UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEUTSCHE TELEKOM AG, Petitioner, v. AIR INDIA, LTD, Respondent.	Civil Action No. 21-cv-09155 (PGG)

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO STAY DISCOVERY

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Petitioner Deutsche Telekom AG ("Deutsche Telekom") respectfully submits this memorandum in opposition to Respondent Air India, Ltd.'s ("Air India") motion to stay discovery.

PRELIMINARY STATEMENT

In its motion for expedited discovery (ECF Nos. 23, 24), Deutsche Telekom explained the urgency of these proceedings in light of Air India's imminent privatization and the risk of significant prejudice to Deutsche Telekom if immediate discovery is not permitted. Deutsche Telekom therefore requested that discovery go forward to enable immediate inquiry into the interrelated issues of (*a*) Air India's status as an alter ego of India—a question that will resolve the coterminous questions of jurisdiction and liability in this matter—(*b*) the terms of Air India's privatization transaction (urgently needed to assess Air India's claims of imminent mootness and alter ego, as well as to avoid prejudice to Deutsche Telekom); and (*c*) information about Air India's U.S. assets so as to enable Deutsche Telekom to seek attachment (and eventual execution) to preserve its rights.

In the face of that urgency, Air India instead seeks to put this entire proceeding on hold by staying discovery. Air India argues for a stay on two grounds. Neither has merit.

First, Air India incorrectly insists that Deutsche Telekom has failed to make a *prima facie* showing that this Court has jurisdiction over Air India under the Foreign Sovereign Immunity Act ("FSIA"). On that basis, Air India demands that no discovery on the question of Air India's alter ego be allowed to go forward until the question of Air India's sovereign immunity is wholly resolved, but without the benefit of discovery to which Deutsche Telekom is entitled.

This is not a persuasive argument. Deutsche Telekom has more than made out a *prima facie* case that Air India is not immune from suit, most obviously because—as the highest court

in Switzerland already confirmed (with preclusive effect)—India agreed to final and binding arbitration with Deutsche Telekom. And with respect to Air India itself, Deutsche Telekom has alleged in detail that India's ownership and control over Air India are so extensive that Air India is an alter ego of India for the purposes of extending both jurisdiction and liability. In fact, Deutsche Telekom has not only alleged facts demonstrating that Air India is an alter ego but it had also supported these allegations with citations to exhibits as well as facts subject to judicial notice that leave no doubt it will be able to prove these allegations. If Deutsche Telekom's Complaint does not suffice to make out a "*prima facie* showing" of jurisdiction, no complaint ever could.

Second, Air India incorrectly argues that this case should be stayed because it is allegedly "duplicative" of Deutsche Telekom's pending petition to enforce the Award in the District Court of the District of Columbia (*Deutsche Telekom AG v. Republic of India*, 21-cv-01070 (hereinafter, "D.D.C. Action")). This argument should be rejected for at least three reasons: *First*, it is completely appropriate for a judgement creditor to commence parallel actions in any and all venues where a debtor may have assets and to pursue all such actions simultaneously until the judgment has been paid. *Second,* the present action has been brought against a different defendant and raises substantially different issues than the D.D.C. Action, *i.e.*, whether Air India is an alter ego of India. Finally, even if this action were identical to the D.D.C. Action, the duplicative actions standard that Air India relies on is a wholly discretionary doctrine. Based on the facts presented here, there is no reason for this Court to exercise its discretion to stay the present case in favor of the D.D.C. Action. On the contrary, for the reasons stated in Deutsche Telekom's motion for expedited discovery, Deutsche Telekom will suffer prejudice if the action does not move forward quickly.

It would be particularly inappropriate to stay the present action because the alter ego question, which is unique to this case and goes to jurisdiction, should be resolved as a matter of urgency. The Supreme Court has stated that the issue of jurisdiction over a sovereign should be resolved "as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1316–17 (2017). That need is only compounded by the risk of prejudice to Deutsche Telekom if it is unable to obtain timely discovery. *See* ECF No. 24 ("Pet. Br."), at 4-6, 12-14; *see also id.* at 13 (explaining the possibility of probative information being rendered unavailable once Air India is privatized). Air India, on the other hand, points to no concrete injury that it will suffer from even limited discovery.

