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

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

OBJECTION OF AD HOC GROUP OF EQUITY HOLDERS OF INTELSAT S.A. TO CONFIRMATION OF CHAPTER 11 PLAN

[1] Due to the large number of Debtors in these jointly administered Chapter 11 cases, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list is available on the website of the Debtors' proposed 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Ad Hoc Group of Equity Holders of Intelsat S.A. (the "**Ad Hoc Group of Equity Holders**")[2] hereby files this objection (the "**Objection**") to confirmation of the Debtors' *Second Amended Joint Chapter 11 Plan of Reorganization of Intelsat S.A. and its Debtor Affiliates* [Dkt. 2773] (the "**Second Amended Plan**") as it relates to Intelsat S.A.[3] In support hereof, the Ad Hoc Group of Equity Holders respectfully states as follows:

SUMMARY OF ARGUMENT

1. The Ad Hoc Group of Equity Holders was constituted in the Spring of 2021 and is made up primarily of retail/individual holders of equity in Intelsat S.A. Original members of the Ad Hoc Group of Equity Holders have held, in the aggregate, in excess of 2,676,114 shares of stock in Intelsat S.A. acquired both pre- and post-petition. More recently, holders of millions of shares of Intelsat S.A. stock have approached and offered to support the group, alarmed that their once valuable shares were not being represented and were on a very fast track to worthlessness under the Second Amended Plan.

2. After all, just over two years ago, and several months before the chapter 11 filing, Intelsat S.A. stock was trading at approximately $26 per share or more, and its market capitalization was in excess of $3.7 billion. But now, the Debtors' Second Amended Plan proposes to cancel the equity in Intelsat S.A. for no consideration and with barely a nod or attempt to explain

[2] As of the date of this filing, Movant's constituents consist of the following: David J. Benz; Darryl B. Boyd; Amy B. Boyd; Kostiantyn Chemerys; Richard Bertram Coons IRA; Lisla Cowles; Chelsea Cummings; Kevin Cummings; Melanie Cummings; David Fogarty; Victor Fteha; Olena Goldsmith; Harry Kent; Andrew Maracini; Markus Mühlthaler; Joel R Packer & Barbara Packer Designated Bene Plan/TOD; Barbara Packer Charles Schwab & Co Inc Cust IRA Rollover; Joel R Packer Charles Schwab & Co Inc Cust IRA Contributory; Michael Pittman; Minesh Poudel; Daniel Rivera; Daniel Rivera – Rollover IRA; Robert Sbarra; Gregory Sinacori; Albert Smegal; Emilio III Barretto Suarez & Michelline Espir Suarez JTWROS; and Manual Crespo Vaquero. More than half of these constituents are pre-petition equity holders.

[3] Capitalized terms used but not defined herein shall have the meaning given them in the Second Amended Plan.

the disintegration of their position in Intelsat S.A. to the retail shareholders.[4] For the reasons set forth below, the Ad Hoc Group of Equity Holders submits that the Debtors have not met and cannot meet their burden of proving that the Court should confirm a chapter 11 plan for Intelsat S.A. that so ignores and wipes out individual shareholders.[5]

3. In order to be confirmed as to Intelsat S.A. and its stakeholders, the Debtors have the burden to prove, and the Court must satisfy itself, among other things, that the Second Amended Plan meets the requirements of the Bankruptcy Code, including (i) that the Second Amended Plan complies with the best interests test and has been proposed in good faith, (ii) that the claimed "settlement" embodied in and which is the basis for the Second Amended Plan is reasonable, fair and equitable, and (iii) that the proposed releases are appropriate under existing law.

4. The record currently shows (and at the confirmation hearing will show)[6] that the Debtors have not even attempted to value Intelsat S.A. as a standalone entity – let alone with any rigor. Given that, the Debtors cannot prove that the Second Amended Plan's proposed distributions to Intelsat S.A. stakeholders – namely the holders of General Unsecured Claims against and Interests in Intelsat S.A. – are appropriate and comply with the requirements of section 1129(a) of the Bankruptcy Code. This is because the Debtors have not performed an appropriate

[4] This includes why Intelsat S.A does not seem to be benefiting or recognizing additional value from what appears to be a relatively hot and active market for Satellite company mergers such as that announced November 8 for the purchase by Viasat of Inmarsat for $7.3 billion of imputed value.

[5] The Second Amended Plan provides: "In the event that the Plan is not capable of being confirmed with respect to a TopCo Debtor, but is capable of being confirmed as to Non-TopCo Debtors, then the Non-TopCo Plan may be confirmed as a single plan of reorganization for all Non-TopCo Debtors." *See* Second Amended Plan, p.1.

