UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEUTSCHE TELEKOM AG, Petitioner, - against – AIR INDIA, LTD., Respondent.	:	Case No.: 21 Civ 9155 (PGG)

AIR INDIA'S MEMORANDUM OF LAW
IN OPPOSITION TO PETITIONER'S MOTION FOR EXPEDITED DISCOVERY

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PRELIMINARY STATEMENT

DT's motion to expedite should be denied. Because this is an FSIA case, and Air India is presumptively immune from the burdens of suit (including discovery), DT is not *entitled* to any of the discovery it seeks. Moreover, DT candidly admits that some of that discovery goes to "liability"—including discovery into Air India's assets—and is thus barred as a matter of black-letter Second Circuit law that DT piously cites and then blithely ignores. And the rest, which goes to whether Air India is the "alter ego" of India, the party against whom DT holds an unconfirmed arbitration award, should be denied at this stage for multiple independently sufficient reasons discussed in further detail below.

More fundamentally, however, DT's motion to expedite should be denied because DT utterly fails to show any urgency or need for discovery to proceed other than on the normal schedule and within the normal procedural safeguards applicable to an FSIA case, including providing Air India the opportunity to first file its motion to dismiss on threshold jurisdictional issues. DT points to the impending sale of Air India to a private party, speculating that it will cause loss of evidence. But DT has known about that sale since 2018, *before* DT got its final arbitration award in the first place. DT has never plausibly alleged any connection between India's divestment efforts and DT's Award, and any such allegation would be baseless. And as the sale process continued to move forward, DT continued to sit on its hands. Thus, in June 2021, as it was widely reported that the sale of Air India would close this year, what did DT do? Nothing. It did not run to the D.C. District Court, where it had sued India—the party selling Air India and the award-debtor itself—two months earlier. DT did not run to this Court either, waiting some five months after the sale was reported to file its action here. It was not until November 9 that DT sought any relief whatsoever (expedited or otherwise) in a letter apparently

intended to incite the Court to immediate action with dire claims of lost rights, "mootness," and the need for immediate, pre-judgment attachment to preserve DT's rights.

DT's motion to expedite makes clear this was all a sham. DT told the Court in its letter that it would seek "limited discovery in aid of its motion for attachment." 21 Civ. 9155 (S.D.N.Y.), Dkt. 10 at 2–3. Now? Not so much. After Air India pointed out that pre-judgment attachment is barred as a matter of law under the FSIA (*id.*, Dkt. 18), DT abandons what had been the sole basis for its claims of urgency, burying in a footnote the feeble assurance that someday DT will explain to the Court why its previewed pre-judgment motion is not frivolous, while repeatedly acknowledging the practical impossibility of obtaining *any* attachment remedy before the sale closes. Worse, DT recasts the *expedited* discovery it seeks as needed "so [DT] can take a view as to whether it is appropriate to seek pre-judgment attachment" despite articulating no legal basis to do so under the FSIA. Br. 2. If DT has not yet "taken a view" whether pre-judgment attachment is "appropriate," then it was irresponsible for DT to file a pre-motion letter seeking that relief and spurring the Court (and Air India, a presumptively immune sovereign) to suffer burdensome, expensive, and expedited letter- and brief-writing.

DT similarly jettisons its pre-motion claim that discovery is urgent because the sale "***may*** render the eventual judgment in this case a nullity," and render DT's action moot. 21 Civ. 9155 (S.D.N.Y.), Dkt. 10 at 2. Predictably, DT takes the opposite position now, saying the sale will ***not*** moot its claims. But even if the sale will moot the claims, as Air India contends, that has no bearing on this motion for expedited discovery. The sale will close in December or January, long before DT could hope to obtain post-judgment attachment or any other form of ultimate relief. And that will remain true whether expedition of discovery is granted or not. So the potential of the sale to moot DT's claim is beside the point and creates no urgency here.

Stripped of the alarmist and utterly unsupported claims of urgency in its pre-motion letter, DT throws in with its co-award creditor Devas' theory (absent from DT's pre-motion letter) that expedition is needed to preserve evidence. Given its recent vintage, it should come as no surprise that DT's new claim is based on nothing. Air India has appeared in this action and is prepared to defend itself. It has put in place a litigation hold. The sale requires that Air India's new owner fire no one without cause for at least one year, assuring the availability of witnesses. Courts routinely deny expedition where, as here, the motion rests on baseless speculation.

DT's motion should thus be seen for what it is: An opportunistic and flimsy pretext to stampede this Court into ignoring the FSIA and binding Circuit law that protects sovereigns from pre-answer discovery except where it is "crucial" to determine immunity. There is no equity in DT's application for rushed discovery, there is no need for it, it is not reasonable, and it should be denied.

