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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	)	Chapter 11
INTELSAT S.A., *et al*.,[1]	)	Case No. 20-32299 (KLP)
Debtors.	)	(Jointly Administered)

DEBTORS' OBJECTION TO THE AD HOC GROUP OF EQUITY HOLDERS' MOTION TO APPOINT EXAMINER

The above-captioned debtors and debtors in possession (collectively, the "Debtors") object to the *Motion for Appointment of an Examiner for Intelsat S.A.*, [Docket No. 2741] (the "Motion")[2] filed by the Ad Hoc Group of Equity Holders of Intelsat S.A. (the "Ad Hoc Equity Group"). In support of this objection, the Debtors respectfully state as follows:

1 Due to the large number of Debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list may be obtained on the website of the Debtors' claims and noticing agent at https://cases.stretto.com/intelsat. The location of the Debtors' service address is: 7900 Tysons One Place, McLean, VA 22102.

2 Capitalized terms used but not immediately defined herein shall have the meanings ascribed to them in the *Declaration of David Tolley, Executive Vice President, Chief Financial Officer, and Co-Chief Restructuring Officer of Intelsat S.A. in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 6] (the "First Day Declaration"), the *Second Amended Joint Chapter 11 Plan of Reorganization of Intelsat S.A. and Its Debtor Affiliates* [Docket No. 2773] (the "Amended Plan") and the *Second Amended Disclosure Statement for the Amended Joint Chapter 11 Plan of Reorganization of Intelsat S.A. and Its Debtor Affiliates* [Docket No. 2774] (the "Disclosure Statement"), as applicable.

Preliminary Statement

1. More than 15 months into these chapter 11 cases and after five failed requests by the Ad Hoc Equity Group for appointment of an official equity committee, a judicial mediation that included the Ad Hoc Equity Group, and the commencement of solicitation of an approved Disclosure Statement, the Ad Hoc Equity Group seeks approval of the Motion. The Motion is an obvious last-ditch gambit by a small ad hoc group of equity holders seeking leverage that does not exist. Aside from vague insinuations, the Motion is devoid of detail regarding why an examiner is appropriate. It is not. Instead, the Motion is simply the latest effort by the Ad Hoc Equity Group, after all its prior attempts failed, to waste estate resources to pursue weak theories.

2. As the Ad Hoc Equity Group well knows, and as the Court recognized at the March 17 hearing denying its motion for an official committee, the Debtors and numerous other groups and professionals, including multiple with fiduciary duties to Intelsat S.A. and its creditors, have already spent significant time investigating, negotiating, mediating, and resolving all potential sources of value at Intelsat S.A. There is no possible basis to claim that another set of eyes is needed days before the Court is scheduled to hear the resolution to these cases beginning on November 8, 2021. Back in March, the Court gave the Ad Hoc Equity Group direct instructions on what to do if it wanted additional oversight: counsel for the Ad Hoc Equity Group should perform its own investigation, make its own arguments, and (if successful) return to the Court asserting a substantial contribution theory to recover its investment in the cases. Instead, the Ad Hoc Equity Group did not review a single document or evaluate a single argument, and it now returns to the Court on the eve of confirmation seeking the same relief the Court already rejected under the guise of an "examiner."

3. The Debtors have attempted to help the Ad Hoc Equity Group understand the work that has been done and the realities of the equity holders' position in this case. But the Ad Hoc Equity Group's reference to "a data room dump" (Mot. ¶ 17) provided by the Debtors in response to the Ad Hoc Equity Group's request for access to the creditor diligence data room is puzzling. The Debtors attempted to grant counsel for the Ad Hoc Equity Group access to the same data room used by the other ad hoc creditor groups to evaluate their positions in this case, but counsel *has not even accepted the Debtors' invitation to the data room,* let alone looked at any documents.[3] Further, the Court's Scheduling Order requires the Ad Hoc Equity Group only to send a simple e-mail to counsel serving expert reports to get a copy of the reports exchanged to date and use them to assess the equity holders' fate.[4] The Ad Hoc Equity Group neglected to do even that.

4. More generally, the Ad Hoc Equity Group's suggestion that it does not have sufficient information to evaluate the options available to equity holders is simply incorrect, and is belied by the fact that they cannot identify anything they have asked for and were not provided. The Debtors have implored counsel to the Ad Hoc Equity Group repeatedly to simply send a request in writing if there was any information they did not have, but needed. They have not done so.[5]

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[3] The Debtors provided invitations for data room access to counsel for the Ad Hoc Equity Group on April 29, 2021, and July 12, 2021.