[6] Parties have designated large swaths of discovery in this case as "Confidential" or "Highly Confidential" pursuant to the *Confidentiality Agreement and Stipulated Protective Order* [Dkt. No. 737]. Thus, the Ad Hoc Group of Equity Holders has omitted from this Objection certain references to specific evidence, including deposition transcripts and expert reports, but reserves the right to elicit evidence supporting this Objection at the hearing on confirmation of the Second Amended Plan.

valuation of (nor attributed any value to) certain assets that belong in whole or part to Intelsat S.A., including (i) causes of action against Intelsat S.A.'s directors and officers backed by over $100 million in D&O insurance, (ii) upwards of $6 billion in net operating losses that belong to Intelsat S.A. or its wholly-owned subsidiary, Intelsat Investment Holdings S.a.r.l. ("**Holdings SARL**"), and (iii) any allocable rights to over $4.8 billion in the Accelerated Relocation Payments. Thus, the Debtors will not be able to prove that the value being allocated to Intelsat S.A. stakeholders ***as a whole*** is appropriate, was fairly considered or constitutes a fair, reasonable or equitable compromise or settlement (particularly where the compromise was for effectively nothing).

5. What's more, in failing to perform such an appropriate valuation, the Debtors also will be unable to show that their proposed allocation of value ***among*** Intelsat S.A.'s stakeholders is appropriate. In particular, the Debtors will not be able to demonstrate that the Second Amended Plan complies with the best interests test set forth in section 1129(a)(7) of the Bankruptcy Code. Indeed, the Ad Hoc Group of Convertible Noteholders has argued that there is, or at least should be, more than enough value at Intelsat S.A., even in a liquidation scenario, to satisfy claims on the Convertible Notes, which are approximately $410 million. If that is true, the Second Amended Plan which, as amended, gives 100% of the equity in Reorganized Intelsat S.A. to General Unsecured Claims and no interest to the current Intelsat S.A. equity holders, proposes a confiscation of value away from the Interest holders at Intelsat S.A., such as the members of the Ad Hoc Group of Equity Holders, and to the holders of the Convertible Notes. While this particular problem with the Second Amended Plan could be somewhat easily remedied by providing Interest holders with a contingent security that only has residual value after creditors at Intelsat S.A. have been paid in full, the Debtors have eschewed this easy fix, which was previously proposed by the Ad Hoc Group of Equity Holders.

6. The Debtors' failure to conduct an appropriate valuation of Intelsat S.A. also makes it impossible for the Debtors to demonstrate that the Second Amended Plan was proposed in good faith, as they must under section 1129(a)(3) of the Bankruptcy Code. The Debtors, but in particular the special committee for Intelsat S.A. (the "**S.A. Special Committee**"), a fiduciary for Intelsat S.A., stakeholders, did not – and perhaps in light of their individual conflicts (such as exposure to D&O claims) could not - do the work that was necessary to apprise themselves as to whether the settlement embodied in the Second Amended Plan, and therefore the Second Amended Plan itself, is reasonable, fair and equitable. Beyond that, and at a more basic level, the S.A. Special Committee seems to not have even viewed itself as a fiduciary for Intelsat S.A. stakeholders with respect to "Conflict Matters" such as Intelsat S.A.'s value, as S.A. Special Committee directors admitted in depositions and as was evidenced by the S.A. Special Committee having gratuitously and unnecessarily submitted expert reports (particularly in light of the Debtors' reports) arguing ***against*** any value being allocated to Intelsat S.A. beyond what is contemplated by the Second Amended Plan, which is effectively nothing.[7]

7. Finally, for those same reasons – including the S.A. Special Committee's lack of diligence and transparent conflicts - the Ad Hoc Group of Equity Holders submits that Intelsat S.A.'s proposed releases of its directors and officers should not be approved pursuant to the Second Amended Plan, because those releases would be an extinguishment of value without any consideration to Intelsat S.A., not a valid exercise of Intelsat S.A.'s business judgment, and are not

[7] The "expert" reports submitted by the S.A. Special Committee included the following: *Expert Report of AtoZ S.A.,* dated October 18, 2021; *Expert Report of John T. Nakahata,* dated October 8, 2021; and *Rebuttal Declaration of Matthew D. Ray in Support of Confirmation of the Amended Chapter 11 Plan,* dated October 18, 2021. Those reports were redundant of expert reports provided by the Debtors and other parties and to that extent unnecessary. Their positions argue firmly against increasing the value attributable to Intelsat S.A and seem on their face to breach fiduciary duties owed to stakeholders of Intelsat S.A.

fair, reasonable or in the best interests of the Intelsat S.A. estate, as required under applicable case law.

8. It is particularly unfortunate that as the Ad Hoc Group of Equity Holders previously reported to the Court in the context of its motion for appointment of an examiner, the challenges to confirmation might have been – and still could be – avoided if the Second Amended Plan were to include: (i) a provision for a contingent security or interest for Intelsat S.A. shareholders if the Convertible Notes are paid in full and (ii) carve outs from releases of all claims on behalf of Intelsat S.A against directors and officers of Intelsat S.A.

BACKGROUND

A. The Chapter 11 Filings.

9. On May 14, 2020 (the "**Petition Date**"), the Debtors commenced voluntary cases under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). On May 15, 2020, the Court entered an order directing that the cases be jointly administered for procedural purposes under Case No. 20-32299 (KLP). No trustee has been appointed and the Debtors continue in possession of their property and manage their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.[8]

B. The Original Plan.

10. On February 12, 2021, Debtors filed the (i) *Joint Chapter 11 Plan of Intelsat S.A. and Its Debtor Affiliates* (the "**Original Plan**"), and (ii) *Disclosure Statement for the Joint Chapter 11 Plan of Intelsat S.A. and Its Debtor Affiliates*. *See* Dkts. 1467-68.