BACKGROUND

The facts relevant to this motion, and Air India's parallel motion to stay discovery, are set forth in Air India's motion to stay. *See* 21 Civ. 9155, Dkt. 26 at 3–5. We briefly set forth below those most relevant to DT's motion to expedite.

Air India is an Indian company, headquartered in India, with its own separate legal existence under India law. It is also an "an agency or instrumentality of a foreign state"—namely, India—and is therefore a "sovereign" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a). Air India had no involvement in the underlying dispute between DT and India that gave rise to the arbitration award DT obtained against India in 2020 (the "Award"). Rather, Air India is named as a defendant here solely because India owns 100% of Air India's shares.

On April 19, 2021, almost a full year after the Award was rendered, DT filed a petition to confirm the Award against India in the District of Columbia District Court (the "D.D.C."). *See*

21 Civ. 1070 (D.D.C.). India moved to dismiss for lack of subject matter jurisdiction, including because DT failed to adequately allege any exception to India's sovereign immunity as a matter of law. *Id.*, Dkt. 11. India's motions have been briefed and are *sub judice* before Judge Richard Leon as of November 12, 2021.

With its action against India pending in the D.D.C., DT commenced this action on November 4, 2021, also seeking to confirm (that is, have this Court recognize and enforce) the same Award, this time against Air India. Of course, Air India is not a party to the Award, so DT seeks confirmation against Air India on the theory that it is the "alter ego" of India. As DT admits in its motion, it seeks to overcome Air India's presumptive sovereign immunity exclusively on the theory that *India* is subject to an immunity exception, and that the alleged exceptions should be imputed to Air India as an alter ego of India. Whether India is subject to an immunity exception for an action to enforce DT's Award is precisely the issue *sub judice* with Judge Leon in the D.D.C. Promptly upon learning of this lawsuit and a substantially similar lawsuit filed by yet another award-creditor of India (Cairn), Air India implemented a litigation hold.

In 2018—before DT got its Award—India publicly announced that it would divest Air India. *See* Compl. ¶¶ 63, 133 & fns. India's divestment efforts have been well publicized throughout the sales process. In June 2021—after DT got its Award—India announced that the divestment would be completed in 2021: "'Air India is getting disinvested. . . . I want to assure you that it (AI Disinvestment) will happen this year,' the Union Minister told ANI news agency."[1] In response, DT did nothing. It did not seek discovery or expedition in the D.D.C.

[1] *See*, *e.g.*, Livemint.com, *Air India disinvestment will be completed in 2021, says aviation minister* (June 4, 2021), https://tinyurl.com/49s8t23u.

In early October, additional details of the sale of Air India were reported in the press, including the identity of the buyer (an affiliate of Tata Sons, Air India's prior private owner), some of the deal terms (including protections ensuring employees would not be fired for at least a year), and further confirmation that closing was expected in 2021.[2] Again, DT did nothing in response to this news. Finally, a month later, DT brought an action against Air India in this Court and announced on November 9 that it intended to seek expedited discovery "in aid of its motion for [pre-judgment] attachment"—a motion precluded as a matter of law under the FSIA. *See* 21 Civ. 9155 (S.D.N.Y.), Dkts. 10, 18.

ARGUMENT

I. THIS COURT SHOULD DENY ALL DISCOVERY AT THIS TIME

A. The non-jurisdictional discovery DT seeks is barred as a matter of law

At the outset, DT seeks discovery that it concedes is irrelevant to whether Air India an exception to immunity applies. Br. 6–8 (seeking discovery on "dispositive issues, *including* jurisdiction"). That discovery is barred as a matter of law.

DT concedes that Air India is "sovereign" under the FSIA; Air India is thus entitled to a "baseline presumption of immunity from suit," *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 709 (2021), and from the burdens of suit, including discovery, *Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, 2021 WL 1226361, at *7 (S.D.N.Y. Apr. 1, 2021) ("sovereign immunity provides 'immunity not only from liability,' but from the expense of discovery as well"). Unless Air India has waived its immunity, or some other exception applies, this Court lacks subject matter jurisdiction over Air India. *See* 28 U.S.C. § 1330(a). Thus, this

[2] Wall Street Journal, *India's Tata Sons to Buy Air India for $2.4 Billion* (Oct. 8, 2021), https://tinyurl.com/a9utyn9p; Government of India, Ministry of Finance Press Release (Oct. 8, 2021), https://tinyurl.com/hcazwbu; The New Indian Express (Oct. 9, 2021), https://tinyurl.com/e36nn7e6.