Instead, Air India cynically responds that Deutsche Telekom will not "really" suffer from harm because the procedural challenges associated with attachment mean that no relief will be afforded to Deutsche Telekom for years, while at the same arguing that Deutsche Telekom will *never* be able to recover once the imminent privatization is completed. *See* ECF No. 26 ("Resp. Br."), at 13-14. Thus, Air India suggests that Deutsche Telekom (among other creditors) and this Court should throw up their hands altogether. Even if India were correct about the hurdles facing Deutsche Telekom (which it is not), Air India's reasoning cuts precisely the other way. This case should not be stayed and should instead rapidly proceed forward so that Deutsche Telekom can be made whole and India can be kept to its promises.

ARGUMENT

I. Air India's Precarious Sovereign Immunity Defense Cannot Shield It From Discovery Here.

"A district court is 'typically within its discretion' to order jurisdictional discovery where a plaintiff has 'made out a prima facie case for jurisdiction.'" *Funk v. Belneftekhim*, 861 F.3d

354, 366 (2d Cir. 2017) (quoting *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 401 (2d Cir. 2009)); *see also Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, No. 19-cv-11787 (AKH), 2021 WL 1226361, at *7 (S.D.N.Y. Apr. 1, 2021) (to make out a *prima* facie case of jurisdiction, plaintiff must "offer[] facts demonstrating that the presumption of immunity can be overcome."). "The Second Circuit has instructed 'that generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue'" and that once a plaintiff shows "a reasonable basis for assuming jurisdiction" they are then entitled to "other discovery." *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp 2d 765, 783 (S.D.N.Y. 2005) (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998)); *see also Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir.1990) (same). Air India demands it be exempted from any discovery in this proceeding—jurisdictional or otherwise—because it has asserted a claim of sovereign immunity. Air India does not dispute that a plaintiff is generally entitled to seek jurisdictional discovery from a foreign sovereign.

In the face of this authorization to seek jurisdictional discovery from even a presumptively sovereign defendant, Air India glibly claims that "this Court cannot find that DT has alleged a prima facie case for jurisdiction . . ." Resp. Br. at 2. Air India continues by arguing that this Court should wait to resolve Air India's previewed motion to dismiss, and not permit discovery "at least until a finding is made that DT has alleged a prima facie case for jurisdiction over Air India." *Id*. at 17. Air India's reasoning is an illogical misapplication of the standard for discovery. What Air India is saying, in effect, is that this court must first *rule* on issues of sovereign immunity before deciding whether a *prima facie* case for jurisdiction has been made out. Air India has it exactly backwards; Air India's approach would completely defeat the purpose of jurisdictional discovery, which is to establish facts critical to the threshold

determination of jurisdiction, including immunity, *before* the case can be dismissed. *See*, *e.g.*, *Millicom Intern. Cellular v. Republic of Costa Rica*, No. 96-cv-315 (RMU), 1997 WL 527340, at *4 (D.D.C. Aug. 18, 1997) ("plaintiffs who are facing a motion to dismiss on the basis of foreign sovereign immunity have a right to conduct preliminary discovery, as long as it is reasonably calculated to elucidate whether an FSIA jurisdictional exception applies"). The standard for *prima facie* jurisdiction must look to the facts and allegations offered at the pleading stage, not after Air India has had the opportunity to dismiss but before Deutsche Telekom has taken any discovery. *See U.S. Fid. and Guar. Co. v. Braspetro Oil Services Co.*, No. 97-cv-6124 (JGK), 1999 WL 307666, at *8 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F3d 94 (2d Cir. 1999) ("[w]here a determination of the existence or absence of a principal/agent or alter ego relationship also determines immunity from suit, the parties must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues.").[1]

Properly viewed as a matter of pleadings, Air India cannot seriously contest that Deutsche Telekom has "offered facts demonstrating that the presumption of immunity can be overcome," *Consulting Concepts*, 2021 WL 1226361, at *7, and "shown a reasonable basis for assuming jurisdiction" *Rafidain*, 150 F.3d at 177.

