

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

ESSAR STEEL MINNESOTA LLC and
ESML HOLDINGS INC.,¹

Debtors.

Chapter 11

Case No. 16-11626 (BLS)

(Jointly Administered)

BRADLEY E. SCHER, solely in his capacity
as Litigation Trustee for SC Mesabi Litigation
Trust,

Plaintiff

v.

ESSAR GLOBAL FUND LIMITED; ESSAR
PROJECTS LIMITED;
ESSAR PROJECTS USA, LLC;
ESSAR PROJECTS (INDIA) LIMITED;
ESSAR PROJECT MANAGEMENT
COMPANY LIMITED; ESSAR
CONSTRUCTIONS LIMITED;
ESSAR PROJECTS MIDDLE EAST FZE;
ESSAR ENGINEERING SERVICES
LIMITED; GLOBAL SUPPLIES FZE;
ESSAR LOGISTICS LIMITED; DOES 1-500

Defendants.

Adv. Proc. No. 17-50001 (BLS)

**SC MESABI LITIGATION TRUST'S MOTION FOR ENTRY OF AN
ORDER APPROVING (I) THE SETTLEMENT BETWEEN THE SC
MESABI LITIGATION TRUST AND THE SETTLING ESSAR PARTIES
AND (II) THE SETTLEMENT BETWEEN THE SC MESABI
LITIGATION TRUST AND THE UC LITIGATION TRUST**

¹ Essar Steel Minnesota LLC has changed its name to Mesabi Metallica Company LLC. The last four digits of its federal taxpayer identification number are 8770. The last four digits of ESML Holdings Inc.'s federal taxpayer identification number are 8071.

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Bradley E. Scher, solely in his capacity as the litigation trustee (the “**Litigation Trustee**”) for the SC Mesabi Litigation Trust (the “**Trust**”), established pursuant to the *Third Amended Chapter 11 Plan of Reorganization of Mesabi Metallics Company LLC (f/k/a Essar Steel Minnesota LLC) and ESML Holdings Inc.* [D.I. 990] (the “**Plan**”),² hereby files this motion (the “**Motion**”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “**Order**”) approving (i) the settlement by and between (a) the Litigation Trustee on the one hand, and (b) Essar Global Fund Limited (“**Essar Global**”), (c) Essar Energy Solutions Limited (“**EESL**”), (d) Essar Projects Limited, (e) Essar Projects (USA), LLC, and (f) Essar Projects Middle East FZE on the other hand (collectively, the “**Settling Essar Parties**,” together with the Litigation Trustee, the “**Parties**”), substantially in the form attached hereto as **Exhibit 1** to **Exhibit A** (the “**Essar Settlement Agreement**”) and (ii) the settlement agreement by and between (a) the Litigation Trustee and (b) Kevin Nystrom, solely in his capacity as the litigation trustee for the UC Litigation Trust (the “**UC Litigation Trustee**”) substantially in the form attached hereto as **Exhibit 2** to **Exhibit A** (the “**UC Trust Settlement Agreement**,” together with the Essar Settlement Agreement, the “**Settlement Agreements**”). In support of the Motion, the Litigation Trustee submits the *Declaration of Bradley E. Scher in Support of the SC Mesabi Litigation Trust’s Motion for Entry of an Order Approving the Settlement between the SC Mesabi Litigation Trust and the Settling Essar Parties* (the “**Scher Declaration**”), filed contemporaneously herewith. In further support of the Motion, the Litigation Trustee respectfully submits as follows:

² Where the context requires, capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Plan or the Settlement Agreements.

Preliminary Statement

By this Motion, the Litigation Trustee requests entry of an order approving the Settlement Agreements in their entirety and authorizing the respective parties to perform all obligations thereunder. The Essar Settlement Agreement represents the culmination of extensive and concerted efforts of the Parties over the course of over six (6) months, multiple meetings in person in New York and Mumbai, as well as numerous additional telephonic conferences, to reach an agreement that would fully resolve the disputes between the Litigation Trustee and the Settling Essar Parties. If approved by the Court, the Essar Settlement Agreement, and the UC Trust Settlement Agreement (which is contingent on the approval of the Essar Settlement Agreement), will achieve a resolution of significant issues for the Trust and its beneficiaries. As discussed in more detail herein, the Settlement Agreements, among other things: (i) allows the Trust to receive \$12 million in cash, (ii) includes a waiver from EESL, the beneficiary with a minimum of an 86.48% beneficial interest in the Trust (and potentially as high as 100%), to any pro rata distribution from the \$12 million cash payment to which it would otherwise have been entitled, (iii) reflects a voluntary reduction of the Litigation Trustee's agreed contingent compensation of over \$8 million (as explained below), which further increases the aggregate distributable amount to Trust beneficiaries, (iv) sets an agreed amount of \$200,000 in consideration of the 2% Distribution (as defined below) to the UC Litigation Trust, and timing of the payment of such settlement amount, thus providing the UC Litigation Trust to receive such amount sooner than ever anticipated, while providing the Trust beneficiaries higher distributable amounts, (v) dismisses the pending Adversary Proceeding with prejudice against the Settling Essar Parties, and providing mutual releases, and (vi) avoids years of costly and protracted litigation and collection efforts that

would be fraught with uncertainties in every phase – from the arbitration of some, but not all of the claims; to expansive discovery from foreign entities, located around the world; to the exorbitant associated expenses that would require additional litigation financing; to the delay that is further exacerbated beyond typical litigation given the relevant circumstances. And even if the Trust were successful in obtaining a judgment years from now, the massive undertaking that would be required to collect and enforce on any such judgment against Corporate Defendants with multi-jurisdictional reach and known history of collection difficulties, would carry high risks with no guarantee of success.