Court must make "a threshold determination of immunity" under the FSIA before it can compel Air India to defend the merits of DT's suit, including by participating in merits-related discovery. *See Process & Indus. Devs. v. Fed. Republic of Nigeria*, 962 F.3d 576, 585 (D.C. Cir. 2020). Per the Second Circuit, until jurisdiction has been established, "discovery should be ordered circumspectly and ***only*** to verify allegations of specific facts ***crucial*** to an ***immunity determination***." *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007).[3]

DT acknowledges that this is the rule. *See* Br. 11 ("courts are directed to order discovery . . . 'only to verify allegations of specific facts crucial to an immunity determination.'"). But in the next breath, DT invites this Court to flout the rule by permitting expedited discovery into issues that DT *admits* have no bearing on Air India's immunity. Specifically, DT seeks discovery into issues "including"—*i.e.*, not limited to—"jurisdiction." Br. 6, heading II; *see also id.* at 15 (DT seeks "expedited discovery to establish . . . *liability*"). This concededly non-jurisdictional discovery includes information regarding (1) "the terms and status of Air India's privatization transaction;" and (2) "the status and location of any Air India assets against which the Award can ultimately be enforced." Br. 6–8. These categories of information have nothing to do with "verify[ing] allegations of specific facts crucial to an immunity determination." *EM Ltd.*, 473 F.3d at 486. Indeed, DT does not contend otherwise, but instead admits that the separate "question of alter ego" is "[t]he *sole* fact-based inquiry to determine jurisdiction over Air India." Br. 11. Accordingly, those categories cannot be a subject of discovery until *after* this Court has ruled on Air India's immunity defenses. *See, e.g.*, *3M Co. v. HSBC Bank USA, N.A.*, 2016 WL 8813992, at *1 (S.D.N.Y. Oct. 21, 2016) (Gardephe, J.) (denying merits-related

[3] All emphases in this brief are added unless otherwise noted.

discovery because "resolution of the FSIA's applicability to Plaintiff's proposed discovery [would] be required *before* discovery could be authorized").

DT invites this Court to ignore the Second Circuit by claiming it needs to explore "the nature of" the sale transaction "to test Air India's assertion that the consummation of the transaction will moot the present action." Br. 1–2. Leaving aside that this discovery is categorically barred because it does not bear on Air India's immunity, DT's argument makes no sense. DT is not seeking ***post***-judgment attachment before the sale closes; rightly so, as there is no conceivable way DT could get it. 21 Civ. 9155 (S.D.N.Y.), Dkt. 26 at 7, 13–15. Indeed, DT has even shrunk back from its motion for ***pre***-judgment attachment in the face of clear law barring that remedy against a sovereign absent an explicit waiver that DT still has been unable to conjure up. So the sale will close in December or January without any form of attachment having been entered—and the closing will have whatever legal effect it will have—regardless of whether this motion to expedite is granted or not.

DT's request for expedited discovery to allow it to "take a view whether it is appropriate to seek pre-judgment attachment," in addition to being barred as a matter of law, is hard to swallow. DT told this Court it had a motion for pre-judgment attachment teed up, and sought expedition on the sole ground that discovery would help DT support its motion. In doing so, DT roused its previously-quiescent co-award creditor (Devas), which had apparently been content to await Air India's threshold motion until it saw DT's letter and remarkably discovered that it, too, was on the supposed precipice of disaster unless expedited discovery were immediately granted on a break-neck schedule. *See* 21 Civ. 5601 (S.D.N.Y.), Dkt. 27. And DT's letter—filed well before Air India was even statutorily required to appear in this action—spurred the Court to

action too, resulting in an expedited briefing schedule over the weekend and now the holiday, which this Court must now devote its own resources to deciding.

But as it turns out, DT is not so sure it has a pre-judgment attachment motion after all, and so it asks the Court to order expedited pre-answer discovery against a presumptively-immune sovereign in violation of controlling Second Circuit cases so that DT can "take a view" on that question. DT's loss of nerve may have something to do with Section 1610(d) of the FSIA, which bars pre-judgment attachment as a matter of law in the absence of an explicit waiver that DT has never even alleged. But don't worry, DT also says in a footnote addressed to a different topic that it actually *does* have a basis to show an explicit waiver, although it primly declines to reveal that basis to the Court. Br. 12 n.4. DT's refusal to reveal the supposed basis for its previewed pre-judgment attachment motion speaks volumes.