[8] Information regarding the Debtors' history and business operations, capital structure, and secured indebtedness, and the events leading up to the commencement of these cases can be found 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*, filed with the Court on the Petition Date. *See* Dkt. 6.

11. On April 13, 2021, the Court ordered mediation of the Original Plan, which proceeded for over four months, without a global resolution and during which proceedings in these cases were largely put on hold. While accorded significant courtesy by the mediator (Judge Santoro), the Ad Hoc Group of Equity Holders was not included in any discussions or negotiations with other mediation parties.

C. The Second Amended Plan.

12. On August 31, 2021, the Debtors filed (i) the Second Amended Plan and (ii) the *Disclosure Statement for the Amended Joint Chapter 11 Plan of Intelsat S.A. and Its Debtor Affiliates* (the "**Amended Disclosure Statement**"), s*ee* Dkt. 2774, in accordance with a restructuring support agreement among the Debtors and certain other ad hoc groups, but not such Intelsat S.A. stakeholders as the ad hoc groups of Convertible Noteholders or Interest holders.

13. The Second Amended Plan provides no recovery to Holders of Interests in Intelsat S.A. and indeterminate recovery to the holders of the Intelsat Unsecured Claims, including to the holders of Convertible Senior Notes. *See* Amended Disclosure Statement, at pp. 19-20 (estimating no recovery for the holders of Intelsat S.A. Interests and a 6.88% recovery for holders of General Unsecured Claims at Intelsat S.A.).

14. But there are several problems with this. *First*, the Second Amended Plan, seemingly at the behest of and to the benefit of creditors at lower levels of the Intelsat corporate ladder, seems to have totally ignored or discounted any exclusive value for Intelsat S.A. Worse, this seems to have been done without rigorous analysis or advocacy by the S.A. Special Committee directors regarding the existence and value of assets belonging to Intelsat S.A. The S.A. Special Committee was tasked with representing the interests of Intelsat S.A. and the stakeholders of

Intelsat S.A. to the exclusion of any other constituencies in these cases.[9] But it appears to have been, at best, a late to the game rubber stamp.[10] *Second*, the Second Amended Plan, lacking interest in or presuming no value in Intelsat S.A., fundamentally fails to value or allocate the Reorganized S.A. Common Stock or other interests, all of which common stock is proposed to be distributed solely to holders of General Unsecured Claims against Intelsat S.A. Thus, even if sufficient value were generated to pay in full the Convertible Noteholders, the equity holders would get nothing under the Second Amended Plan; in other words, there is a possibility that creditors at Intelsat S.A. could obtain a windfall to the detriment of Interest holders. *Third*, the Second Amended Plan improperly proposes that Intelsat S.A. will release and forfeit the value of potentially valuable claims against its directors and officers (the "**S.A. Debtor Release**"), particularly available under Luxembourg law, for no consideration to the creditors and equity holders of Intelsat SA. These issues manifest themselves in multiple provisions of the Second Amended Plan.

INTELSAT S.A. ASSETS ARE NOT VALUED AND ARE FORFEITED IN THE PLAN

15. **The S.A. NOLs.** The Second Amended Plan and its proponents ignore or discount any value of the $6 billion or so in net operating losses held exclusively at the Intelsat. S.A. level; at most the Second Amended Plan simply discusses possible distributions of Reorganized S.A. Common Stock to the HoldCo Creditor Ad Hoc Group members on their Convertible Notes and makes a casual reference to "value attributable to the net operating losses or other tax attributes (that are held outside of the Debtors' Luxembourg tax unity). . ." *See* Second Amended Plan, at p.

[9] *See* Amended Disclosure Statement, at p. 68 ("Each applicable board of directors delegated to its Special Committee the authority to take any action with respect to the Conflict Matters, as determined in the sole judgment of the Disinterested Directors, including, any release or settlement of potential Claims or Causes of Action of the applicable Debtor or its subsidiaries, if any, and any other transaction implicating the Company or its subsidiaries.") and p. 6 (describing the Special Committees as "independent fiduciaries").

[10] The S.A. Special Committee was only constituted as of November 2020 well after the other Special Committees, and did not retain a financial advisor until June 2021, and only to defend its prior actions.

12.[11] This is a critical oversight for upwards of $6 billion of Net Operating Losses that belong to Intelsat S.A. directly and through its subsidiary, Holdings SARL, independent of the other Debtors ("**S.A. NOLs**"). The Second Amended Plan and Amended Disclosure Statement nowhere quantify the value of these S.A. NOLs. Thus, the Second Amended Plan may misallocate or even squander the inherent independent worth that Intelsat S.A. carries on account of owning some or all of the S.A. NOLs. Indeed, if the S.A. NOLs have value themselves or in conjunction with other assets, in excess of the creditor claims at Intelsat S.A., then those creditors could receive a windfall to the exclusion and detriment of the holders of Intelsat S.A. Interests, such as the members of the Ad Hoc Group, who would receive nothing.