In the Litigation Trustee's business judgment, the Settlement Agreements provide significant value to the beneficiaries of the Trust, are fair and reasonable and in the best interests of all constituents, taking into account (1) the projected costs of litigation, (2) the probability of success in litigation, (3) the projected difficulty in collecting a judgment, (4) the complexity of issues involved, and the expense, delay and risk that would attend such litigation, and, (4) the interests of claimholders. The gross implied value of the Essar Settlement Agreement is the equivalent of the Trust recovering approximately \$90 million (as explained below), even before taking into account the massive costs and expenses that would otherwise need to be incurred, and the daunting collection risk that exists. Taking all of these factors into account, the Litigation Trustee believes the true value of the Essar Settlement Agreement would be equivalent to several hundred million dollars, as further explained below. Accordingly, the Litigation Trustee respectfully requests that the Court grant this Motion.

Background

A. The Chapter 11 Cases

1. On July 8, 2016 (the “**Petition Date**”), Mesabi Metallica Company LLC (f/k/a Essar Steel Minnesota LLC) (“**Mesabi**”) and ESML Holdings Inc. (“**Holdings**”) each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing their chapter 11 cases (the “**Chapter 11 Cases**”). Mesabi and Holdings were authorized to, and did, operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On October 27, 2016, the Essar Settling Parties filed proofs of claim in the Chapter 11 Cases (collectively, the “**Affiliate Claims**”) totaling approximately \$2.3 billion. The Affiliate Claims are listed in **Exhibit B** attached hereto.

3. On November 19, 2016, Mesabi filed an omnibus objection, seeking disallowance of certain of the Affiliate Claims [D.I. 533] (the “**Claims Objection**”). The Claims Objection was fully incorporated in the Complaint (as defined below).

4. On June 8, 2017, Mesabi and Holdings jointly filed their Plan, which was confirmed by this Court on June 13, 2017 [D.I. 1025] (the “**Confirmation Order**”). On December 22, 2017 (the “**Effective Date**”), the Plan went effective and Mesabi emerged as the Reorganized Debtor.

5. The Plan provided for the establishment of two litigation trusts: (a) the SC Mesabi Litigation Trust and (b) the UC Litigation Trust. Bradley E. Scher was appointed as the Litigation Trustee of the SC Mesabi Litigation Trust, and Kevin Nystrom was appointed as the litigation trustee of the UC Litigation Trust (together, the “**Litigation Trustees**”).

6. Assets of the Trust include, in relevant part, “the SC Claims,” which are defined as Tranche 1 Claims and Tranche 2 Claims (*see* Plan § 1.1(135)), and “any proceeds derived from any Insurance Coverage Action related to the SC Claims.” *See* Plan § 1.1(139). Tranche 1 Claims are further defined to mean “all Transferred Causes of Action of any Debtor against any affiliate of any Debtor, other than Individual Claims” and Tranche 2 Claims mean “all Transferred Causes of Action of any Debtor, other than Individual Claims and Tranche 1 Claims.” *See* Plan §§ 1.1(162)-(163). On the Effective Date, the assets of the Trust automatically vested in the Trust, free and clear.

7. The UC Litigation Trust is entitled to 2.0% of the Net Available Cash distributed on account of the Tranche 1 Claims, if no insurance proceeds are received by the UC Litigation Trust with respect to the Individual Claims after the UC Litigation Trustee’s good faith efforts to collect under all applicable insurance policies (the “**2% Distribution**”). *See* Plan § 8.11(a).

8. Pursuant to the Plan and Confirmation Order, the powers and responsibilities of the Litigation Trustees include the right to “prosecute, compromise, transfer, release, abandon, and/or settle the Transferred Causes of Action and the objections to Trust Claims on behalf of their respective Litigation Trusts.” Further, causes of action in the Adversary Proceeding (as defined below) were transferred in part to the SC Litigation Trust and in part to the UC Litigation Trust on the Effective Date.

9. On December 27, 2018, Claim Nos. 112, 113, 160, and 161 – filed in the Chapter 11 Cases, held by two of Mesabi’s prepetition lenders (the Term Loan Lenders and the Project Finance Lenders) were transferred to EESL [D.I.s 1592, 1593, 1594, 1595] (collectively, the “**Claim Transfers**”). Thus, EESL currently holds a minimum of 86.48% of the beneficial interest

in the Trust (and up to a maximum of 100% interest, depending on the resolution of objections to the claims of the SC Lenders (defined below)) and two seats on the Trust Advisory Board.

10. The remaining 13.52% beneficial interest in the Trust is arguably held by Central Bank of India and Export-Import Bank of India (collectively, the “**SC Lenders**”). However, as the Court is aware, and as further explained below, the SC Lenders’ claims in the Chapter 11 Cases and their beneficial interests in the Trust are in dispute.

B. *The Adversary Proceeding Against the Essar Defendants*

11. On January 11, 2017, Mesabi commenced an adversary proceeding against the Corporate Defendants³ and certain individual defendants (the “**Individual Defendants**”), Adv. Proc. No. 17-50001 (BLS) (the “**Adversary Proceeding**”), by filing a complaint, which was later amended on August 29, 2017.

12. The parties to the Adversary Proceeding stipulated to extend all defendants’ response deadline to sixty (60) days after the Litigation Trustees’ counsel notifies defendants’ counsel in writing that a response is required. The Litigation Trustees’ counsel provided such written notice on April 30, 2018. Around this time, the Litigation Trustee and the Corporate Defendants also began preliminary good faith negotiations to resolve the Adversary Proceeding in its entirety.

13. On July 16, 2018, the Litigation Trustees filed a joint motion to: (i) substitute Mesabi as plaintiff, (ii) segregate litigation trust assets pursuant to the Plan, and (iii) amend the

³ The “**Corporate Defendants**” are, collectively: Essar Global, Essar Projects Limited, Essar Projects USA, LLC, Essar Projects (India) Limited, Essar Projects Management Company Limited, Essar Constructions Limited, Essar Projects Middle East FZE, Essar Engineering Services Limited, Global Supplies FZE, and Essar Logistics Limited.

caption of the Adversary Proceeding. Upon certification of counsel, the parties submitted an agreed order granting the motion, which the Court entered on August 10, 2018.