B. The Court should deny "jurisdictional" discovery in its discretion

DT also seeks purportedly "jurisdictional" discovery into whether Air India is the "alter ego" of India, on the theory that (i) India is allegedly subject to various immunity exceptions, and (ii) Air India is allegedly subject to those same exceptions as an alter ego. Br. 11. The Court should deny this discovery at this time because (1) whether India is subject to an immunity exception, as DT alleges, is already the subject of a fully-briefed motion in DT's first-filed D.D.C. action, and there is no need to jump this duplicative action ahead; (2) DT has not made a prima facie showing in this action that India (let alone Air India) is subject to an immunity exception; and (3) even if DT had made a prima facie showing, Air India has jurisdictional and other threshold defenses that do not require resolution of the disputed alter ego issue, which should be decided before any discovery proceeds.

1. The Court should deny discovery pending a jurisdictional ruling in the D.D.C.

Before Air India's alleged alter ego status becomes even potentially relevant to Air India's immunity from suit—and thus a proper subject for jurisdictional discovery—the Court must first determine whether *India* retains *its* immunity. As DT's own brief shows, the only basis it alleges to overcome Air India's immunity is that *India* is subject to an immunity exception, and that Air India is subject to the same exception. *See* Br. 11 (claiming that "[t]his court has jurisdiction over Air India and this dispute *because* India waived its sovereign immunity"). DT does not, and could not, plausibly allege that any immunity exception applies *independently* to Air India, that had nothing to do with the underlying dispute or resulting Award. It follows that if *India* is immune, then *Air India* is also immune—regardless of whether Air India is an alter ego or not.

But the issue of whether India is immune is already the subject of India's motion to dismiss in the D.D.C., which is *sub judice* before Judge Leon. *See* 21 Civ. 1070 (D.D.C.), Dkts. 11, 17 (setting forth India's immunity-based defenses). Accordingly, this Court cannot reach that predicate issue now without creating a risk of inconsistent rulings and a certainty of wasted judicial and party resources. *See Curtis v. Citibank, N.A.,* 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit"). Rather than permit duplicative litigation in this later-filed action, the Court should stay all proceedings pending Judge Leon's ruling, which will either obviate this action in its entirety (if India is found immune) or narrow the issues this Court must decide (if India is found not to be immune). *Hulley Enterprises Ltd. v. Russian Fed'n,* 211 F. Supp. 3d 269, 276 (D.D.C. 2016) ("A stay may be warranted where the resolution of other litigation will likely 'narrow the issues in the pending cases and assist in the determination of the

questions of law involved.'") (quoting *Landis v. N. Am. Co.,* 57 S.Ct. 163, 164 (1936)); *see generally* 21 Civ. 9155 (S.D.N.Y.), Dkt. 26 at 9–12 (Air India's motion to stay on these grounds).

DT barely mentions its prior-filed action against India in the D.D.C., where it sat on its hands for 7 months without seeking any discovery from India, expedited or not, while the public sale process of Air India (begun in 2018) continued to play out and ultimately concluded. Thus, DT "has not proffered any special circumstances which would warrant maintaining the instant suit" in the face of the first-filed D.D.C. action, where identical issues are pending decision by another federal court. *Howard v. Klynveld Peat Marwick Goerdeler* 977 F. Supp. 654, 664 (S.D.N.Y. 1997), *aff'd*, 173 F.3d at 844 (2d Cir. 1997).

To support its request for expedition, DT argues that the sale of Air India creates urgency, but that is not true. Air India will be sold long before DT could attach any assets here, whether this Court permits "jurisdictional" discovery or not—and no matter how "expedited" that discovery may be. ***Pre***-judgment attachment is barred as a matter of law, and DT offers nothing but the promise of future revelation to suggest otherwise. *Supra* 8. And, as Air India demonstrated in its motion to stay, DT has no hope of obtaining ***post***-judgment attachment before the privatization sale closes this coming December or January. *See* 21 Civ. 9155 (S.D.N.Y.), Dkt. 26 at 7, 13-15. Again, DT does not contend otherwise, and its motion does not indulge any notion that this derivative (and duplicative) FSIA case could be concluded in mere weeks. And because DT does not quixotically seek ultimate relief before the sale concludes (which DT could not obtain, in any event), whether or not the sale will "moot" DT's claims has no bearing on this motion. *Supra* 7.

Shorn of the pretexts that formed the basis for its motion, DT now seeks expedited discovery solely on the theory that sale might render evidence unavailable. Br. 12–13. DT never claimed urgency on this basis in its pre-motion letter; rather, DT apparently discovered this impending "irreparable" harm only after Devas made the same claim in its November 15 letter.