16. Indeed, the S.A. NOLs do not belong to the other Debtor entities and the Debtors have conceded that the S.A. NOLs belong to Intelsat S.A. and its subsidiary, which reside above the tax unity of the operational companies. While it is conceded that the S.A. NOLs belong at the parent Intelsat S.A. company level or just below that, little to nothing seems to have been done to investigate and preserve their value for the holders of the Intelsat S.A. Interests, including by the S.A. Special Committee. Although the Amended Disclosure Statement states that the S.A. Special Committee "expended significant time and effort" and gathered "voluminous data and information" regarding, *inter alia*, "tax attributes held outside the tax entity", *see* Amended Disclosure Statement, at p. 6, the Amended Disclosure Statement specifically does not state that the Special Committee made any attempt to value the S.A. NOLs, other than perhaps just assuming that they are worth zero.

[11] The Original Plan had failed to even mention net operating losses outside of the tax unity at all.

17. ***The D&O Claims.*** Likewise, the Second Amended Plan neglects to mention or preserve value for Intelsat S.A. and its stakeholders insofar as they may have viable claims against the Board of Directors and management of Intelsat S.A. under Luxembourg law. These claims could very well be viable and valuable given the allegations asserted against members of the Board of Directors – ranging from insider trading and overwhelming compliance failures associated therewith, to bending to improper threats and interference from Appaloosa and others, to breach of fiduciary duty for allowing dissipation of assets and asset value, as evidenced by the diminution of upwards of (and much more than) the $4-5 billion of equity market value, which occurred just prior to the filing of the bankruptcy petition. *See In re Silver Lake Group, L.L.C. Securities Litigation,* No. 4:2020-CV-02341-JSW (N.D. Cal. 2021).

18. In this regard, under Luxembourg law, holders of Intelsat S.A. Interests may be entitled to file a claim for management *error* against the entire Intelsat S.A. Board of Directors regarding the circumstances leading to and development of the Intelsat S.A. bankruptcy proceeding. After consulting with Luxembourg counsel, the Ad Hoc Group of Equity Holders understands that there may be a viable case that could be brought against Intelsat S.A.'s Board of Directors for management error in connection with its handling of the events that have led to this bankruptcy proceeding. *See Affidavit of M^e Jean-Baptiste Beauvoir-Planson*, dated Sept. 22, 2021. Such a case would inure to the benefit of Intelsat S.A. and thus the stakeholders of Intelsat S.A. The Ad Hoc Group of Equity Holders further understands that Intelsat S.A. is the beneficiary of at least $100 million of directors' and officers' insurance (and perhaps more), which could ultimately aid in reducing the loss to Intelsat S.A stakeholders.

19. But the Second Amended Plan does not contemplate that these claims can be pursued by Intelsat S.A. stakeholders. To the contrary, the Second Amended Plan proposes that,

to the extent such claims are construed as derivative in nature – a legal position which the Ad Hoc Group of Equity Holders believes the Debtors will take - they could receive the benefit of the S.A. Debtor Release. In particular, under the Second Amended Plan, the definition of "Releasing Parties" includes "each of the Debtors". *See* Second Amended Plan, at p. 19-20. And the definition of "Released Parties" includes "current and former directors" and "managers" of the Debtors. *See* Second Amended Plan, at p. 19 (defining "Released Parties" and "Related Party"). Thus, if the Second Amended Plan is confirmed in its present form, potential derivative claims by Intelsat S.A. against its officers and directors would be wiped out for no consideration – certainly no consideration to Intelsat S.A. and its stakeholders.

20. In this regard, it is important to note that under Luxembourg law the holders of 10% of the voting rights of a company may bring a legal proceeding on behalf of the company against the board of directors for management error. *See Affidavit of Me Jean-Baptiste Beauvoir-Planson*. The Second Amended Plan does permit individual creditors and shareholders to affirmatively opt out of the third-party releases, thereby preserving potential direct claims against parties other than the Debtors. Counsel to the Ad Hoc Group delivered to the Debtors and Debtors' counsel opt outs on behalf of holders of at least 3,763,813 shares in Intelsat S.A., clearly indicating that the equity holders were opting out of the releases (i) in their individual capacity and (ii) to the fullest extent possible collectively to bring or preserve claims including on behalf of, *inter alia*, Intelsat S.A. against directors, officers or others pursuant to Luxembourg law. In addition, the Ad Hoc Group of Equity Holders understands that holders of at least an additional 10,766,504 shares in Intelsat S.A. also opted out of the releases. Together, these opt outs total more than enough to meet the 10% threshold under Luxembourg law to assert and preserve claims on behalf of Intelsat S.A., to the extent they are not released under the Second Amended Plan.