14. On August 13, 2018, the Litigation Trustee filed the *Second Amended Complaint and Substantive and Non-Substantive Objections to Claim Nos. 179-186* [Adv. D.I. 60] against the Corporate Defendants. The second amended complaint alleged 31 claims for relief, all of which constitute Tranche 1 Claims and are property of the Trust.

15. On September 12, 2018, three of the Corporate Defendants – Essar Global, Essar Project Management Company Limited, and Essar Constructions Limited – moved to dismiss seven of the 31 claims alleged in the second amended complaint (the “**MTD**”), specifically: (i) claims 1, 2, 3, and 4 against Essar Global, and (ii) claims 5, 6, and 20 in their entirety. The remaining Corporate Defendants (except Essar Engineering Services Limited, Essar Projects (India), and Global Supplies FZE) filed an answer to the other claims in the second amended complaint not subject to the MTD.

16. In addition, on September 12, 2018, Essar Projects Limited, Essar Projects USA, LLC, and Essar Projects Middle East FZE filed a joint motion to compel arbitration on claims 1, 2, and 3 of the second amended complaint and stay the action as to those claims pending resolution of the arbitration (“**Arbitration Motion**”).

17. The Court granted the Arbitration Motion in a memorandum opinion dated February 15, 2019 and order entered on March 7, 2019. As a result, claims 1, 2, and 3 of the complaint “are stayed only with respect to Essar Projects Limited, Essar Projects USA, LLC, and Essar Projects Middle East FZE pending completion of the arbitration process.”

18. The Court granted in part, and denied in part, the MTD in a memorandum opinion dated May 23, 2019 and order entered on June 5, 2019. The Court denied the MTD as to claims 1, 2, 3, and 4 (alter ego liability against Essar Global), but granted the MTD as to claims 5 and 6 (breach of the 2010 contracts) with leave to replead and granted the MTD as to claim twenty in its entirety.

19. On July 3, 2019, the Litigation Trustee filed the third amended complaint (the **“Complaint”**).

20. Throughout this time, the Parties continued good faith negotiations to resolve the Adversary Proceeding in its entirety. As a result, the Parties entered into a series of stipulations to extend the deadline to respond to the complaint while negotiations were ongoing, which deadline is once again extended under section 8 of the Essar Settlement Agreement, “through five (5) Business Days after the Final Order Date.”

C. *The Adversary Proceeding against the SC Lenders*

21. On July 20, 2018, the Litigation Trustee initiated a separate action, Adv. Proc. No. 18-50555 (BLS), against the SC Lenders for fraudulent transfer, avoidance of liens, objections to (and disallowance of) the SC Lenders’ claims asserted in the Chapter 11 Cases, equitable subordination, and declaratory relief (the **“SC Lender Adversary Proceeding”**).

22. The initiation of the SC Lender Adversary Proceeding followed the Objection of U.S. Bank National Association of Proof of Claim Nos. 144 and 154 Filed by Central Bank of India and Export Import Bank of India, filed on December 22, 2017 in the Chapter 11 Cases. Because this claims objection was filed just before Mesabi and Holdings filed the notice of the

Effective Date, the SC Lenders did not receive any distributions under the Plan and such distributions remain held in escrow by Mesabi until the SC Lenders' claims are resolved.⁴

23. On November 5, 2018, the SC Lenders moved to dismiss this complaint. After full briefing and a hearing on the merits on June 26, 2019, the Court took the matter under advisement. As of the date of this Motion, the Court has not issued an opinion on the SC Lenders' dismissal motion.

24. Both before and subsequent to the June 2019 hearing, the Litigation Trustee has had multiple conversations with the SC Lenders and/or their counsel to try to reach a potential settlement with, and/or including, the SC Lenders.

25. While conversations between the Litigation Trustee and the SC Lenders and their counsel over the past year or more have been unfruitful, the Litigation Trustee was informed a number of times by the SC Lenders' counsel that the SC Lenders were engaging in separate settlement negotiations with Essar Global and its affiliates regarding several issues between the parties, including, but not limited to, the Litigation Trustee's pending litigation before this Court against both the SC Lenders and Essar Defendants. Although the Litigation Trustee has been open and willing to expand these discussions to include potential global resolutions as it relates to the Trust, the Essar Defendants and the SC Lenders, the SC Lenders have so far been unwilling to engage in meaningful negotiations and the Litigation Trustee has been shut down due to lack of

⁴ If the SC Lenders' claims were not in dispute, the SC Lenders would have received distributions under the Plan of: approximately \$3.3 million in cash, \$405,000 for expenses, and approximately \$40.6 million in secured notes with accruing PIK interest. These funds and notes remain in escrow at the reorganized debtor and will be distributed in accordance with the Plan upon resolution of the objection to the SC Lenders' claims.

communication on the part of the SC Lenders. As a result, the validity and allowance of the SC Lenders' claims still remain in dispute.

D. *The Essar Settlement Agreement*

26. As noted above, the Parties explored the prospects of settlement not long after the initiation of the Adversary Proceeding. In the past twelve or so months, the Parties and their counsel have made more concerted efforts to consider potential negotiated resolutions and engage in meaningful settlement discussions.

27. Among other options, the Parties and their counsel considered a potential global settlement of the matters being prosecuted by the Litigation Trustee in this Court, including the pending SC Lender Adversary Proceeding. The Litigation Trustee and his counsel even traveled to Mumbai, India to have in-person meetings with representatives of the Corporate Defendants and the SC Lenders. These efforts were in vain and a global resolution was never reached.