In any event, DT's newfangled fears have no basis in the record. Air India's documents are preserved pursuant to a litigation hold, and a condition of sale requires the new owner to retain all current Air India employees for at least one year following the completion of the sale. *Supra* 3, 4. So if DT defeats India's immunity motion in the D.D.C., and Air India's immunity motion here, it will have an opportunity to preserve witness testimony. Baseless speculation is not nearly enough to warrant jumping this action ahead of the prior-filed and duplicative action pending in the D.D.C. *See also infra* Point II.B (detailing lack of urgency).

2. The Court should deny discovery because DT has not made a prima facie showing of jurisdiction

If the Court does not stay this action in its entirety pending resolution of the first-filed D.D.C. proceeding, it should nevertheless deny jurisdictional discovery because DT has not alleged a prima facie case of jurisdiction. "The Second Circuit has made clear that plaintiffs facing a sovereign immunity challenge have no automatic right to discovery." *Consulting Concepts*, 2021 WL 1226361, at *7. Rather, DT "***must*** 'establish a prima facie case that the district court ha[s] jurisdiction . . . .' ***before*** discovery is granted." *Id.* (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998)); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528 (5th Cir. 1992) (reversing jurisdictional discovery for abuse of discretion).[4]

[4] *See also, e.g.*, *Frontera*, 582 F.3d at 401–02 (affirming denial of jurisdictional discovery where court found no prima facie case for jurisdiction); *Fagan v. Republic of Austria*, 2011 WL 1197677, at *20 (S.D.N.Y. Mar. 25, 2011) (denying "jurisdictional discovery" where plaintiffs failed to make "prima facie" showing).

Here, DT has not "to date, made out a prima facie case for the Court's exercise of jurisdiction over [Air India], because [DT has] not offered facts demonstrating that the presumption of immunity can be overcome." *Consulting Concepts*, 2021 WL 1226361, at *7. Critically, DT's failure to make out a prima facie case here does not require, in the first instance, any decision as to whether Air India is an alter ego or not. Rather, as noted, DT's efforts to overcome Air India's immunity are entirely derivative of its allegations that *India* waived *its* immunity. *Supra* 5−6. DT claims that "[w]hat remains… is the question of establishing that Air India is, in fact, India's alter ego (Br. 18), but that's not true; for the reasons set forth in India's pending motion to dismiss in the D.D.C., DT's allegations are legally insufficient with respect to India. *See* 21 Civ. 1070 (D.D.C.), Dkts. 11, 17. *A fortiori*, those allegations do not make out a prima facie case for jurisdiction over Air India here.

In arguing otherwise, DT not only asks this Court to front-run Judge Leon on the issue of whether India is immune. It also asks the Court to make the determination of whether it has made out a prima facie case without an adequate record. Ordinarily, the question of whether jurisdictional discovery should be permitted is determined *after* the parties have briefed a Rule 12(b)(1) motion to dismiss—as numerous cases reflect. *See, e.g.*, *Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, 2021 WL 1226361, at *1 (S.D.N.Y. Apr. 1, 2021) (denying motion for pre-answer discovery on sovereign immunity issues and granting defendants' motion to dismiss); *Robinson v. Government of Malaysia,* 269 F.3d 133 (2d Cir. 2001) (collecting cases where prima facie jurisdiction determined on fully-briefed Rule 12(b)(1) motions). And for good reason: Only after the parties have briefed the legal sufficiency of the complaint's allegations, and proffered any factual support already on hand, could a court possibility determine what factual disputes, if any, are "crucial" to determining the Court's jurisdiction. *EM Ltd.*, 473 F.3d

at 486; *see, e.g.*, *Gualandi v. Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004) (jurisdictional discovery appropriately denied post-briefing on Rule 12(b)(1) motion where "appellants were unable to demonstrate that additional discovery was needed to decide the jurisdictional issue"). Indeed, DT cites no case where the plaintiff was found to have met its prima facie burden *except* in the context of an order denying a fully-briefed motion to dismiss under Rule 12(b)(1).

This case illustrates the wisdom of the prevailing approach: Absent a stay of all proceedings, Air India intends to move to dismiss on the grounds, among others, that DT has failed to sufficiently allege an immunity exception as to India (the issue pending in the D.D.C.), and that even if it *had* sufficiently alleged an exception, that exception does not extend to DT's declaratory judgment claim here. *See* 21 Civ. 9155 (S.D.N.Y.), Dkts. 18, & 26 at 18–20. This Court should resolve that motion—and the attendant question whether any "crucial" jurisdictional facts are in dispute—after due deliberation, on the basis of full briefing, and with the benefit of the parties' arguments. It should not assume, let alone predetermine, the (antecedent) question of the legal sufficiency of DT's "waiver" allegations against either India or Air India by unnecessarily jumping ahead to the (subsequent) alter ego question. Indeed, to do so—particularly in the context of a rushed motion to expedite discovery—would be contrary to the Second Circuit's clear instruction to minimize the burdens of discovery on sovereigns and permit discovery "***only***" as to "***crucial***" issues of jurisdiction. *EM Ltd.*, 473 F. 3d at 486.