[4] *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation Procedures with Respect to Confirmation of the Debtors' Proposed Chapter 11 Plan, (III) Approving the Forms of of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* at fn. 3 [Docket No. 2815] (the "Disclosure Statement Order").

[5] Counsel to the Ad Hoc Equity Group made one informal request for copies of the Debtors' D&O Policies even though it had had access to that information in the data room for *months* prior to making the request. In any event, Debtors' counsel provided the policies 90 minutes after the request was made and told counsel to the Ad Hoc Equity Group in writing that it should "Let us know if there is something else you were looking for." No one for the Ad Hoc Equity Group ever sought additional information, and the Ad Hoc Equity Group has served zero written discovery requests.

5. At this point in the case, the Motion is an abuse of process that would serve no purpose but delay, obstruction and additional expense. Appointment of an examiner is not appropriate when the party requesting the examiner has already sought and been denied the same "examination" through five failed requests for an equity committee and where multiple other sets of professionals with fiduciary duties to Intelsat S.A. stakeholders have already performed the same requested "examination." Neither the Bankruptcy Code nor applicable precedent require appointment of an examiner in these circumstances, and the Motion should be denied.

Background

I. Intelsat S.A. Equity Holders Already Exist As Represented Constituencies In These Cases.

6. Intelsat S.A. sits at the top of the Debtors' corporate structure and is therefore the most junior entity in the capital structure. As of the Petition Date, Intelsat S.A. had approximately 142,085,774 shares of common stock outstanding. Importantly, per Bankruptcy Rule 2019 statements filed by significant holders of Intelsat S.A.'s common stock, the equity holders are already either well-represented or are sophisticated holders who do not require, and will not benefit from, additional representation:

- Cyrus Capital Partners, a holder in the Convert Ad Hoc Group, holds over 7.5 percent of Intelsat S.A.'s total outstanding common stock. The Convert Ad Hoc Group is represented by Boies Schiller LLP, Stroock Stroock & Lavan LLP, and Nelson Mullins Riley & Scarborough LLP, as counsel, and Lazard Freres & Co. LLC as financial advisor.[6]

- Appaloosa LP, a member of the HoldCo Creditor Ad Hoc Group, holds nearly 2.5 percent of shares of Intelsat S.A. common stock.[7] Appaloosa is represented by

[6] *See Verified Statement of the Ad Hoc Group of Convertible Noteholders Pursuant to Bankruptcy Rule 2019* at Exhibit A [Docket No. 1376].

[7] *See Amended Verified Statement Pursuant to Bankruptcy Rule 2019 of Ad Hoc Committee of Parent Company Creditors* at Exhibit A [Docket No. 1606].

Paul, Weiss, Rifkind, Wharton & Garrison, Whiteford, Taylor & Preston L.L.P., and Loyens & Loeff, as counsel, and Ducera Partners, as financial advisors.

- Davidson Kempner Capital Management, a member of the Jackson Crossover Ad Hoc Group, holds another 1 percent of shares.[8] The Jackson Crossover Ad Hoc Group is represented by Jones Day and AKD Benelux, as counsel, and Houlihan Lokey Capital Inc., as financial advisors.

- Intelsat S.A.'s board of directors includes appointees from some of the largest stockholders of the Company, including two directors appointed by Serafina S.A.. Serafina S.A. collectively owns over 34 percent of Intelsat S.A.'s outstanding equity, and is represented by Latham & Watkins LLP.

7. When combined, the reported holdings of these stakeholders aggregate to **over 45 percent of the Debtors' outstanding equity**—vastly outweighing the approximately 2 percent currently reported to be represented by the Ad Hoc Equity Group. These stakeholders have every incentive to advocate for a recovery to equity if it were possible in these cases.

II. The Intelsat S.A. Special Committee Is A Fiduciary of Intelsat S.A. Stakeholders.

8. The boards of directors of certain Debtor entities including Intelsat S.A., each established a special committee (the "Special Committees") and appointed disinterested directors to serve as independent fiduciaries on each of the Special Committees. The Special Committees also retained independent advisors to advise them with respect to their duties.