28. When it became apparent that a global settlement was not feasible at this time, the Litigation Trustee focused his discussions with the Settling Essar Parties to resolve, at the least, the Trust's claims against the Corporate Defendants. Based on these negotiations, the Corporate Defendants' deadline to respond to the Complaint was extended several times and the Parties have agreed to forgo initiating the Arbitration pending approval of this Settlement Agreement.

29. On December 19, 2019, after months of engaging in vigorous arm's-length negotiations, the Litigation Trustee and EESL, on behalf of itself and the Settling Essar Parties, executed a definitive settlement term sheet that included the material terms of the Essar Settlement Agreement, including that it remained subject to certain approvals.

30. After finalizing the material terms of the Essar Settlement Agreement, the Litigation Trustee engaged in negotiations with the UC Litigation Trustee and as discussed below entered into the UC Litigation Trust Settlement Agreement resolving all issues relating to the 2% Distribution and any potential payments owed to the UC Litigation Trust.

31. In accordance with the SC Mesabi Litigation Trust Agreement (the “**Trust Agreement**”), the Litigation Trustee also convened with the Trust’s advisory board (the “**Trust Advisory Board**”) to explain the terms of the Settlement Agreements and his rationale for entering into them and recommendation that they should be approved.

32. The Trust Advisory Board currently consists of two members: (i) Andrew Wright as the appointed representative filling both seats held by EESL, and (ii) James Bailey as the appointed representative on behalf of the SC Lenders.

33. Prior to voting, the Litigation Trustee requested each Trust Advisory Board member to indicate any conflict of interest such member has or may have with respect to the Settlement Agreements and if each member believed he was not conflicted to vote in accordance with Section 7.4 of the Trust Agreement.

34. Mr. Wright acknowledged that as a party to the Essar Settlement Agreement and an affiliate of certain Settling Essar Parties, EESL had a conflict of interest in voting on the Settlement Agreements and abstained from voting. However, Mr. Wright did acknowledge that he is in favor of the UC Trust Settlement, but also recognized its inextricable link to the Essar Settlement Agreement.

35. Mr. Bailey stated that the SC Lenders did not have a conflict of interest in voting on the Settlement Agreements and voted against both Settlement Agreements. The SC Lenders’

refusal to support the Essar Settlement Agreement, as explained to the Litigation Trustee, was purportedly because the amount of recovery is insufficient or too low. And although the SC Lenders agreed that the amount of the 2% Distribution should be calculated based on the total cash amount paid to the Trust, the SC Lenders would not vote to approve the UC Trust Settlement Agreement as they believed it was inextricably linked to the Essar Settlement Agreement.

36. When the Litigation Trustee asked for a suggested amount or range of recovery that would be considered sufficient for the SC Lenders, none was given. Mr. Bailey was only able to represent that there were ongoing negotiations between some, or all, of the SC Lenders and Essar entities, but without a definitive timeline or any new proposals exchanged.

37. The Trust Agreement provides, in relevant part, that “[a]ll settlements or compromises of SC Claims by the Litigation Trustee shall require approval of the [Trust Advisory Board] (see Section 6.3(c)), and that “the affirmative vote of only a majority of the members of the [Trust Advisory Board], who are not ‘conflicted members’ shall be required to approve of such matter or issue and the same shall be the act of the [Trust Advisory Board]” (see Section 7.5(d)). Here, the sole member of the Trust Advisory Board who asserted there was no conflict did not approve the Settlement Agreements.

38. The Litigation Trustee believes, however, that both members of the Trust Advisory Board are “conflicted members” under the Trust Agreement. Specifically, EESL’s representative has a conflict of interest because the Essar Settlement Agreement directly involves EESL as one of the settling parties, and as explained in greater detail below, that the SC Lenders’ representative has a conflict of interest because, among other things, the SC Lenders’ claims, which entitle them

to an interest in the Trust, are in active dispute in the Litigation Trustee's SC Lender Adversary Proceeding.

39. During the Trust Advisory Board meeting convened on February 28, 2020, the Litigation Trustee advised the Trust Advisory Board that if there is no settlement with the SC Lenders, either separately with the Litigation Trustee, or as part of a global settlement with all parties, the funds from the Essar Settlement Agreement may be used to finance the ongoing adversary proceeding against the SC Lenders. The Litigation Trustee further stated if the Litigation Trustee is successful in the litigation against the SC Lenders, the SC Lenders would not have any beneficial interest in the Trust.

40. After careful consideration and consultation with his counsel, the Litigation Trustee determined that, in his opinion, all members of the Trust Advisory Board were conflicted to vote on the Settlement Agreements and the Settlement Agreements could not obtain the approval of the Trust Advisory Board by any votes of a non-conflicted member. Thus, in exercising his reasonable business judgment, the Litigation Trustee determined that the best practice would be to proceed with this Motion and seek the Court's approval of the Settlement Agreements.

41. As of March 31 2020, the Parties fully executed the Essar Settlement Agreement attached hereto as **Exhibit 1** to **Exhibit A**.

42. Because the claims and/or causes of action to be resolved through the Essar Settlement Agreement exceed \$5 million, the conflicted nature of the entire Trust Advisory Board, and the Litigation Trustee's good faith belief that the Essar Settlement Agreement is the most reasonable and prudent means of satisfying his fiduciary duty to protect and maximize the assets of the Trust, the Litigation Trustee believes that he is obligated to file and pursue this Motion and

seek the Court's approval of the Essar Settlement Agreement and the UC Trust Settlement Agreement over the objection of the SC Lenders, and the abstention of EESL, owing to its acknowledged conflict as holder of 86.48% of the beneficial interests in the Trust.

E. *The UC Trust Settlement Agreement*

43. The Litigation Trustee believes that neither Settlement Agreement impairs, impacts, or otherwise affects any causes of action, claims, or objections held by the UC Litigation Trust, all of which are fully preserved and pending in the Adversary Proceeding.