21. ***The Accelerated Relocation Payments***. The Second Amended Plan proposes that all of the $4.8 billion of Accelerated Relocation Payments will benefit constituencies other than the creditors and shareholders of Intelsat S.A. The Amended Disclosure Statement merely states that the "Debtors contend that the ***appropriate*** recipient of the Accelerated Relocation Payments from the FCC is License" and, therefore, that 100% of value should go to License and no value on account of the Accelerated Relocation Payments is attributable to or should be shared with Intelsat S.A. *See* Amended Disclosure Statement, at p. 51 (emphasis supplied). But even the Amended Disclosure Statement does not go so far as to state that License is the "legal" owner of the Accelerated Relocation Payments. At the confirmation hearing, the Debtors must prove to the Court's satisfaction that the Accelerated Relocation Payments legally and equitably belong solely to License, and that no part of such payments are rightfully allocable to Intelsat S.A. To the extent the Debtors cannot make this showing, the Second Amended Plan cannot be confirmed to give all of the value of the Accelerated Relocation Payments to License or other Intelsat operating entities. It should be noted that the Convertible Noteholders have raised strong arguments, claiming significant entitlement to the Accelerated Relocation Payments to Intelsat S.A. (which arguments the Ad Hoc Group of Equity Holders adopts and defers to). It should also be noted that if even less than 9% of the Accelerated Relocation Payments were shared with Intelsat S.A., all of the Convertible Notes would be satisfied and all excess value could drop to equity holders.

OBJECTION

A. The Debtors Have the Burden of Proving – But Have Failed to Prove - that the Second Amended Plan Complies with Sections 1129 and 1123 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019, as it Relates to the Reorganization of Intelsat S.A.

22. The Debtors have the burden of proving that the Second Amended Plan complies with the provisions of sections 1129 and 1123 of the Bankruptcy Code and Federal Rule of

Bankruptcy Procedure 9019. With respect to the reorganization of Intelsat S.A. in particular, the Debtors must prove that the Second Amended Plan complies with sections 1129(a)(7) and (a)(3) based on valuations and allocations therein, and that the settlement proposed in the Second Amended Plan is a good faith settlement and is "reasonable, fair and equitable." The Debtors and other proponents of the Second Amended Plan have conspicuously ignored or run away from acknowledging and valuing assets at Intelsat S.A., certainly not enough to prove that no value can drop to beleaguered retail shareholders. Nor can they stand behind claims that the S.A. Special Committee somehow vigorously analyzed such and effected a fair and without conflict reasonable compromise or settlement. This is their own fault, particularly since the Ad Hoc Group of Equity Holders, in their motion for appointment of an examiner filed on August 30, 2021, warned of these deficiencies and attempted to propose that an objective analysis of such should be made by a Court-appointed examiner, which proposal was vigorously opposed by the Debtor and all of the plan proponents (and ultimately denied by the Court) as, *inter alia*, being too close to the confirmation hearing, which now has been moved more than two months away.

23. ***Burden of Proof***. Courts "universally agree" that the burden of proof in a confirmation proceeding lies with the plan proponent – here the Debtors. *In re Trenton Ridge Investors, LLC*, 461 B.R. 440, 459 (Bankr. S.D. Ohio 2011) (citation omitted); *see also In re Future Energy Corp.*, 83 B.R. 470, 481 n.21 (Bankr. S.D. Ohio 1988) ("It is well-established that the proponents of a Chapter 11 plan bear the burden of proving compliance with the requirements of §1129(a)"). What's more, even in the absence of an objection, "the Court has an independent duty to determine compliance with each of the Bankruptcy Code's confirmation requirements." *In re Trenton Ridge Investors, LLC,* 461 B.R. at 458.

24. Court differ as to the appropriate standard of proof at a confirmation hearing. *Compare In re New Midland Plaza Associates*, 247 B.R. 877, 883 (Bankr. S.D. Fla. 2000) ("The appropriate standard of proof at a hearing on confirmation is the clear and convincing evidence standard, rather than the preponderance of the evidence standard.") (citation omitted) and *In re Birdneck Apartment Associates, II, L.P.*, 156 B.R. 499, 507 (Bankr. E.D. Va. 1993) (imposing a "clear and convincing" standard in determining whether a plan is fair and equitable) *with In re Trenton Ridge Investors*, LLC, 461 B.R. at 460 (adopting a preponderance of the evidence standard). But whatever the standard, the Debtors cannot meet it here.

25. ***Section 1129(a)(7)***. Section 1129(a)(7) of the Bankruptcy Code provides, in pertinent part:

> With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date . . .

11 U.S.C. §1129(a)(7).

26. "The best interests test requires that each holder of a claim or interest in an impaired class accept the plan or, alternatively, receive or retain under the plan property having a present value at least equal to what the holder would receive or retain if the debtor were liquidated under chapter 7 on the effective date of the plan. The plan proponent must introduce sufficient current financial information about the debtor, his assets and liabilities, and his prospects to permit the court to judge whether the test has been satisfied." *In re Piece Goods Shops Co., L.P.*, 188 B.R. 778, 791 (Bankr. M.D.N.C. 1995). While not an exact science, the best interests valuation "is to

be based on evidence not assumptions." *In re Multiut Corp.*, 449 B.R. 323, 344 (Bankr. N.D. Ill. 2011).

27. ***Section 1129(a)(3)***. One of the many burdens the Debtors must meet to have the Second Amended Plan confirmed by this Court is to prove that it complies with section 1129(a)(3) of the Bankruptcy Code. Section 1129(a)(3) provides that, in order to be confirmed, a chapter 11 plan must have "been proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1129(a)(3). To determine whether a plan has been proposed in good faith under section 1129, "the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 247 (3d Cir. 2004), *as amended* (Feb. 23, 2005) (citation omitted). In that regard, there are two recognized policies or objectives: "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (*citing Toibb v. Radloff*, 501 U.S. 157, 163, (1991). More generally, the Bankruptcy Code's objectives include, among other things: "discourag[ing] debtor misconduct", *In re WR Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013) and "achieving fundamental fairness and justice," *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 157 (3d Cir. 2012) (*citing In re Kaiser Aluminum Corp.*, 456 F.3d 328, 339–343 (3d Cir. 2006)).