9. The Intelsat S.A. Special Committee ("S.A. Special Committee") was authorized to investigate and determine, among other things, whether conflict exists between Intelsat S.A. and its stakeholders with regard to any matter. As an independent fiduciary to Intelsat S.A. stakeholders only, the S.A. Special Committee expended significant time and effort gathering voluminous data and information regarding a multitude of complex issues in the chapter 11 cases, including: potential claims that may exist in connection with certain historical and ongoing

[8] *See Second Amended Verified Statement of the Intelsat Jackson Crossover Ad Hoc Group Pursuant to Bankruptcy Rule 2019* at Exhibit A [Docket No. 2765].

intercompany transactions and relationships; the allocation of payment of certain of the administrative expenses in these chapter 11 cases; various foreign and domestic tax issues, including the value of and entitlement to tax attributes such as net operating losses held by that certain Luxembourg fiscal unity formed by certain of the Debtors, as well as other tax attributes held outside of the tax unity; the accelerated relocation payments and which Debtor or Debtors should be entitled to receive them; and the Debtors' business plan and enterprise valuation, among many other issues.

10. The Special Committees and their advisors have spent over a year conducting a substantial review and analysis on the topics described above, and have engaged in exhaustive discussions with the other Special Committees and various creditor constituencies regarding the same. After such substantial review and analysis and after retaining the ability to continue to analyze conflicts matters for the benefit of each of their respective constituencies, each of the Special Committees agreed to authorize entry into the plan support agreement related to the initial Plan and ultimately the Amended Plan Support Agreement.

III. This Court Already Determined An Additional Estate-Funded Review Of The Issues Raised By The Ad Hoc Equity Group Holders Was Inappropriate.

11. The Motion follows four requests by the Ad Hoc Equity Group to the U.S. Trustee and one request to this Court to appoint an official equity committee, which was requested to serve the same "need" the Ad Hoc Equity Group is seeking to serve by the appointment of an examiner. All of those requests were denied, the latest being denied by the U.S. Trustee on August 27, 2021—three days before the Motion was filed.

12. In particular, the Court denied the Ad Hoc Equity Group's motion for an official equity committee on March 17, 2021. After a lengthy hearing, the Court found that the Ad Hoc Equity Group had "not adequately demonstrated a substantial likelihood of a meaningful

distribution" to equity in these chapter 11 cases, that its interests were adequately represented by numerous parties (including the Debtors' Board, the S.A. Special Committee, the UCC, and others), and that it was otherwise able to advance its own interests without official status. *See* Ex. A, 3/17/21 Hrg. Tr., at 53.

13. This Court also noted that the Ad Hoc Equity Group was already represented by able counsel, could continue to participate in these chapter 11 cases and, based on its ultimate contribution to these cases (if any) seek compensation under section 503 of the Bankruptcy Code. *See Id*.

14. To date, however, the Ad Hoc Equity Group has not meaningfully participated in these cases or sought to advance or develop any of the bald assertions contained in the Motion. As discussed, the Ad Hoc Equity Group has not even accessed the Debtors' data room despite being granted access twice, nor did it even ask for any other information or request to review a single expert report prepared by any stakeholder. Based on the assertions in the Motion, it appears that the Ad Hoc Equity Group has done effectively nothing to diligence its theories, evaluate its legal arguments, or articulate any realistic scenario under which equity holders of Intelsat S.A. could be entitled to a recovery.

15. Now, instead of taking the Court's direction from March 17 to make an investment to advance its own interests, develop and prosecute its own arguments, and subsequently (if successful) seek reimbursement on a substantial contribution theory, the Motion seeks to weaponize use of an examiner as a proxy for an estate-funded professional to conduct the same fruitless re-investigation the Court already rejected six months ago. For the reasons discussed herein, the relief requested in the Motion is unnecessary and inappropriate in light of, among other things, the mandate of the S.A. Special Committee, the existence of the UCC, and the active

existing representation of nearly half of all equity interests in these cases. Given these facts, on the eve of confirmation, and in the absence of any evidence that equity is likely to receive any meaningful distribution in these chapter 11 cases, the Motion is a wholly inappropriate abuse of the Bankruptcy Code, and it should be denied.

Argument

I. An Examiner Should Not Be Appointed.

16. In relevant part, section 1104(c) of the Bankruptcy Code provides:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor ***as is appropriate***, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, ***if***—
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
> >
> > (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c)(1)–(2) (emphasis added).