To establish jurisdiction over Air India, Deutsche Telekom must demonstrate: (*a*) that India is subject to one of the FSIA's sovereign immunity exceptions (*see* 28 U.S.C. § 1605(a));

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1. *See also In re Terrorist Attacks on September 11, 2001*, 298 F. Supp. 3d 631, 640 (S.D.N.Y. 2018) (Because Plaintiffs' allegations, *accepted as true for purposes of resolving the instant motions*, narrowly articulate a reasonable basis for this Court to assume jurisdiction under JASTA over Plaintiffs' claims against Saudi Arabia, this Court will exercise its discretion to allow Plaintiffs limited jurisdictional discovery.") (emphasis added).

and (*b*) that Air India is an alter ego of India such that India's waivers of immunity are also imputed to Air India. Deutsche Telekom has more than plead a reasonable basis to satisfy both of these showings, and has made out a *prima facie* case that it is entitled to jurisdictional discovery.

A. Air India Does Not Enjoy Sovereign Immunity.

Air India's assertion of sovereign immunity in this case is contingent on whether India itself comes within one of the exceptions to foreign sovereign immunity in relation to its dispute with Deutsche Telekom. Unfortunately for Air India, India has lost the protections of sovereign immunity under no less than three well-recognized exceptions to immunity set forth by the FISA.

First, both India and the U.S. are parties to the Convention on the Recognition and Enforcement of Arbitral Awards, Oct. 6, 1958, 330 U.N.T.S. 3 ("New York Convention") and the Award was rendered pursuant to the New York Convention. ECF No. 1 ("Compl."), ¶ 18. The Second Circuit has recognized that under 28 U.S.C. § 1605(a)(1), a sovereign that joins the New York Convention implicitly waives immunity from the enforcement of awards in other Convention jurisdictions. *See Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) ("by becoming a party to [New York Convention], a foreign sovereign implicitly waived its immunity because the terms of the [New York Convention] provided, *inter alia,* that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'") (internal quotations omitted); *see also Blue Ridge Investments, LLC v. Republic of Argentina*, 902 F. Supp. 2d 367, 373 (S.D.N.Y. 2012) (Gardephe, J) ("Implied waiver is commonly found in cases involving the enforcement of arbitration awards, however, so long as the award is rendered pursuant to a convention to which the foreign state is a signatory, and the convention provides for recognition and enforcement of the award in contracting states."); *Seetransport Wiking*

Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 582 (2d Cir. 1993) (finding waiver where petitioner "seeks recognition and enforcement of the I.C.C. arbitral award pursuant to the Convention, which expressly permits recognition and enforcement actions in Contracting States."); *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (finding waiver exception where sovereign is a party to the New York Convention and the confirmation action is in another state that is a party to the Convention).

Second, Air India is not immune because this case falls squarely under the FSIA's arbitration exception. Under § 1605(a)(6) of the FSIA

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6). It is uncontroverted that the Award is governed by a "treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," specifically, the New York Convention. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993) (finding that the New York Convention was the type of treaty contemplated by Congress under § 1605(a)(6)'s arbitration exception). Moreover, under the terms of a bilateral investment treaty between India and Germany (the "Treaty"), India agreed to refer any investment disputes with investors like Deutsche Telekom to final and binding arbitration in accordance with the United Nations Commission on International Trade Rules on Arbitration. Compl. ¶ 28. The existence of a binding arbitration agreement between India and Deutsche Telekom has been confirmed in two separate adjudications—once by the panel of arbitrators themselves, and a second time by the Swiss Federal Supreme Court, the

highest court of Switzerland, which upheld the arbitrators' determination. Compl. ¶¶ 34-35; *see also* ECF Nos. 6-3 and 6-4.

