profit and loss statement for the ARCTURUS reflects that for the January 2016 through August 2017 time period, the ARCTURUS reported negative net income.[234] In addition, Key applied an 80% utilization rate, which he arrived at by averaging the rate over the six to seven months before

232. Paragon's and Signet's Revised Stipulations of Fact as to Their Contentions Regarding Damages (Doc. 392, 7).

233. Key Dep., 114–115, S.Ex.333 (Doc. 431-4).

234. Confidential Signet Revenues and Utilization Memo, Signet Ex. 289 (432-10, 4).

Hurricane Harvey.[235] But calculating an average over a longer time period would have reduced the utilization rate.[236] And Key acknowledged that the Port of Ingleside experienced "slow starting up" after Hurricane Harvey, strongly suggesting that in the months after the storm, Signet would not have realized the same utilization rate for the ARCTURUS that it experienced before the hurricane.[237]

Ultimately, the evidence on which Signet relies does not demonstrate that the company lost $755,467.31 in profits from loss of charter hire for the ARCTURUS. On the contrary, the record supports the conclusion that any profits would have been significantly lower, and may have proven fully elusive in the dampened market in the months after Hurricane Harvey. As a result, the Court concludes that Signet is not entitled to any damages for loss of charter hire.

4. Indemnity

Signet argues that under the Tariff, Paragon possesses a contractual obligation to indemnify Signet for any damages arising from the services provided under that contract, including for settlement payments that Signet made to third parties whose property was damaged

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235. *Id.*

236. *Id.* (reflecting a 65% utilization rate for the January 2016 through August 2017 period).

237. Key Dep., 117:4–5, S.Ex.333 (Doc. 431-4).

by the events at issue in this lawsuit. In particular, Section 16(h)(ii) of the Tariff specified that "Owners [Paragon] agree to indemnify Signet Group from and against third party liabilities arising out of this agreement not covered by the other indemnity provisions of this Tariff, but only to the extent of the negligence or other fault of the Owners Group."[238]

"The interpretation of an indemnity provision in a maritime contract is ordinarily governed by federal maritime law rather than by state law." *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 (5th Cir. 1981); *see also Channette v. Neches Gulf Marine, Inc.*, 440 F. App'x 258 (5th Cir. 2011). An indemnity provision should be construed to cover "all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties." *Corbitt*, 654 F.2d at 333. In the context of multi-party litigation, an indemnitee may establish entitlement to contractual indemnification for a settlement where the indemnitee can establish that potential liability existed as to the original plaintiff. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1218 (5th Cir. 1986). Courts may consider whether the claim against the indemnitee was frivolous, whether the settlement was reasonable, and whether "the indemnitee settled under a reasonable apprehension of liability." *Id.*

Based on a straightforward application of Section 16(h)(ii) of the Tariff, Signet is entitled to contractual

238. *2016 Signet Ingleside Tariff*, Section 16(h)(ii), S.Ex.1 (Doc. 414, 8). Section 16(h)(i) represents an analogous provision containing Signet's indemnity obligations towards Paragon.

indemnification from Paragon for any damages or settlement amount that Signet has paid related to the Noble semisubmersible oil rigs. The Court has concluded that Paragon's negligence proximately caused those damages in full. Additionally, Signet had a reasonable apprehension of liability because Noble alleged a negligence claim against Signet on the grounds that the tugs were unseaworthy at the time of the breakaway. Signet ultimately settled those claims for $875,000.[239] When the parties reached this settlement, Noble's drilling expert estimated the damages to the NOBLE JIM DAY and NOBLE DANNY ATKINS as between $11 million and $17.8 million.[240] In light of the potential exposure that Signet faced, the Court finds the settlement for $875,000 reasonable, and Signet is entitled to recover that amount from Paragon.

With respect to the damages upon the University of Texas research pier, the Court concludes that neither Paragon nor Signet are entitled to indemnity from the other, as the Court found both parties equally responsible for the damages. The Tariff's third-party indemnity provisions apply only "to the extent of the negligence or other fault of" the other party to the contract. As a result, the Tariff would require only that Paragon indemnify Signet for any third- party liabilities that exceeded 50% of the damages to the pier. The same would hold true as to Signet's indemnity obligations toward Paragon.

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239. Signet's Motion to Supplement and Modify the Court's Order and Opinion (Doc. 463, 12).