28. ***Rule 9019***. The Second Amended Plan also serves as and is predicated on being a settlement among all creditors and shareholders of the Debtors. In particular, the Second Amended Plan provides as follows:

> The Plan shall be deemed a motion to approve the good faith compromise and settlement of all such Claims, Interests, Causes of Action and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair,

> equitable, reasonable and in the best interests of the Debtors and their Estates. Subject to Article VI hereof, all distributions made to Holders of Allowed Claims and Allowed Interests (as applicable) in any Class are intended to be and shall be final.

See Plan, Art. IV.A.

29. Thus, in order to be confirmed, the Second Amended Plan must not only satisfy the requirements of section 1129, but it must also satisfy Federal Rule of Bankruptcy Procedure 9019. Rule 9019 provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). "In summary, the court is to consider the probability of the trustee's success in any ensuing litigation, any collection difficulties, the complexity, time and expense of the litigation, and the interests of creditors with proper deference to their reasonable views." *In re Austin*, 186 B.R. 397, 400 (Bankr. E.D. Va. 1995) (citations omitted). *See also In re CS Mining, LLC*, 574 B.R. 259, 273 (Bankr. D. Utah 2017).

30. In addition, when assessing the reasonableness of a settlement, a court "may consider whether the settlement is the product of good faith, arm's-length negotiations between the parties." *In re CS Mining*, 574 B.R. at 273. But the proponent of a settlement "must demonstrate more than a 'mere good faith negotiation of the settlement' because the court must independently make a finding that the compromise is reasonable, fair and equitable." *In re HyLoft, Inc*., 451 B.R. 104, 109 (Bankr. D. Nev. 2011); *see also In re Pacific Gas & Electric Co.*, 304 B.R. 395, 417 (Bankr. N.D. Cal. 2004) (holding that in order to approve a settlement under Rule 9019, a court must find that "the settlement was negotiated in good faith and is reasonable, fair and equitable").

31. ***The Debtors and Plan Proponents Cannot Prove that the Second Amended Plan Complies with the Bankruptcy Code or the Federal Rules of Bankruptcy Procedures.*** The Ad

Hoc Group of Equity Holders respectfully submits that the Debtors cannot meet their heavy burden of proving that the Second Amended Plan complies with Bankruptcy Code sections 1129(a)(7) and (a)(3) and Federal Rule of Bankruptcy Procedure 9019 (nor as discussed hereafter can they prove that the S.A. Debtor Release is appropriate under existing case law). At bottom, this is because the Debtors cannot demonstrate that the Second Amended Plan is the product of a diligent or good faith investigation by the Debtors and the S.A. Special Committee into the value of Intelsat S.A and the allocation of that value, nor that the settlement embodied in it is "reasonable, fair and equitable", for the reasons set forth below.

(a) The Debtors Have Not Met Their Burden or Even Tried to Value Intelsat S.A. as a Standalone Entity and Certainly Have Not Proven that No Value of Intelsat S.A. Can Extend to Equity Holders after Coverage of the $410 Million of Convertible Notes.

32. It is notable that the Debtors and S.A. Special Committee merely presume away and do not attempt to value at Intelsat S.A. any D&O Claims, any even compromised allocations of the $4.8 billion of Accelerated Relocation Payments, nor any value for upwards of $6 billion of S.A. NOLs. Indicative of the blithe disregard of or ostrich approach toward valuation is that the Debtors' advisors have not tried to attribute any value to such a major asset as the upwards of $6 billion in S.A. NOLs, claiming that they are not aware of any means of utilizing or monetizing them.

33. Rather than meeting their burden, the Debtors have neglected to seriously examine multiple perspectives in valuing the S.A. NOLs, which could bring standalone value to Intelsat S.A., such as acquiring operational assets or entering into strategic partnerships. Such strategies are not *ipso facto* an abuse of Luxembourg law.

34. In not even making the attempt to attribute or bring value to the S.A. NOLs, a "material asset" of Intelsat S.A., with other assets, the Debtors and their financial advisors have

not met their burden to show that no value can extend to the Equity Holders in excess of the $410 million due to the Convertible Notes.

(b) The Intelsat S.A. Special Committee's "Independent Directors" Were Conflicted and Did Not View Themselves as Primarily Representing Intelsat S.A. Stakeholders and Cannot be Viewed as Having Effected a Reasonable, Fair and Equitable Compromise or Settlement For Intelsat. S.A. Stakeholders, Particularly its Equity Holders.