Undeterred, India continues to maintain in the D.D.C. Action that India did not extend to Deutsche Telekom any treaty protections or agree to arbitrate. Not only are those claims meritless, they are now barred by the doctrine of *res judicata*. *See*, *e.g.*, *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783, 794 (N.D. Tex. 2003) (giving preclusive effect to a decision by the Swiss Federal Supreme Court that refused to set aside an arbitration award at the request of a losing party). India thus falls squarely under the immunity exception of FSIA § 1605(a)(6). *See also Blue Ridge*, 735 F.3d at 85 (finding a waiver of immunity under § 1605(a)(6) because an arbitration award had been rendered under the ICSID Convention); *Mobile Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 116 (2d Cir. 2017) (quoting 28 U.S.C. § 1605(a)(6)) ("[T]he FSIA explicitly contemplates the exercise of federal court jurisdiction over actions to enforce international arbitral awards against foreign sovereigns under the exemption from immunity provided by Section 1605(a)(6).").

Third, and finally, India is not immune under 28 U.S.C. § 1605(a)(2), which applies when an "action is based upon a commercial activity carried on in the United States by the foreign state" or "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Here, a large part of the shareholding in Devas—the Indian entity in which Deutsche Telekom invested—was held by venture capital and private equity funds in the U.S. The underlying project to commercialize spectrum for space-based broadband also originated with discussions in the U.S. with Indian authorities. Finally, the property on which Deutsche Telekom seeks to enforce the award—Air India's assets—form part of India's commercial activity carried on in the United States.

B. The Complaint Has Made A Prima Facie Showing that Air India is an Alter Ego of India.

Deutsche Telekom has made a *prima facie* showing that Air India is India's alter ego. The relevant test to establish Air India's status as an alter ego is to examine whether it is "so extensively controlled by its owner that a relationship of principal and agent is created," or when giving effect to the ostensible separate legal status of the state and its instrumentality would work a "fraud or injustice." *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*") 462 U.S. 611, 629 (1983) (internal citations omitted).

To determine "extensive" control, the Second Circuit will look to whether the sovereign: "(1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state." *EM Ltd. v. Banco Central De La Republica Argentina*, 800 F.3d 78, 91 (2d Cir. 2015); *see also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018) (discussing factors to consider under an alter ego analysis).[2]

2. In addition, courts in this District consider: "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law." *Esso Exploration and Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, 397 F.Supp.3d 323, 334-35 (S.D.N.Y. 2019) (citing *In re 650 Fifth Ave. & Related Props*., 881 F.Supp.2d 533, 549-50 (S.D.N.Y. 2012)).

In nearly a hundred pages, and even more exhibits, Deutsche Telekom's Complaint comprehensively shows that the relationship between Air India and India satisfies the test imposed by *Bancec*. Compl., ¶¶ 48-129; *see also* Pet. Br., at 17-20.

Since it nationalized Air India, India has treated Air India as its alter ego rather than a separate and independent company. Air India's Articles of Association make clear that the Indian government can appoint India's Board of Directors and set the terms of their pay, as well as issue directives and require Air India to seek the government's approval for certain aspects of daily operations. Compl. ¶¶ 53, 61-62. India moreover exercises its control over Air India: India ensures that Air India's leadership is politically friendly, notwithstanding officials' lack of experience in the management of airlines, and manages Air India policy and day-to-day operations on matters large and small, including politically-oriented aircraft purchases. *Id*. ¶¶ 65-76, 87-92, 99-104, ; *see also*, *e.g.*, *id*., ¶ 86 (discussing India's Ministry of Civil Aviation demanding that first class passengers be offered ayurvedic massage in-flight). India also interferes with the planning of routes and pilot pay, among other things. *See e.g.*, *Id*. ¶¶ 62, 101. Due to its politicized mismanagement of the airline, India props up Air India with loans, capital contributions, and guarantees while disregarding corporate formalities. *Id*. ¶¶ 106-112. The government treats Air India as its own private airline, commandeering its planes and property as its own when needed. *Id*. ¶¶ 103, 121-122. Even the Indian Supreme Court, among other Indian courts, has ruled that Air India is to be considered the "state" under Indian law for constitutional purposes. *Id*. ¶¶ 126-129.