240. *Id.*

Signet and Paragon each entered into a settlement with the University of Texas as to the claims that the institution alleged against them.[241] Neither party contends that through those settlement agreements, it incurred any liability beyond 50% of the damages to the pier. As a result, the Tariff 's third-party indemnity provisions do not obligate either party to indemnify the other.[242]

5. Prejudgment Interest

Signet contends that it is entitled to prejudgment interest on all recoverable damages and argues that the Court should fix the rate at Signet's borrowing cost, which was at 5–6% from August 25, 2017, through July 2019, and at 17.5% from July 2019 on.[243] Paragon argues that a prejudgment interest award is discretionary and should not be given here because the increase in Signet's interest rate from 5–6% to 17.5% in 2019 is excessive, Signet's losses should have been covered by the American Club, and the length of time over which the amount will be calculated was driven by a number of claims on which Signet did not prevail, which will make it difficult to

241. *Id.* at 21. Signet informed the Court that it paid $775,000 to the university as part of the settlement. The Court is unaware of the terms of the Paragon settlement.

242. In light of this conclusion, the Court does not reach whether Section 16(d) of the Tariff would limit Signet's indemnity obligations toward Paragon to $200,000.

243. Signet's Motion to Supplement and Modify the Court's Order and Opinion (Doc. 463, 12); Steve Key Dep., 110:23- 112:17, S.Ex. 333 (Doc. 431-4).

determine an equitable pre-judgment interest award.[244] Paragon also states that "Signet's representations about its costs of capital are vague as to whether the subject lending was related to this loss, and questionable given Signet was insured for the loss."[245]

a. Recoverability of Prejudgment Interest

Under maritime law, an award for prejudgment interest "is the rule rather than the exception; prejudgment interest must be awarded unless unusual circumstances make an award inequitable." *Ryan Walsh Stevedoring Co. v. James Marine Servs., Inc.*, 792 F.2d 489, 492 (5th Cir. 1986). The purpose of prejudgment interest is to compensate the prevailing party for the loss of use of funds between the time of the injury and the date of judgment, not to penalize the party at fault. *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 215 (5th Cir. 2006); *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 415 (5th Cir. 1982).

Although prejudgment interest is not "automatic" in admiralty collision cases, courts deny such an award only in exceptional circumstances, such as the prevailing party's undue delay in prosecuting the lawsuit or its bad faith conduct. *City of Milwaukee v. Cement Div., Nat. Gypsum Co.,* 515 U.S. 189, 196, 199 (1995); *Jauch,* 470 F.3d at 215. In contrast, "neither a good-faith dispute over liability nor the existence of mutual fault justifies the

244. Paragon's Motion to Amend or Clarify (Doc. 464-1, 25).

245. Paragon's Response to Signet's Motion (Doc. 468, 8).

denial of prejudgment interest in an admiralty collision case." *Cement Div.,* 515 U.S. at 196, 199.

In the current matter, no exceptional circumstances warrant the denial of prejudgment interest. Paragon has not demonstrated that Signet engaged in bad faith conduct or caused undue delay in the prosecution of this lawsuit. While considerable delay occurred in bringing the matter to trial, the delays arose primarily from the voluminous discovery that the lawsuit generated and, perhaps more significantly, the COVID-19 pandemic that hindered discovery and the prosecution of all litigation. In the absence of exceptional circumstances that warrant otherwise, the Court finds that Signet is entitled to prejudgment interest on the amounts awarded it based on the damages to the ARCTURUS and the ENTERPRISE, as well as on the amount of the settlement payment to Noble.

b. Applicable Interest Rate and Date that Interest Began to Accrue

Traditional federal principles govern the applicable rate for prejudgment interest. *See Cement Div., Nat. Gymsom Co.*, 515 U.S. at 194. Courts have "broad discretion in setting prejudgment interest rates," and may look to the judgment creditor's actual cost of borrowing money, to state law, or to other reasonable guideposts indicating a fair level of compensation. *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096, 1101 (5th Cir. 1981) (affirming a prejudgment interest rate 0f 10%, below the prevailing party's actual

cost of borrowing); *see also Perez v. Bruister*, 823 F.3d 250, 274 (5th Cir. 2016) (explaining that in the absence of federal law governing prejudgment interest rates, courts look to state law); *Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F. Supp. 738, 772 (E.D. La. 1989), *aff'd and remanded*, 904 F.2d 317 (5th Cir. 1990) (applying prejudgment interest rate equal to the statutory rate for postjudgment interest). Based on these principles, courts at times apply varying prejudgment interest rates for different time periods. *See, e.g.*, *Todd Shipyards Corp v. Turbine Service, Inc.*, 592 F. Supp. 380, 386 (E.D. La. 1984), *aff'd in part, rev'd in part sub nom. Todd Shipyards Corp. v. Auto Transp.*, S.A., 763 F.2d 745 (5th Cir. 1985) (relying on a Louisiana statute to apply interest rates of 7%, 10%, and 12% for different time period). And under the general rule of admiralty, "interest on damages should be allowed uniformly from the date of the loss, unless for good reasons it is determined otherwise." *Esso Int'l, Inc. v. S.S. Captain John*, 443 F.2d 1144, 1151 (5th Cir. 1971). The interest "on repair costs runs from the date of the accident even though the owner does not pay these costs until some later date." *Ryan Walsh Stevedoring Co.*, 792 F.2d at 493.