17. The Ad Hoc Equity Group argues that an examiner must be appointed to investigate and report to the Court on "potential litigation, asset claims and value of Intelsat S.A. . . . whose value or attributes have been ignored or devalued without explanation in the chapter 11 plan filed by the Debtors on August 24, 2021[] . . . to the detriment and exclusion of Intelsat S.A. and its major stakeholders[.]" Mot. p. 2. In favor of appointment, the Ad Hoc Equity Group argues that: (1) appointment is mandatory under section 1104(c)(2) of the Bankruptcy Code due to the Debtors' fixed, liquidated, unsecured debts in excess of $5,000,000 and (2) various factors prove that

appointment is in the best interest of creditors under section 1104(c)(1) of the Bankruptcy Code. Mot. ¶¶ 8–11. Both assertions are incorrect.

A. Appointment of an Examiner Is Not Required Under 11 U.S.C. § 1104(c)(2).

18. The Ad Hoc Equity Group argues that the appointment of an examiner is mandatory based on the language of section 1104(c)(2) of the Bankruptcy Code. *See* Mot. ¶¶ 25–26. But several courts have denied motions to appoint examiners even when the debtors' unsecured debts exceeded the $5 million threshold. These courts held that the "as is appropriate" language of section 1104(c) confers upon the court discretion to deny the appointment of an examiner where, as here, an appointment is not appropriate under the facts and circumstances of the case. For example, in *In re Residential Capital, LLC*, the Bankruptcy Court described the scenario here as the exact type of case where (despite debts in excess of $5 million) an examiner should be denied: "The appointment of an examiner would be inappropriate if the motion requesting such appointment was filed for an improper purpose such as a litigation delay tactic, or if there is no factual basis to conclude an investigation needs to be conducted, or if an appropriate and thorough investigation has already been conducted." 474 B.R. 112, 121 (Bankr. S.D.N.Y. 2012).

19. All three of these factors are present here: the Motion is indisputably a litigation tactic filed 15 months after the case and on the eve of confirmation, there is no factual basis to conclude that an "examination" of any conduct is necessary, and investigations have already been conducted of the vague assertions made in the Motion by the Debtors, the Debtors' Board of Directors, the S.A. Special Committee, and the UCC (among other groups). There is no reason to burden the estate with yet another review, at the behest of an extraordinarily small constituency who has made nothing but meritless and vague assertions after having 15 months and the benefit of substantial document productions to come up with any plausible theories.

20. In *In re Spansion*, for example, the bankruptcy court exercised its discretion to deny the request for an examiner where (as here), despite more than $5 million in unsecured debt, the movant provided no evidence of conduct that would make an investigation "appropriate," and where the key inquiry of the examination—whether the debtors' management had acted in bad faith—was a classic confirmation issue that was already being presented to the Court. *U.S. Bank Nat'l Ass'n v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 128 (Bankr. D. Del. 2010). So too here. As the Court knows, the Convert Ad Hoc Group is already arguing that the accelerated relocation payments and additional "tax value" should be attributed to Intelsat S.A., and that same issue has been reviewed in detail by the Debtors, the S.A. Special Committee, and the UCC (among many others). Ultimately, the Court will review the evidence presented by the various parties and make a decision at the confirmation hearing scheduled to commence on November 8, 2021. In the interim, as in *Spansion,* it would be a waste of estate assets for the court to appoint an examiner with no meaningful duties, "a result that could not have been intended by Congress." *Id.* at 127.

21. Similarly, courts have found the appointment of an examiner is not mandatory where the only basis for the investigation is the $5 million statutory threshold, and thus "would serve no useful or beneficial purpose and is not in the best interests of the estate." *In re Shelter Resources Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983). In *In re Shelter*, the key matter sought to be investigated was rendered moot by a settlement of the underlying action, and there was no factual assertions suggesting fraud, mismanagement. *Id*. Accordingly, the court held "to slavishly and blindly follow the so-called mandatory dictates of Section 1104(c)(2) is needless, costly and non-productive and would impose a grave injustice on all parties herein." *Id.*

22. The reasoning set forth in *Residential Capital*, *Spansion*, and *Shelter* is applicable here. This case has been ongoing for more than 15 months and is now on the eve of confirmation. The shareholders of Intelsat S.A. are aligned with numerous stakeholders—board members and officers of Intelsat S.A. with substantial equity holdings and every incentive to find equity value if there was a realistic possibility of doing so, a special committee of the board at Intelsat S.A. with fiduciary duties to act in the best interests of Intelsat S.A. only, an official committee of unsecured creditors charged with maximizing value for unsecured creditors generally, and an active and sophisticated ad hoc creditor group focused on its interests in Intelsat S.A. If value for equity holders plausibly existed, such value would have been identified and closely scrutinized by one (or likely more) of them in the last 15 months.