35. The S.A. Special Committee, with its "independent" directors taken and designated not from the outside but from the existing Intelsat S.A. board, was formed for the ostensible purpose of representing Intelsat S.A. in "Conflict Matters" with other intercompany entities. Such Conflict Matters include the valuation and ownership of the S.A. NOLs, as well as which entities are entitled to the Accelerated Relocation Payments. *See Debtors' Omnibus Reply in Support of Their Second Exclusivity Motion* [Dkt. 1964], ¶ 6 (listing relevant "claims or conflict issues"). The S.A. Special Committee was supposed to act in the best interest of Intelsat S.A. only. *Id*. at ¶ 78 ("Each of these Special Committees consists of independent directors appointed to act in the best interests of their entity only (with no interests in other Debtor entities) regarding conflict matters between the Debtor entities.").

36. Instead, the S.A. Special Committee did not conduct a valuation of, *inter alia*, the S.A. NOLs, but simply parroted other intercompany entities that claim there is no value to them. Further, the S.A. Special Committee has, rather than leaving the argument to other parties such as Debtors have, taken an adversarial position to Intelsat S.A. and its stakeholders, such as arguing against any value for D&O claims or S.A. NOLs, as well as that the Accelerated Relocation Payments should go to License, although such position clearly goes against the interests of Intelsat S.A. Indeed, after agreeing to the Original Plan and the Second Amended Plan, the S.A. Special Committee has retained and paid significant sums to experts to defend them, rather than the

interests of Intelsat S.A. stakeholders. This alone demonstrates that the S.A. Special Committee is not acting as a fiduciary or in the best interests of Intelsat S.A. and its stakeholders alone.

37. The evidence seems clear that the Intelsat S.A. Special Committee's "independent" directors focused on agreeing to a consensual plan for the entire Intelsat enterprise and at most thought they secondarily represented certain interests of the Convertible Noteholder group and no other stakeholders of Intelsat S.A., *i.e.,* not the shareholders whose interests they did not acknowledge.

38. Conflicts within the Intelsat S.A. Special Committee also seem to be evidenced in the context of insider stock sales undertaken on November 5, 2019, which have elicited allegations of illegal insider trading. *See In re Silver Lake Group.* The allegations are that in a November 5, 2019, meeting with the FCC, FCC personnel gave strong indications that it might switch to a public auction of the C-band spectrum licenses – an occurrence that would have a strong negative consequence on Intelsat's business. That this meeting provided pivotal material non-public information to Intelsat management is clear including from contemporaneous text messages. Intelsat's two largest shareholders, BC Partners LLP and Silver Lake Group, L.L.C., along with Intelsat's chairman, proceeded to sell $246 million in stock just hours after the meeting. To the extent that claims of insider trading are fully substantiated, at least two causes of action may result: claims of D&O/insider exposure against the sellers themselves and also claims against the directors for compliance failures. This means that that S.A. Special Committee is facially conflicted in investigating any D&O claims against all directors.

39. Further and even more blatant, Edward Kangas, an independent director of the Intelsat S.A. Special Committee, is also a paid advisor to BC Partners. Thus, a conflict exists between this "independent" director of the S.A. Special Committee in his investigation of any

claim against BC Partners. For this reason as well, the S.A. Special Committee cannot be relied on to or presumed to have objectively investigated the D&O claims.

40. The implications of the S.A. Special Committee's colorable conflict of representation has been further exemplified by the allegation that in January 2021, the Ad Hoc Committee of ParentCo Creditors represented by Paul, Weiss, Rifkind, Wharton & Garrison (the "**Paul Weiss Group**") threatened Intelsat with litigation in Luxembourg involving the restructuring of Intelsat S.A. in 2018. The S.A. Special Committee agreed to take or omit to take certain actions in conjunction with the Paul Weiss Group agreeing not to commence litigation. In doing so, the directors would seem to have been acting in their own interest, not in the interest of the stakeholders of Intelsat S.A.

41. Perhaps most telling is the resistance the S.A. Special Committee has shown to communicating information and its reasoning to Intelsat S.A. stakeholders -- both Convertible Noteholders and Interest holders -- and its seeming lack of concern that both sets of stakeholders through ad hoc groups currently oppose the Plan and see no extra value generated from the alleged settlement which the S.A Special Committee is so fiercely defending against those stakeholders.[12]

(c) The Debtors Have Refused to Propose a Plan that Would Allocate Excess Value, if Any, at Intelsat S.A. to Holders of Interests in Intelsat S.A.

42. The resistance to the reasonable, good faith proposal of the Ad Hoc Group of Equity Holders is particularly perturbing not only on its face but in light of the fact that the Convertible

[12] Adding insult to injury and as a further objection to the Second Amended Plan, the proposed settlement in the Second Amended Plan is additionally irksome, discriminatory and punitive to the extent that there were not good faith negotiations with Intelsat S.A. stakeholders and further that the Second Amended Plan provides for payment of tens of millions of dollars of fees and expenses to the ad hoc groups who dictated and support the Second Amended Plan, but no reimbursement to professionals for Intelsat S.A. ad hoc groups, because an acceptable settlement was not negotiated with them.

Noteholders are arguing for value at Intelsat S.A. far exceeding the amount of their General Unsecured Claims.

43. Just looking at the Accelerated Relocation Payments, the Ad Hoc Group of Convertible Noteholders have argued for recovery rights exceeding and satisfying all Convertible Note claims many times over. Thus, they have filed the expert report of Ruth Milkman, the former Chief of Staff of the FCC.