In the present lawsuit, the Court has concluded that Signet may recover $5,377,019.97 for damages related to the ENTERPRISE, $1,608,592.56 for damages related to the ARCTURUS, and $875,000 for the amount paid in settlement with Noble. The loss as to the ENTERPRISE and ARCTURUS arose almost immediately after Hurricane Harvey, as Signet began the salvage and repair efforts within days of the storm. As a result, the Court will apply prejudgment interest as to these

amounts from August 25, 2017, the date of the DPDS1's breakaway during Hurricane Harvey. As to the Noble settlement payment, the Court finds that Signet's "loss" occurred upon the payment of the settlement—i.e., when Signet lost the use of the monies. Under the terms of the Settlement, Release, and Indemnity Agreement, Signet paid the $875,000 by no later than May 22, 2020.[246] As a result, the Court will apply prejudgment interest on the $875,000 beginning on May 22, 2020.

Finally, the Court finds that prejudgment interest of 4% represents a fair level of compensation. Signet requests the rate of 5-6% from August 25, 2017, through July 2019, and 17.5% thereafter, based on the cost of borrowing.[247] In its briefing, however, Signet provides no explanation for the significant increase in its cost of borrowing in mid-2019. And the Court finds an interest rate of 17.5% excessive, especially when the general cost of borrowing remained at historically-low levels. In addition, since 2018, the statutory rate for postjudgment interest has not exceeded 3.5% and has remained below 1% for considerable lengths of time. *See, e.g.,* https://www. txs. uscourts.gov/page/post-judgment-interest-rates-2018. The current rate for postjudgment interest is 3.28%. *See* https://www.txs.uscourts.gov/ page/post-judgment-interest-rates-2022. Based on the relevant factors, the Court will apply prejudgment interest at the rate of 4%.

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246. Noble Drilling and Signet Settlement, Release, and Indemnity Agreement, S.Ex.240 (Doc. 432-7, 4).

247. Signet's Motion to Supplement and Modify the Court's Order and Opinion (Doc. 463, 26).

6. Postjudgment Interest

Under federal law, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court". *See* 28 U.S.C. § 1961. The statute applies in maritime actions, and also establishes the applicable interest rate. *See, e.g.*, *Meaux Surface Prot., Inc. v. Fogleman*, 607 F.3d 161, 173 (5th Cir. 2010) (vacating the district court's denial of postjudgment interest in a maritime action because an award of postjudgment interest pursuant to the Section 1961 rate "is not discretionary"). In the present matter, the Court will award Signet postjudgment interest at the rate applicable at the time of entry of the Final Judgment.

7. Court Costs

Signet requests recovery of its court costs under Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1920. Rule 54(d)(1) "creates a presumption in favor of awarding costs to the prevailing party", and a court may not deny costs without articulating the reason for doing so. *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373, 383 (5th Cir. 2012). At the same time, a party may only recover costs related to the claims on which it prevailed. *See e.g.*, *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991). In the current matter, Signet prevailed as to the claims surrounding the initial breakaway of the DPDS1 on August 25, but not as to the claims involving the allision with the University of Texas pier. As a result, Signet is entitled to recover its taxable costs stemming from the claims related to the events of August 25, but not as to the events of August 28.

IV. Conclusion

The Court bases the preceding findings of fact and conclusions of law on the trial record and the applicable law. As explained in this Opinion, Paragon bears sole responsibility for the initial breakaway of the DPDS1 from the Gulf Copper dock, and is liable for the damages that resulted in the immediate aftermath of that event. The damaged vessels and structures include the DPDS1 itself, the Gulf Copper dock, the Signet tug boats ENTERPRISE and ARCTURUS, and the Noble semisubmersible oil rigs DANNY ADKINS and JIM DAY. As to the ENTERPRISE, Signet may recover $1,735,607.78 for wreck removal services, $41,412.17 for surveyor expenses, and $3,600,000 as the fair market value of the vessel at the time of casualty. As to the ARCTURUS, Signet may recover $1,517,311.08 in repair costs, $37,055.74 in salvage costs, and $54,225.74 for surveyor expenses.

The subsequent allision with the University of Texas research pier represents a separate incident that both Paragon and Signet could have avoided. Each party bears 50% responsibility for the resulting damages to the research pier. The parties have each entered into a settlement agreement with the University of Texas as to the institution's claims. Neither Paragon nor Signet is entitled to indemnity from the other for any amounts paid pursuant to those settlement agreements.

As to each of these two incidents, Signet's Ingleside Tariff governed as to the services that the tug boats provided.

As to prejudgment interest, the Court finds that prejudgment interest is to accrue as simple interest at the rate of 4% on $6,985,612.51, beginning on August 25, 2017, and on $875,000, beginning on May 22, 2020, through the date of the Final Judgment.