23. Moreover, confirmation is days away. The Motion is a clear example of a "litigation tactic" by the Ad Hoc Equity Group to collaterally attack the Court's decision denying its motion for an equity committee and attempt to delay confirmation of the Amended Plan of Reorganization scheduled to be heard beginning on November 8. Under these circumstances, the Ad Hoc Equity Group should not be rewarded for its efforts to harass the Debtors.

24. Instead, if the Ad Hoc Equity Group truly believes there is meaningful value available to equity holders after being denied official committee status, its remedy is to do what the Court already advised it to do: have the courage of conviction to make an investment, analyze the wealth of information that the Debtors have made available, and be heard at plan confirmation. That is the only path forward available under the Bankruptcy Code. The absence of another estate-funded Ad Hoc Equity Group professional to proceed down that path simply does not constitute "the 'factual basis' necessary to conclude that an investigation needs to be conducted."

Id. It proves the opposite: that this Court has already found that another estate-funded investigation on behalf of equity holders was *not* appropriate.

25. The Ad Hoc Equity Group relies on the Sixth Circuit case *Revco* and other non-binding case law[9] to support its position that appointment is mandatory even where (as here) it would serve no substantive purpose. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)* 898 F.2d 498, 500–01 (6th Cir. 1990); Mot. ¶ 25. But even *Revco* did not establish a bright line rule that an examiner shall be appointed in all cases where the $5,000,000 threshold of section 1104(c)(2) is met. Instead, the court there found that appointment is appropriate only in noncontroversial situations when a request for an examiner would not constitute "abuse," create undue delay in the administration of the bankruptcy estate, or cause the debtor to incur substantial and unnecessary costs and expenses detrimental to the interests of creditors and parties in interest. All of the concerns about appointment of an examiner that were absent in *Revco* are present in spades here.

26. Indeed, in the case cited by the Ad Hoc Equity Group, the Sixth Circuit explicitly declined to rule on whether appointment of an examiner was mandatory where (as here) the request itself was an obvious abuse of process. *Id.* at 501. And for good reason. Such a construction of the statute would allow disgruntled, out-of-the-money creditors to derail and delay a debtor's progress towards confirmation in *any* complex chapter 11 case simply by filing an examiner motion. In finding no such abuse was present on the facts before it, the Sixth Circuit stated, "[t]hat is *not* the case before us, of course, and *we do not decide it* except to note that the bankruptcy court retains broad discretion to direct the examiner's investigation, including its nature, extent, and

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9 Specifically, the Ad Hoc Equity Group cites cases in the Second the Seventh Circuit. *See Loral Stockholders Protective Comm. v. Loral Space & Commc'ns, Ltd. (In re Loral Space & Commc'ns, Ltd.)*, 2004 WL 2979785, at *5 (S.D.N.Y. Dec. 23, 2004); *In re UAL Corp.*, 307 B.R. 80, 84 (Bankr. N.D. Ill. 2004). It does not (and cannot) cite any cases in the Fourth Circuit that support its position that appointment of an examiner is mandatory.

duration." *Id.* (emphasis added). But the facts here present precisely the type of case that caused the *Revco* court to except from its holding certain instances where a request for an examiner is not "appropriate." If there were ever a case where an examiner is not "appropriate," it is this case, where the Movant (a) waited 15 months before seeking an examiner; (b) has already had five requests for official status and estate funding rejected; (c) has been given access to massive volumes of information but declined to review any of it; (d) has not identified with particularity any claims that it wants to be "examined"; and (e) has the same interests in achieving equity value already shared by numerous estate fiduciaries and other creditors.

B. Appointment of an Examiner Is Not Appropriate Under Section 1104(c)(1) of the Bankruptcy Code.

27. Many courts have found that appointment of an examiner under section 1104(c)(1) of the Bankruptcy Code is discretionary and determined by the court's construction of the facts of the case. *See, e.g.*, *In re ProFlo Industries, LLC*, 2018 WL 615122 (Bankr. N.D. Oh. 2018) ("The appointment of an examiner under § 1104(c)(1) is a matter of discretion."); *In re Gilman Services, Inc.*, 46 B.R. 322 (Bankr. D. Mass. 1985) (stating same); *American Bulk Transport Co.*, 8 B.R. 337 (Bankr. D. Kan. 1980) ("Ultimately, the appointment of an examiner [under section 1104(c)(1)] depends upon whether the appointment is in the best interests of creditors, equity security holders, and other interests of the estate; the question is one that is equitable and discretionary with the Court.") (citing *In re Lenihan*, 4 B.R. 209 (Bankr. D. R.I. 1980).