44. Rather, the UC Trust Settlement Agreement will directly benefit the UC Litigation Trust by providing finality regarding the 2% Distribution through an up-front payment to the UC Litigation Trust, subject to, among other things, the Court's approval of the Essar Settlement Agreement. The Litigation Trustee entered into the UC Trust Settlement Agreement with the UC Litigation Trustee to fully resolve the calculation of the 2% Distribution for \$200,000, which amount was based the Essar Settlement Agreement amount of \$12 million with a further negotiated reduction of \$40,000. A true and correct copy of the Litigation Trustee's agreement with the UC Litigation Trust is attached as **Exhibit 2** to **Exhibit A**.

Jurisdiction and Venue

45. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

46. By the Motion, the Litigation Trustee seeks entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, approving the Settlement Agreements in all respects.

Basis for Relief

47. Bankruptcy Rule 9019 provides, in relevant part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise and settlement.” Fed. R. Bankr. P. 9019(a). Compromises are favored in bankruptcy because they minimize the costs of litigation and further the parties’ interests in expediting administration of a bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); 10 Collier on Bankruptcy, ¶ 9019.01 (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. rev. 2006). In deciding whether to approve a compromise under Bankruptcy Rule 9019, the Court must determine if the settlement is “fair, reasonable, and in the interest of the estate.” *In re Key3Media Grp., Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (citing *In re Louise’s, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). This test is known as the “best interests” balancing test.

48. Under the “best interests” test, courts within the Third Circuit have considered the following four factors to determine whether to approve a particular compromise or settlement as fair and equitable: (1) the probability of success in litigation concerning the subject matter of the settlement; (2) the projected difficulty in collecting after obtaining a judgment in such litigation; (3) the complexity of the issues involved, and the expense, inconvenience, and delay that would therefore attend such litigation; and (4) the paramount interest of holders of claims against and interests in the debtor, to which proper deference to their reasonable views of the settlement should be afforded. *Martin*, 91 F.3d at 393 (following *Protective Comm. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) and clarifying four-factor test); *see also Will v. Northwestern Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644-45 (3d Cir. 2006); *In re RNI*

Wind Down Corp., 348 B.R. 286, 297-99 (Bankr. D. Del. 2006); *In re Kaiser Aluminum Corp.*, 339 B.R. 91, 96-97 (D. Del. 2006).

49. A proposed compromise need not be the best result that a settling party could have achieved, but only must fall within the “reasonable range of litigation possibilities.” *See e.g., In re Pa. Truck Lines, Inc.*, 150 B.R. 595, 598 (E.D.Pa. 1992), *aff’d*, 8 F.3d 812 (3d Cir. 1993); *Key3Media*, 336 B.R. at 92-93 (court is not required to determine that settlement is best possible compromise); *In re Energy Corp.*, 886 F.2d 921, 929 (7th Cir. 1989); *In re Sea Containers Ltd.*, 2008 WL 4296562, at *5 (Bankr. D. Del. Sept. 19, 2008). The Court should determine whether a settlement “falls above the lowest point in the range of reasonable litigation possibilities.” *Whyte v. Kiviston (In re SemCrude, L.P.)*, 2010 Bankr. Lexis 4160 at *9 (Bankr. D. Del. Nov. 19, 2010) (J. Shannon).

50. The factors guiding the “best interests” test reflect that the Settlement Agreements are fair and equitable to the beneficiaries of the Trust, and the Settlement Agreements should be approved by the Court.

F. *The Settlement Agreements Provide Significant Value to the Trust*

51. The Settlement Agreements resolve a litigation that has been pending for over three years, but is, in many ways, still in its nascent stage. The Corporate Defendants have not yet filed an answer to the Complaint, the ordered arbitration on three claims for three of the Corporate Defendants has not begun, and a case scheduling order and discovery plan has not been filed.

52. The Essar Settlement Agreement provides an integrated and comprehensive set of obligations and covenants among the Parties in consideration for releases of the claims and causes of action of the Litigation Trustee, on behalf of the Trust, against the Settling Essar Parties. In

particular, the Essar Settlement Agreement provides that the Settling Essar Parties will contribute significant value to the Trust in the form of \$12 million in cash (the “**Settlement Amount**”), a waiver of any distribution from this amount to EESL, to which it otherwise be entitled as a bona fide Trust beneficiary, and a disallowance of all of the claims filed in the Chapter 11 Cases by all Settling Essar Parties, which totals over \$2.3 billion.

53. Further, through the Essar Settlement Agreement, the Litigation Trustee is not releasing, discharging, or dismissing the claims and causes of actions against those Corporate Defendants who are not a Settling Essar Party. Specifically, the claims objections against (i) Essar Projects (India) Limited; (ii) Essar Project Management Company Limited; (iii) Essar Constructions Limited; (iv) Essar Engineering Services Limited; (v) Global Supplies FZE; and, (vi) Essar Logistics Limited (collectively, the “**Non-Settling Defendants**”) will remain pending.

54. In addition, the gross implied value of the Essar Settlement Agreement is approximately \$90 million – a value nearly eight times more than the Settlement Amount. This value arises from not only the Settlement Amount itself, but also EESL’s agreement to waive any distribution therefrom (though it holds a minimum of an 86.48% beneficial interest in the Trust). It is also generated by the Litigation Trustee’s agreement to base his 10% fee on the Settlement Payment alone as opposed to the higher implied amount of the settlement without EESL’s waiver (worth over \$8 million). It also arises from the UC Litigation Trust’s similar agreement to accept a distribution of \$200,000 (a \$40,000 further reduction off of 2% of the Settlement Amount) as opposed to an amount approaching \$2 million, without EESL’s waiver, all as shown in the below calculations. This \$90 million settlement value does not even take into account the risks of litigation, anticipated costs to potentially achieve a judgement, and ultimately the massive risks

and attendant costs and uncertainties accompanying attempts to collect on any such judgment against distressed entities with no assets in the United States, as explained further below.