The Court also awards Signet postjudgment interest at the statutory rate applicable at the time of Final Judgment, until it is paid in full.

The Court also awards Signet its court costs incurred as to the claims surrounding the initial breakaway of the DPDS1 on August 25.

The Court will issue a separate Order establishing a briefing schedule on the issue of attorney's fees and the amount of recoverable court costs.

Signed on August 17, 2022.

/s/ Fernando Rodriguez, Jr.
Fernando Rodriguez, Jr.
United States District Judge

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION, FILED MARCH 9, 2023

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CONSOLIDATED

No. 1:17-cv-00203

PARAGON ASSET COMPANY LTD,
AS OWNER OF THE DRILLSHIP DPDS1

v.

GULF COPPER & MANUFACTURING
CORPORATION, *et al.*

No. 1:17-cv-00247

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY

Appendix C

No. 1:18-cv-00035

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ARCTURUS,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY

Filed: March 9, 2023

FINAL JUDGMENT

Judge Rodriguez

In accordance with the Court's Amended Order and Opinion (Doc. 473) and the Order and Opinion (Doc. 489) regarding attorney's fees, costs, and expenses, Final Judgment is entered in favor of Signet Maritime Corporation as to its causes of action against Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC. Accordingly, it is:

ORDERED that as to the SIGNET ENTERPRISE, Signet Maritime Corporation shall recover $5,377,019.95 from Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that as to the SIGNET ARCTURUS, Signet Maritime Corporation shall recover $1,608,592.56 from Paragon Asset Company, Ltd., Paragon Offshore

Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that as to Noble Drilling (U.S.) LLC and related entities, Signet Maritime Corporation shall recover $875,000 from Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that Signet Maritime Corporation shall recover attorney's fees of $1,362,042.85 from Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that Signet Maritime Corporation shall recover nontaxable expenses of $353,499.48 from Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that Signet Maritime Corporation shall recover taxable costs of $60,072.48 from Paragon Asset Company, Ltd., Paragon Offshore Limited, Paragon International Finance Company, and Paragon Offshore Drilling LLC, jointly and severally;

ORDERED that this Final Judgment shall bear prejudgment interest to accrue as simple interest at the rate of 4% on $6,985,612.51, beginning on August 25, 2017, and on $875,000, beginning on May 22, 2020, through the date of this Final Judgment; and

ORDERED that this Final Judgment shall bear post-judgment interest at the statutory rate of 5.04% per annum from the date following this Final Judgment, until it is paid in full, for all of which execution shall issue.

All other relief not expressly granted is denied.

This judgment is final, disposes of all parties and claims, and is appealable.

The Clerk of Court is directed to close this matter.

Signed on March 9, 2023.

/s/ Fernando Rodriguez, Jr.
Fernando Rodriguez, Jr.
United States District Judge

APPENDIX D — ON PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-40209

PARAGON ASSET COMPANY, LIMITED,
AS OWNER OF THE DRILLSHIP DPDS1,

Plaintiff—Appellant

v.

AMERICAN STEAMSHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION, INCORPORATED,

Defendant—Appellee

v.

PARAGON OFFSHORE LIMITED,

Defendant—Appellant

PARAGON INTERNATIONAL FINANCE COMPANY,

Third Party Defendant—Appellant

Appendix D

PARAGON OFFSHORE DRILLING, L.L.C.,

Counter-Claimant—Appellant

v.

SIGNET MARITIME CORPORATION,

Claimant—Appellee

IN THE MATTER OF THE COMPLAINT OF
SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY,

Plaintiff—Appellee

SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ENTERPRISE,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY,

Plaintiff—Appellee

v.

PARAGON ASSET COMPANY, LIMITED,

Counter-Claimant—Appellant

Appendix D

IN THE MATTER OF THE COMPLAINT OF
SIGNET MARITIME CORPORATION,
AS OWNER OF THE TUG SIGNET ARCTURUS,
ITS ENGINES, TACKLE, ETC., IN A CAUSE
OF EXONERATION FROM OR
LIMITATION OF LIABILITY,

Plaintiff—Appellee

SIGNET MARITIME CORPORATION, AS OWNER
OF THE TUG SIGNET ARCTURUS, ITS ENGINES,
TACKLE, ETC., IN A CAUSE OF EXONERATION
FROM OR LIMITATION OF LIABILITY,

Plaintiff—Appellee

v.

PARAGON ASSET COMPANY, LIMITED,

Appellant

Argued: February 5, 2024
Decided and Filed: April 24, 2024

No. 23-40209 On Appeal from the United States
District Court for the Southern District of Texas,
Brownsville Division
Nos. 1:17-CV-203, 1:17-CV-247, 1:18-CV-35—
Fernando, MI Rodriguez, Jr. District Judge

Appendix D

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.