These allegations, which are well supported by citations to judicially noticeable facts and evidentiary materials, more than satisfy the threshold of a *prima facie* showing or reasonable basis for jurisdiction, and thus satisfy the required showing to allow discovery to go forward. *See*, *e.g.*,

Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 256–57 (S.D.N.Y. 1993) (allowing discovery to go forward against sovereign and refusing to dismiss alter ego claims, because "plaintiff has done more than make conclusory allegations that the New York Foundation is the Iranian Foundation's agent. He has offered an array of documents that, taken together, provide support for" an alter ego claim.").

* * *

Deutsche Telekom has established a *prima facie* case for jurisdiction over Air India with respect to both India's underlying sovereign immunity (or lack thereof), and Air India's alter ego status. Indeed, based on the strength of the underlying facts—including that a competent court has already established that India agreed to arbitrate with Deutsche Telekom, and the comprehensive documentary evidence supporting Deutsche Telekom's alter ego claims—Air India's purported sovereign immunity defense is left hanging by a thread.

II. There Is No Need To Wait for the District of D.C.'s Decision.

Air India also suggests that a stay of discovery is appropriate because the D.D.C. Action is considering enforcement of the Award against India and is therefore allegedly duplicative of this proceeding.

In the first place, there is nothing improper in Deutsche Telekom's having brought a second enforcement action before this Court, in parallel with the D.D.C. Action. When a debtor refuses to make good on a final and binding arbitration award, it must expect that the creditor will pursue recognition and enforcement simultaneously in *any and all venues where the debtor may have assets.* There is no rule that requires a judgment creditor or holder of an arbitral award to exhaust the enforcement possibilities in one jurisdiction before seeking enforcement anywhere else. In *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, the Second Circuit noted that "recognition and enforcement occur together, as one process, under the New York Convention,"

thereby negating the need for a petitioner to "confirm their foreign arbitral award before they would be allowed to enforce it," including against an alter ego. 850 F.3d 58, 72-74 (2d Cir. 2017). This position is consistent with the New York Convention, which "necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003). Furthermore, the New York Convention provides limited grounds for a stay in the event an award is not yet binding or subject to set-aside—a standard Air India cannot show because the Award has been declared enforceable by the Swiss court of primary jurisdiction already. *See* New York Convention, Article V(1)(e); *see also Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) ("a court may adjourn enforcement proceedings *only on the grounds explicitly set forth in Article V(1)(e)* of the Convention.") (emphasis added).

Air India is also wrong to assert that the present action is duplicative of the pending enforcement action before Judge Leon in the D.D.C. Action. The differences between this proceeding and the D.D.C. Action are apparent from the face of the complaints and the relief requested. *Howard v. Kylnveld Peat Marwich Goerdeler*, 977 F.Supp. 654, 664 (S.D.N.Y. 1997) (quoting *The Haytian Republic*, 154 U.S. 118, 124 (1894)) (for an action to be duplicative there must be "the same relief prayed for"). The present case makes different factual allegations against a different defendant and seeks to execute against different assets than the D.D.C. Action. The crux of the present action is to enforce an arbitral award against Air India *as an alter ego of India*, a claim that is entirely absent from the D.D.C. Action. The current action seeks declaratory relief, which is an entirely separate cause of action from a petition to enforce an arbitral award. *Aurelius Capital Master Ltd. v. Republic of Argentina*, No. 09-cv-8757 (TPG), 2010 WL 103868, at *2 (S.D.N.Y. Jan. 13, 2010) ("There exists a separate valid cause of action

against Defendants to have BCRA declared an alter ego of Argentina . . . , which would render BCRA jointly and severally liable for the Final Judgments and the judgments expected to be awarded in the [pending enforcement actions].”). Deutsche Telekom’s alter ego claim will *not* be resolved in the D.D.C. Action. *Katz v. Geradi*, *Jr.*, 655 F.3d 1212, at *1219 (10th Cir. 2011) (the “proper question” when considering whether an action is duplicative is “whether, assuming the first suit was already final, the second suit would be precluded under res judicata analysis.”).