55. Under the terms of the Essar Settlement Agreement, the net distributable value to the SC Lenders (when just considering the savings from EESL's waiver of distribution and the Litigation Trustee and UC Trust's agreement to accept lesser amounts calculated off of the lower settlement number), is \$10.6 million:

\$12,000,000	Settlement Amount
(\$1,200,000)	minus Reduced Trustee Fee
<u>(\$200,000)</u>	minus Reduced UC Trust Settlement
<u>\$10,600,000</u>	Potential Distributable value to SC Lenders.

56. To reach a total potential distributable value of \$10.6 million without these waivers, the Litigation Trustee would need to have achieved a settlement payment of approximately \$90 million as follows:

\$90,000,000	Gross Settlement Amount
(\$9,000,000)	minus Litigation Trustee compensation
<u>(\$1,800,000)</u>	minus 2% distribution reserved for UC Litigation Trust
\$79,200,000	Net value to be split between beneficiaries
(Approx. \$68,500,000)	Potential distributable value to EESL
Approx. <u>\$10,700,000</u>	Potential distributable value to SC Lenders

57. Even with a gross cash settlement value of around \$90 million, the potential judgment value that would have to be *realized* would need to be almost three times higher when the following factors are taken into account.

58. First, given the nature of the pending claims in the Complaint, the international reach of the Corporate Defendants, and the need for extensive discovery, all of which will require significant time and effort, the Litigation Trustee anticipates that the litigation costs alone will likely exceed \$10 million to prosecute through trial, before costs to collect on any judgement. This projected estimate does not include the additional costs and expense associated with any appeals, post-trial or post-judgment matters, which given the difficulties discussed herein, could easily increase the litigation costs in a short amount of time.

59. The Trust does not have sufficient funds to undertake this prosecution and SC Lenders have declined requests to fund any portion of the prosecution of the Adversary Proceeding. As such, the Litigation Trustee would need to seek separate litigation financing to continue to prosecute the Adversary Proceeding against the Essar Defendants. Assuming the Trust could obtain the necessary financing, the Litigation Trustee believes that given the factors of this case, a litigation funder would require a contingent return of at least approximately 30% of the gross proceeds.

60. In addition to a litigation finance funder's requisite return, the Litigation Trustee is cognizant that the Trust would also have to pay attorneys' expenses and contingent fees. Given the nature of this litigation, and the likely terms of any litigation funding, the Litigation Trustee anticipates that the legal firm will also need to agree to a blended rate contingent fee structure, with the contingent portion of their fee coming off of any gross recovery.

61. More significantly, the actual risks and hurdles the Trust would need to successfully navigate to actually collect on any money judgment against the Corporate Defendants are significant. Indeed, in a separate matter, certain of Mesabi's prepetition lenders prosecuted and

obtained judgments in multiple jurisdictions around the world against Essar Global totaling over \$700 million. The plaintiffs/judgment creditors were then forced to expend significant additional amounts in legal fees to enforce these judgments in different jurisdictions around the world including, but not limited to the U.K., Cayman Islands, Dubai, Mauritius, the British Virgin Islands, and multiple state and federal courts in the U.S., which the defendants aggressively resisted. Even after over a year of chasing after assets and after judgment enforcement orders were entered in most of the proceedings, it took the plaintiffs another several months to finally seize one aircraft, arrest two oil tankers owned by Essar shipping in the United Arab Emirates, and enforce over certain accounts owned by one of the Corporate Defendants, also in the United Arab Emirates. This relentless pursuit of assets to enforce and collect on judgments not only came at tremendous time and expense, but it is what the Litigation Trustee believes caused Essar Global and its subsidiaries to enter into a settlement with the judgment creditors at or around the time their Claims were transferred to EESL. Even after all that additional post-judgement time and expense, the Litigation Trustee is informed and believes that the judgment creditors ultimately recovered less than half of what they were entitled to by judgment.

62. Finally, in addition to the ultimate outcome of the litigation being uncertain, it is likely to take several years to complete – particularly now in light of the backlog of cases and significant impact the current worldwide pandemic is causing on the legal system. It would not be uncommon for this litigation to take three years to complete. Combined with an additional two years spent attempting to collect on the judgment, it is likely that but for this Settlement, no funds would be recovered in the next five years. Accordingly, when determining a reasonable settlement, these risks and the present value of any future recoveries should be considered.

63. Given all of these factors, the realities of the Settling Essar Defendants' financial conditions and varying locations of operations, uncertainties of the viability of collection, and significant costs that would be involved in seeking a judgment and collecting on that judgment, the Litigation Trustee believes that in order for the Trust to receive an equivalent distribution amount, the Trust would need to realize proceeds from any eventual judgment in the range of \$260 million, which is calculated as follows:

\$260,000,000	Gross Judgment Recovery for the Trust ⁵
(\$78,000,000)	minus a 30% litigation financing fee
<u>(\$39,000,000)</u>	minus 15% contingency legal fee
\$143,000,000	Net to Trust
<u>(\$14,300,000)</u>	minus 10% payment to Litigation Trustee
<u>(\$2,860,000)</u>	minus 2% UC Trustee reserve
\$125,840,000	Net Recovery for Distribution to Beneficiaries
<u>\$78,136,739.29</u>	Total equivalent gross Settlement Amount reduced to present value utilizing a 5-yr term and a 10% discount rate
\$67,572,652.14	86.48% EESL Beneficial Interest
\$10,564,087.15	13.52% SC Lender Beneficial Interest

64. While the Litigation Trustee has confidence in the strength and validity of the claims asserted in the Adversary Proceeding against the Corporate Defendants, the Litigation Trustee also has considered the vigorous defenses the Corporate Defendants would assert, and the

⁵ This represents the amount actually recovered, not the value of a judgment necessary to recover such amount. The Litigation Trustee believes that in order to recover this amount, the judgment amount will need to be significantly higher.

resulting lengthy, complicated, and expensive discovery and litigation process for the Trust if litigation continues to be pursued, the known difficulties of collection and enforcement if a judgment against the Corporate Defendants is achieved, and the potentially smaller pot of cash ultimately available for distributions to the all of the Trust beneficiaries. Taking into account these realities of litigation and collection, when viewed through this lens, the Litigation Trustee believes that the compromise reflected in the Essar Settlement Agreement is well in the range of reasonableness.