44. Yet, although Convertible Noteholders may argue that they are entitled to full recovery, they and the Debtors refuse to accept or propose a plan consistent with that assertion and that would, if the Convertible Noteholders are even to some degree correct, allow for significant excess value that could flow to Interest holders.

B. The Plan Should Not Release Claims Against Intelsat S.A.'s Directors or Officers.

45. While a chapter 11 plan must meet the requirements of section 1129 in order to be confirmable, section 1123(b) provides that the plan may also include, among other things, "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. §1123(b)(3)(A). But the case law is clear that a debtor's release of claims belonging to it must be a "valid exercise of the debtor's business judgment" and must be "fair, reasonable, and in the best interests of the estate." *In re Retail Grp., Inc.*, No. 20-33113-KRH, 2021 WL 962553, at *15 (Bankr. E.D. Va. Mar. 9, 2021). *See also In re Abeinsa Holding, Inc.*, 562 B.R. 265, 282 (Bankr. D. Del. 2016) (same).

46. In *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), the Court adopted a five factor test for determining the "fairness" of a debtor's release of its own claims. *Id.* at 346. Those five factors are: (i) whether there is an identity of interests between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources; (ii) whether

there is a substantial contribution to the plan by the non-debtor; (iii) the necessity of the release to the reorganization; (iv) the overwhelming acceptance of the plan and release by creditors and interest holders; and (v) the payment of all or substantially all of the claims of the creditors and interest holders under the plan. *Id*. (*citing In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999)).

47. And in *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704 (4th Cir. 2011), the Court, in deciding on the validity of certain third party releases, stated that the factors set forth in *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002) and *In re Railworks Corp.*, 345 B.R. 529 (Bankr. D. Md. 2006) are "instructive and so commend them to a bankruptcy court ***when considering whether to approve nondebtor releases as part of a final plan of reorganization***." *Behrmann*, 663 F.3d at 712 (emphasis supplied). Thus, the *Dow Corning* and *Railworks Corp.* factors arguably apply anytime the proponent of a chapter 11 plan seeks to release any nondebtor, as Intelsat S.A. proposes to do here.

48. The *Dow Corning* factors are: "(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full

and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions." *Dow Corning*, 280 F.3d at 658.

49. The *Railworks Corp.* factors are: "(1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction." *Railworks Corp.*, 345 B.R. at 536.

50. There is no justification for unconditionally releasing claims against Intelsat S.A. directors and officers for several reasons:

(a) The Intelsat S.A. directors and officers do not meet any of the above itemized factors for receiving releases from Intelsat S.A. In particular, they have not paid any consideration for such and Reorganized Intelsat S.A. receives no benefit from such as a standalone entity not connected to the rest of Intelsat's operations being separately reorganized.

(b) The Ad Hoc Group of Equity Holders further submits that (i) Intelsat S.A.'s release of any claims it has against its directors and officers is not "essential" to Intelsat S.A.'s reorganization, (ii) the impacted classes, including the Intelsat S.A. Interest holders, have not voted in favor of the Second Amended Plan – indeed they have been deemed to reject it, and (iii) there is no "mechanism to pay for all, or substantially all, of the class or classes affected by" the Debtor Release.

(c) Such an omnibus release would violate the rights of 10% or more of Intelsat S.A.'s shareholders to bring actions against directors and officers under Luxembourg law, including to the extent that over 10% of Intelsat S.A. equity holders duly opted out of such

releases which they could assert collectively with other equity holders consistent with the Court approved release opt out form.

(d) Such releases would deny the right of Intelsat S.A. to at least take advantage of $100 million or more of D&O insurance, rather than wasting or dissipating such as an available asset.

RESERVATION OF RIGHTS

51. Insofar as a number of conditions to confirmation under section 1129 of the Bankruptcy Code have not occurred or are not due to be proven up yet, the Ad Hoc Group of Equity Holders reserves its right to object to them and other matters.

52. For example, the vote on the Second Amended Plan has not been revealed yet and therefore it is not known whether an impaired class of Intelsat S.A. creditors voted for the Second Amended Plan as required by section 1129(a)(10).

53. The Ad Hoc Group of Equity Holders further notes that section 1129(a)(5)(A) of the Bankruptcy Code requires that:

> (i) the proponent of the Plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
>
> (B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

11 U.S.C. 1129(a)(5)(A).

54. The Debtors have not yet made the disclosure required by section 11129(a)(5)(A). The Ad Hoc Group of Equity Holders reserves its right to object to the Plan to the extent that the

Debtors fail to make such disclosures prior to the hearing on confirmation of the Second Amended Plan.

CONCLUSION

55. For the foregoing reasons, the Ad Hoc Group of Equity Holders respectfully requests that the Court deny confirmation of the Second Amended Plan as it relates to Intelsat S.A.

Dated: November 12, 2021
Chicago, IL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, a copy of the *Objection of Ad Hoc Group of Equity Holders of Intelsat S.A. to Confirmation of Chapter 11 Plan* was filed and served via the Court's Electronic Filing System on all parties receiving such notification.

/s/ Susan Poll Klaessy