3. Regardless, the Court should address Air India's threshold defenses before permitting any discovery into its alleged "alter ego" status

Regardless, the Court need not rule on the prima facie sufficiency of DT's jurisdictional allegations to deny jurisdictional discovery now, because even if DT had alleged a prima facie case, the Court can—and under controlling cases, should—decide Air India's previewed motion to dismiss before permitting any "jurisdictional" discovery to proceed.

A prima facie showing is necessary to get jurisdictional discovery, but it does not create an entitlement to it. *See Funk v. Belneftkhim*, 861 F.3d 354 at 366 ("A district court is 'typically *within its discretion*' to order jurisdictional discovery where a plaintiff has 'made out a prima facie case for jurisdiction.'"). Here, the Court should decline to order immediate discovery in its discretion because, as further detailed in Air India's motion to stay discovery, Air India intends to move to dismiss on several grounds, none of which turns on whether or not Air India is an alter ego. Dkt. 26 at 18–20. This Court should decide these defenses before it permits any "jurisdictional" discovery into Air India's alter ego status.

"If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first," because "[i]t would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal." *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998), *superseded by statute on other grounds*. Thus, the D.C. Circuit—which oversees the court where venue for sovereign claims is presumptively appropriate, 28 U.S.C. § 1391(f)(4)—holds that "jurisdictional discovery . . . should not be authorized *at all* if the defendant raises either a different jurisdictional or an 'other non-merits ground," "the resolution of which would impose a lesser burden upon the defendant." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Thus, "where a colorable claim of immunity is made, a trial court should—at least if the defendant so argues—normally consider other potentially dispositive jurisdictional defenses *before* allowing FSIA discovery[.]" *In re Papandreou*, 139 F.3d at 254; *see also* Dkt. 33 at 20.

Here, because decision on Air India's other defenses has the potential to obviate all jurisdictional discovery, the Court should deny discovery until the motion is decided. If the

motion is denied, the Court will then be in a position to determine whether any facts "crucial" to jurisdiction are disputed, *EM Ltd*., 473 F. 3d at 486, and if so, what appropriately-targeted jurisdictional discovery may be warranted. *See, e.g.*, *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1333 (2d Cir. 1990) (plaintiff would only be entitled to jurisdictional discovery on remand if the district court resolved antecedent legal issues adversely to the sovereign); *Funk*, 861 F.3d at 367 (citing with approval district court's refusal to permit jurisdictional discovery on "commercial activity" exception until another threshold immunity issues had been resolved).

II. IF THE COURT ORDERS DISCOVERY, IT SHOULD NOT BE EXPEDITED

To the extent the Court allows any discovery to proceed at this time, it should deny expedition. "Courts in this circuit apply a 'flexible standard of reasonableness and good cause' in evaluating motions for expedited discovery." *3M Co.*, 2016 WL 8813992, at *1. This approach may be informed (but is not controlled) by the four-factor test established in *Notaro v. Koch*, which considers whether the movant has shown: "(1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted." 95 F.R.D. 403, 405 (S.D.N.Y.1982).

A. Expedition would trample Air India's protections as a sovereign

This Court has recognized that discovery against foreign sovereigns presents unique barriers to proceeding on an expedited timeline, and those same barriers are present here. In *3M Co. v. HSBC Bank USA, N.A.*, this Court rejected a request for a two-week discovery schedule against Ziraat Bank, a Turkish instrumentality, because "service of [those] requests . . . present[ed] issues under the Foreign Sovereign Immunities Act." 2016 WL 8813992, at *1. Because Ziraat Bank had raised colorable claims of FSIA immunity, "resolution of the FSIA's

applicability to [the] proposed discovery w[ould] be required before the discovery could be authorized," and such briefing would "significantly delay the resolution of [plaintiff's underlying] motion." *Id.* Thus, the court concluded that a two-week discovery schedule was unreasonable when "[b]riefing and resolution of the underlying legal issues alone would likely consume a number of months, not including any appeal." *Id.* at *2.