65. Based on the foregoing, and as set forth in more detail herein and the Scher Declaration, the Litigation Trustee respectfully requests that the Court enter an order authorizing the Litigation Trustee to enter into the Essar Settlement Agreement and the UC Trust Settlement Agreement.

G. *The Essar Settlement Agreement Satisfies All of the Martin Factors*

a. *Probability of Success in Litigation, Projected Difficulty in Collecting, Complexity of Issues and Expenses, and Inconvenience and Delay*

66. While the Litigation Trustee is confident in its legal and factual positions, litigation is inherently uncertain, and here, the Complaint involves 31 complex claims for, among other claims, breaches of contract, fraudulent transfers, tortious interference, claims disallowance, and equitable subordination against certain of the Settling Essar Parties. The outcome of such litigation is far from certain.

67. Further, it is plain that litigating the Complaint to final judgment would impose significant cost on the Trust and further consume resources better allocated to the beneficiaries of the Trust.

68. Even if judgments were obtained in this action against the Settling Essar Parties, the collection efforts in connection with any judgment would be highly challenging, protracted, costly, and of questionable likelihood as to ultimate success.

69. For instance, all but one of the Settling Essar Parties are believed to be based and/or operating outside the United States. Specifically, as to the Settling Essar Parties, the Litigation Trustee is informed and believes, that: Essar Global is organized under the laws of the Cayman Islands; EESL is based in Mauritius, Essar Projects Limited and Essar Projects Middle East FZE are each companies organized under the laws of the United Arab Emirates; and only Essar Projects USA, LLC is a Delaware limited liability company. The Litigation Trustee is unaware of any actual existing operations and assets of these companies in the United States.

70. The Litigation Trustee is further informed and believes, that the operations and any assets of the rest of the Corporate Defendants similarly exist, if anywhere, outside of the United States: Essar Project Management Company Limited, Essar Constructions Limited, and Global Supplies FZE are each companies organized under the laws of the United Arab Emirates, and Essar Projects (India) Limited and Essar Logistics Limited, are each companies organized under the laws of India. Moreover, Essar Global represented to the Litigation Trustee that several of its direct or indirect subsidiaries are involved in foreign insolvency proceedings in India.⁶ The Litigation Trustee is also concerned that even the assets outside of insolvency proceedings would be subject

⁶ Specifically, the Litigation Trustee has been informed that Essar Projects (India) Limited is in bankruptcy proceedings in India, EPC Constructions India Private Limited, formerly known as Essar Projects (India) Limited (“EPC”), an indirect subsidiary of Essar Global, is in bankruptcy proceedings in India, and that each of Essar Constructions Limited and Essar Project Management Company Limited is an indirect subsidiary of EPC; and (ii) Arkay Logistics Limited, formerly known as Essar Logistics Limited (“Arkay”), is no longer an Essar entity and is currently in bankruptcy proceedings in India.

to a significant liens amounts that would be an added impediment to any judgment enforcement and/or collection efforts.

71. All of these issues would render collection efforts against the Essar parties particularly difficult. Courts have recognized in many different contexts the difficulties that collection may pose against foreign defendants. *See, e.g., Carter v. Forjas Taurus S.A.*, 2016 U.S. Dist. Lexis 96054 at *32 (S.D. Fla. July 22, 2016) (approving a class settlement, acknowledging likely difficulties, delay and expenses in attempting to collect judgment from a foreign defendant); *In re Yellowstone Club World, LLC*, 2010 Bankr. Lexis 1894 at *13 (Bankr. D. Mont. June 10, 2010) (approving settlement and holding that factor strongly weighed in favor of approval when trustee testified to concern about difficulty in collecting any judgment based on existence of foreign entities and possible involvement of foreign courts); *Cordelia Lighting, Inc. v. Zhejiang Yankon Grp. Co. Ltd.*, 2015 U.S. Dist. Lexis 189725 at *24 (C.D. Cal. Apr. 27, 2015) (potential difficulty in collecting from foreign defendant with limited assets in the United States supported a finding of irreparable harm, in context of preliminary injunction); *Aevoe Corp. v. Shenzhen Membrane Precise Electron Ltd.*, 2012 U.S. Dist. Lexis 60485 at *14 (D. Nev. May 1, 2012) (difficulty of collecting on a money judgment against a foreign entity weighed in favor of issuance of preliminary injunction); *Old St. Paul Missionary Baptist Church v. First Nation Ins. Group*, 2010 U.S. Dist. Lexis 63790 at *11-12 (E.D. Ark. June 25, 2010) (in context of attorneys award, court acknowledged challenge in collecting judgment requiring finding assets in foreign country and obtaining right to execute on such assets across international boundaries); *Bushnell, Inc. v. Brunton Co.*, 673 F.Supp.2d 1241, 1263 (D. Kan. Nov. 25, 2009) (“prospect of collecting money

damages from a foreign defendant with few to no assets in the United States tips in favor of a finding of irreparable harm.”).