28. The relief requested in the Motion cannot satisfy this standard. The contemplated areas of investigation for an examiner identified in the Motion are vaguely described, but appear to generally fall into three categories: the value of the "non-unity" NOLs, the allocation of the accelerated relocation payment claims, and claims and causes of action against Intelsat S.A. directors and officers. None of these topics will benefit from the appointment of an examiner.

29. As to the first topic, the Amended Plan provides that the value, if any, of the "non-unity" NOLs will go *to the creditors of Intelsat S.A*. The Ad Hoc Equity Group essentially hopes that these net operating losses are so valuable that unsecured creditors of Intelsat S.A. will be paid in full, leaving some value to "trickle down" to equity. While there is no basis for this suggestion, even if there was, it is not a reason to appoint an examiner. Instead, the Ad Hoc Equity Group should hire a valuation expert (if one exists) who could make the case that Intelsat S.A. creditors who are receiving the value of the "non-unity" NOLs are being paid in full, leaving value for equity. An examiner cannot be a proxy for a valuation expert.

30. As to the second topic, and as the Court is well aware, hundreds of pages of briefing have been filed on the allocation of the accelerated relocation payments. Numerous parties have advanced arguments relating to those payments (including parties advocating for stakeholders of Intelsat S.A.) over the past year. And, perhaps most significantly, the vast majority of such arguments are legal arguments. An examiner cannot be a proxy for a lawyer advancing primarily legal argument, nor is there any value to the estate or its creditors to add another voice to the chorus of voices already making arguments and filing briefs on this point.

31. As to the third topic, the Ad Hoc Equity Group makes vague references to unidentified, allegedly "viable claims" against Intelsat S.A. board members and management for diminution of value and management error under Luxembourg law. Mot. ¶¶ 14–15. The Motion does not identify any "management error," and could not do so. Putting aside that equity holders are unlikely to be able state a claim as a matter of law under applicable Luxembourg law, these claims were investigated by the S.A. Special Committee (and every one of the other special committees, not to mention the UCC and every other creditor group) and no viable theory has been identified by anyone. To have an examiner search for a needle in the haystack would be pointless

and wasteful. But, if the Ad Hoc Equity Group believes such claims could be a source of value for its constituents, it should start by pursuing even the most basic analysis of the wealth of information already available to it—something it has so far refused to do.

32. More generally, the context of these cases provides numerous reasons not to appoint an examiner. These cases have 35 Debtors, five Special Committees, five ad hoc groups, numerous individual stakeholders, and an official committee of unsecured creditors, all of whom have investigated a whole host of claims and topics over the last 15 months. And after this 15 months, the Debtors were finally in a position to file the Amended Plan that enjoys support from holders of more than 75 percent (or $11 billion) of the Debtors' nearly $15 billion capital structure (so far).

33. The bottom line is that the Motion does not seek "appropriate" relief. The Debtors are on the last leg to confirmation after 15 months of incredibly hard work. Only now, after having its request for official status denied five times, does the Ad Hoc Equity Group seek to prolong these chapter 11 cases and create a sideshow investigation. Many courts have denied requests for an examiner upon a finding that the request was a litigation tactic. *See, e.g.*, *In re Dewey & Leaboef LLP,* 478 B.R. 627, 639 (Bankr. S.D.N.Y. 2012) (denying the request for an examiner after finding that the examiner motion was filed for an improper purpose as a litigation tactic); *see also In re Bradlees Stores, Inc.*, 209 B.R. 36, 39 (Bankr. S.D.N.Y. 1997) ("the impracticality of the movants' request is obvious and suggests that the request is nothing more than a liquidation/negotiation tactic."); *In re Schepps Food Stores, Inc.*, 148 B.R. 27, 31 (Bankr. S.D. Tex. 1992) (finding ample support to conclude that the movant's interest in the appointment of an examiner, approximately one month prior to the confirmation hearing, was a tactic to prevent confirmation). The Court should do the same thing here.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully submit that the Court deny the Motion in its entirety.

Richmond, Virginia
Dated: September 24, 2021

/s/ Jeremy S. Williams

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