Here, the Court should not order any jurisdictional discovery—expedited or otherwise—until it has had an appropriate opportunity to assess whether any jurisdictional facts need to be resolved. *Supra* Point I.B. As in *3M*, resolving Air India's challenges to the sufficiency of DT's jurisdictional allegations (which would also require resolving India's challenges, unless the Court allows Judge Leon to rule first), will "likely consume a number of months." 2016 WL 8813992, at *2. Air India by statute has until early January to file its opening brief on jurisdiction (28 U.S.C. § 1608(d)), which means there will not be a decision on immunity until late January, at the earliest—more than a month after the conclusion of DT's proposed discovery schedule. Br. 20 n.7. Closing expedited discovery one week before the sale, as DT proposes, is simply not feasible given the threshold issues that still must be determined.

DT cites *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co*. for the uncontroversial proposition that a court should resolve FSIA immunity issues "as near to the outset of the case as is reasonably possible," 137 S. Ct. 1312, 1316–17 (2017), but that case cuts the opposite way here. The Supreme Court gave its admonition in the context of approving of an FSIA dismissal **without** jurisdictional discovery where the parties had stipulated to the relevant facts, and the question before it was thus "purely a legal one [that] can be resolved at the outset of the case." *Id.* at 1324. Here, by contrast, DT asks this Court to order jurisdictional discovery despite the existence of Air India's still-unresolved "purely legal" challenges that could promptly

dispose of the case. *Id.* at 1316, 1324 (discovery may be appropriate "where jurisdictional questions turn upon further factual development," and "[i]f a decision about the matter requires resolution of factual disputes"). Following the Supreme Court's direction here thus requires that the Court address the potentially dispositive legal challenges before embarking on potentially unnecessary "jurisdictional" discovery, rather than the other way around.

B. DT identifies no urgency warranting expedition

DT nevertheless asks the Court to go off script, ignore the FSIA and Second Circuit law, and treat Air India like it would any other (non-sovereign) defendant. But it provides the Court no reason it should do those things (even assuming it could). Instead, it points to the impending sale of Air India to a private party. But again, that sale creates no urgency at all, let alone urgency that would justify wasteful duplicative proceedings here, ignoring the ordinary sequence of defenses in FSIA cases, and imposing the rigors of expedited discovery on a sovereign defendant that remains presumptively immune from the burdens of suit. *See Klipsch Grp., Inc. v. Big Box Store Ltd.*, 2012 WL 4901407, at *4 (S.D.N.Y. Oct. 11, 2012) (no expedited discovery where "little evidence" existed "that any additional injury to Plaintiff w[ould] result . . . absent expedited discovery"), *supplemented*, 2012 WL 5265727 (S.D.N.Y. Oct. 24, 2012).

DT tries to blame *Air India* for the purportedly "urgency" of its motion, on the grounds that India decided to divest Air India and that Air India took the position that the sale will moot DT's claims. DT should consult a calendar. India has been trying to divest Air India since 2018, and it was reported almost six months ago that the sale "will close this year." *Supra* at 1. If that's when India "created urgency," DT should account for why it then sat on its hands for six months. Moreover, Air India had not uttered the word "moot" when DT launched its irresponsible quest for expedited discovery "in aid of" its legally-prohibited attachment motion on November 9. Rather, *DT* claimed mootness to justify its baseless motion—only to abandon

that position when faced with the practical and legal reality that it could never hope to get any attachment before the sale closes. *Supra* at 2.[5]

Now, with its claims of urgency exposed as baseless, DT is left with rank speculation—which it borrowed post-hoc from Devas—that evidence relevant to jurisdiction will somehow be lost when the sale closes. Expedited discovery to preserve evidence is permitted only when a substantial, non-speculative showing has been made that evidence is likely to disappear. *See, e.g.*, *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 395 (D.D.C. 2014) (court allowed expedited deposition of witness in his late 90's because he "[could not] be long for this earth"), *aff'd in part, rev'd in part*, 812 F.3d 127 (D.C. Cir. 2016); *Stern v. Cosby*, 246 F.R.D. 453, 457–58 (S.D.N.Y. 2007) (expedited discovery in light of apparent witness tampering and bribery after commencement of action). By contrast, such discovery is appropriately denied where the loss is speculative. *Best v. AT & T, Inc.*, 2014 WL 1923149, at *2 (S.D. Ohio May 14, 2014) (as here, "[t]here [wa]s no evidence to support plaintiff's speculative assertion that the defendants will destroy the requested discovery"); *Complaint of Akropan Shipping Corp. v. Nat'l Enter. Sonatrach*, 1990 WL 16097, at *2, *3 (S.D.N.Y. Feb. 14, 1990) (no jurisdictional discovery on speculative theory that witness in dangerous profession was "liable to die suddenly").