72. Indeed, prior to the Complaint being filed, certain of the former beneficiaries to the Trust initiated actions against some, or all, of the key Settling Essar Parties, and in some of these actions, were reportedly even been able to obtain judgments. For example, certain of these former Trust beneficiaries obtained judgments in state and federal courts in the United States against certain key Settling Essar Parties, dating back to at least 2016, and initiated enforcement actions, and obtained judgments in at least five additional foreign jurisdictions, including the United Kingdom, the Cayman Islands, Dubai, Mauritius, and the British Virgin Islands. In most cases, the entry of the judgments was a protracted, hotly contested, and expensive process. Even in cases where the judgments were in place and diligent enforcement efforts continued for several years, spanning across the globe, the relevant beneficiaries of the Trust were unsuccessful in collecting the full value of their judgments. Given this history, litigating the Complaint against the Settling Essar Parties would be subject to significantly greater or at least equal collection risk. Moreover, the prior collection successes by prior trust beneficiaries are likely to make any collection efforts now, and in the future, even more challenging, as any “low hanging fruit” (to the extent any ever existed) is likely to be gone, either through sales or implementation of financing liens on these assets.

b. Interests of Claimholders

73. A notable part of the Essar Settlement Agreement is that EESL, as the holder of an 86.48% interest in the Trust at minimum, is waiving its rights to any distribution of the settlement proceeds as a beneficiary of the Trust to which it may be entitled. Further, in the Essar Settlement

Agreement, the Litigation Trustee is agreeing to calculate his total compensation based on the \$12 million that the Settling Essar Parties are paying in accordance with the Essar Settlement Agreement instead of total grossed up settlement value of the Essar Settlement Agreement. As such, the remaining interest holders in the Trust will receive distributions from the Trust equivalent to what they would have received if the Settling Essar Parties had paid approximately \$90 million into the Trust, with EESL retaining its rights to a distribution as a Trust beneficiary in connection therewith.

74. Moreover, many of the Settling Essar Parties have asserted approximately \$2.3 billion in claims against Mesabi's estate based on the same contracts and other agreements referenced in the Complaint. The Essar Settlement Agreement would, if approved, resolve these disputes between the Settling Essar Parties, the Mesabi estate, and the Trust in the Complaint, while bringing \$12 million of gross proceeds into the Trust.

75. In addition, the UC Litigation Trustee has agreed to receive a total cap amount of \$200,000 based on the Settlement Amount for the 2% Distribution to the UC Litigation Trust, which fully resolves the 2% Distribution calculation for the benefit of the Trust and provides immediate payment to the UC Litigation Trust on behalf of its beneficiaries. While the general concept of calculating the 2% Distribution is uncontroversial, the UC Trust Settlement Agreement is premised on the approval of the Essar Settlement Agreement, which as explained above, satisfies all of the requirements under Rule 9019.

76. Finally, the parties to the Essar Settlement Agreement negotiated its terms in good faith and at arm's length over a significant period of time, and there is no reason to delay the effectiveness of its approval by this Court.

77. Although the SC Lenders have voted against the Essar Settlement Agreement, and in connection thereto, the UC Trust Settlement Agreement, they have not, to date, made any efforts to engage in meaningful negotiations with the Litigation Trustee, despite the Litigation Trustee's numerous attempts to engage with them in New York and India, in person and through counsel and agents. Indeed, rather than trying to resolve the SC Lender Adversary Proceeding, the Litigation Trustee has been informed that the SC Lenders are engaging in separate settlement negotiations with Essar Global that may or may not involve or affect the SC Lender Adversary Proceeding.

78. Although the Litigation Trustee welcomes a global settlement amongst all parties and sought to facilitate one, he must also diligently perform his fiduciary duties and obligations to the Trust. So far, the SC Lenders have refused to engage in productive negotiations and simply stated that the Settlement Amount is "insufficient" without any counterproposal or further explanation or conversation.

79. In addition to the pending SC Lender Adversary Proceeding and the SC Lenders claim objection, which if successful would result in the SC Lenders having no beneficial interest in the Trust whatsoever, the Litigation Trustee has a good faith belief that the SC Lenders' basis for refusing to approve the Settlement Agreements has less to do with a legitimate dispute about the Settlement Amount and the terms of the Essar Settlement Agreement and instead, may be a leveraging tool against Essar Global to force a better settlement involving issues that have nothing to do with the Trust or the Chapter 11 Cases. The Litigation Trustee believes that the SC Lenders have other financial arrangements and commitments with the Essar Global group outside of their relationship in the pending litigation before this Court.

80. The Litigation Trustee believes therefore that the existence of these independent side negotiations, the fact that the SC Lenders have not made any meaningful attempt to engage in negotiations and would not even provide a counter offer or detailed rationale for why they rejected the negotiated settlement agreement, combined with the fact that this settlement does not resolve the litigation against the SC Lenders nor allow their claims in full as they have requested, renders the SC Lenders conflicted and unable to properly reject the Settlement Agreement. Therefore, with the entire Trust Advisory Board conflicted, the Litigation Trustee believes that he is obligated to exercise his own business judgment in evaluating the terms of the settlement agreement and seek the Court's approval of such determination.

81. As explained herein and based on the foregoing, the Litigation Trustee believes that the Settlement Agreements represent fair and reasonable compromises that are in the best interests of all trust beneficiaries. Accordingly, the Litigation Trustee respectfully requests that the Court approve the Settlement Agreements.

Notice

82. Notice of this Motion has been provided to (a) the U.S. Trustee; (b) counsel to the Settling Essar Parties; (c) counsel to the UC Litigation Trustee; (d) counsel to the SC Lenders, (e) Trust Advisory Board members, and (f) all parties requesting notices pursuant to Bankruptcy Rule 2002. The Litigation Trustee submits that, in light of the nature of the relief requested, no other or further notice need be provided.

83. No previous request for the relief sought herein has been made to this or any other Court.

Conclusion

WHEREFORE, Plaintiff respectfully requests that the Court enter the order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion, and granting such other and further relief as the Court deems just and proper.

Dated: April 8, 2020

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