Here, DT offers nothing but baseless speculation that evidence may be lost. As noted, Air India's records are subject to a litigation hold and its employees cannot be terminated (without cause) for at least a year after the sale closes. *Supra* at 4, 5. Air India has appeared in the action and stands prepared to defend itself. DT is adequately protected. *See Synopsys, Inc. v.*

[5] Because DT no longer seeks attachment before the sale concludes, the cases it cites are inapposite. *In re Keurig Green Mountain Single-serve Coffee Antitrust Litig.*, 2014 WL 12959675, at *3 (S.D.N.Y. July 23, 2014) (expedition in connection with motion for preliminary relief); *New York v. Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 392 (E.D.N.Y. 2013) (same); *N. Atl. Operating Co. v. Evergreen Distributors, LLC*, 293 F.R.D. 363, 368 (E.D.N.Y. 2013) (same).

AzurEngine Techs., Inc., 401 F. Supp. 3d 1068, 1076 (S.D. Cal. 2019) (denying expedited discovery in part because litigation hold obviated any risk of spoliation); *compare Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (all but one of the defendants had not appeared).

Finally, DT's claim of urgency is "clearly belied by [its] own dilatory behavior." *Gidatex, S.r.L. v. Campaniello Imports, Ltd*., 13 F. Supp. 2d 417 (S.D.N.Y. 1998). DT has known that India has been trying to divest Air India since 2018. If DT thought the sale would affect its access to discovery relevant to its claims against Air India, it could have filed this action earlier than three weeks ago. (Indeed, on DT's theory, it also could have sought the evidence from India in the D.D.C., where its action has been pending since April.) *See Pearson Educ., Inc. v. Doe*, 2012 WL 4832816, at *4 (S.D.N.Y. Oct. 1, 2012) (denying expedition where movant had not exhausted less burdensome means). But DT never did any of that. *See Major, Lindsey & Africa, LLC v. Mahn*, 2010 WL 3959609, at *7 (S.D.N.Y. Sept. 7, 2010) (no expedited discovery where delay belied claimed urgency); *Park West Radiology v. Carecore Nat. LLC*, 240 F.R.D. 109, 112 (S.D.N.Y. 2007) (same). Rather, after waiting until the closing was weeks away, DT ginned up a claim of urgency in an apparent effort to leap-frog its competing award-creditors. DT's only "urgency" was to race Devas to the trough, and Air India should not be made to suffer an absurd discovery schedule in response to made-up claims of urgency.

C. Expedition would substantially prejudice Air India

The Court should also deny expedition because it would unduly prejudice Air India. As in *3M*, "determining the availability of" documents relating to "transactions that took place in [India] between [Indian] entities" would be time consuming and burdensome. 2016 WL 8813992, at *2. Thus, courts often acknowledge that discovery against a foreign instrumentality concerning actions abroad creates practical burdens that impede the fact-gathering process. For

example, the Fifth Circuit reversed as an abuse of discretion the grant of jurisdictional discovery as to a foreign instrumentality where the alter ego question "[could not] be proved without massive, intrusive discovery in Mexico on highly sensitive domestic issues." *Arriba*, 962 F.2d at 534, 536–37; *see also In re Arb. between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 500 (2d Cir. 2002) (affirming dismissal for *forum non-conveniens* where alter ego issue required "extensive discovery" outside the U.S., including witnesses "beyond the subpoena power" and "pertinent documents" in foreign language).

Here, Air India would face the same challenges. DT's requests regarding Air India's relationship to India relate to actions "that took place in [India] between [Indian] entities." *3M*, 2016 WL 8813992, at *2. Responsive documents reside in India on Indian servers. Gathering such documents would require extensive communication with Air India officials, who are native speakers of languages other than English, located thousands of miles away in a time zone 10.5 hours ahead of New York. *See Monegasque De Reassurances S.A.M.*, 311 F.3d at 500 (noting difficulties of obtaining discovery from foreign sovereign). Given these inefficiencies, contrary to DT's characterization, "the requested information" is *not* "easy to locate without a time-consuming document collection process." Br. 13. Rather, "it is highly unlikely that [DT] will be able to complete the contemplated discovery on the 'expedited' schedule that it suggests." *3M*, 2016 WL 8813992, at *2.

DT's claim that its requested discovery "is not at all prejudicial because it will address facts that Air India has itself placed in issue" is wrong. Br. 14. No factual development is needed to resolve Air India's threshold defenses. And if India is entitled to immunity as a matter of law, then Air India is too, and there will have been no need for any discovery at all.

CONCLUSION

For these reasons, the court should deny DT's motion for expedited discovery.

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