Further, the facts required to establish alter ego liability are entirely distinct from the facts needed for a petition to enforce an award. *Howard*, 977 F.Supp. 654 at 664 (quoting *The Haytian Republic*, 154 U.S. at 124) (for an action to be duplicative, the relief prayed for “must be founded upon the same facts”). Indeed, the D.D.C. Action has thus far involved *no* fact discovery, nor is it likely to, consistent with the summary nature of award enforcement proceedings. *See Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 587 (2d Cir. 2016) (internal quotation marks omitted) (“confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court”). The very fact that Deutsche Telekom is compelled now to seek expedited discovery in the current matter speaks to the distinctive nature of the two actions.

Air India also argues that if the petition for enforcement was to be disregarded as duplicative by this Court, the remaining declaratory judgment action could also be disposed of for lack of justiciability. Resp. Br. at 18. But here too, Air India is incorrect. *See Kensington Int’l Ltd. v. Republic of Congo*, No. 03-cv-4578 (LAP), 2007 WL 1032269 (S.D.N.Y. Mar. 30, 2007) (rejecting challenge to alter ego declaratory action because plaintiff “specifies the precise declaratory relief it is seeking” and thus “the controversy between the parties is not speculative or hypothetical”); *see also EM Ltd. v Argentina*, 08-cv-7974 (S.D.N.Y. 2010) (allowing alter ego

declaratory judgment claim to proceed despite pending claims against the sovereign); *EM Ltd. v. Argentina*, 06-cv-7792 (S.D.N.Y. 2006) (same). Even if Petitioner were to withdraw its petition to enforce, the current dispute over alter ego liability would remain, as would the need for expedited discovery and the potential attachment. This further underscores the non-duplicative nature of this action. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) ("[T]he true test of the sufficiency of a plea of 'other suit pending' in another forum [i]s the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit.").

And even if Air India were correct on the duplicative nature of the two actions, *quod non*, the current action should not be stayed. There is no obligation for this Court to stay a duplicative case. This Court is charged with the authority to administer its docket and to determine what is the most efficient and effective way to resolve the dispute between the parties. *In re World Trade Center Disaster Site Litigation*, 722 F.3d 483, 487 (2d Cir. 2013) (*quoting Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)) ("It is well established that district courts possess the 'inherent power' and responsibility to manage their dockets 'so as to achieve the orderly and expeditious disposition of cases.'"). "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." *Curtis*, 226 F.3d at 138 (emphasis added). The Second Circuit does not apply a "rigid test" but rather grants courts discretion to determine the course of a particular matter, taking into consideration the "equities of the situation." *Id.*

The alter ego question can be resolved separate and apart from the underlying enforceability of the Award (and India's sovereign immunity) at issue in D.D.C. Action. Given the very high burden to block enforcement of an arbitral award under the New York Convention,

it is highly probable, in fact, that Deutsche Telekom will prevail in the D.D.C. Action, such that alter ego will need to be resolved in this proceeding.[3] There is thus no reason to stay discovery relevant to the alter ego question.

III. Immediate Discovery Would Not Be Futile and Would Protect Deutsche Telekom from Prejudice.

Air India's motion for a stay highlights the extent to which a stay would inequitably impact Deutsche Telekom. To warrant a stay, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *see also Howard*, 977 F.Supp.654 at 665 ("in determining whether dismissal based on duplicativeness is appropriate, courts may consider special factors counselling for or against the exercise of jurisdiction") (internal quotation marks omitted). Air India has utterly failed to make out any case of hardship or inequity.

By contrast, Air India lays bare for this Court precisely the harm that will be caused to Deutsche Telekom if the current enforcement action cannot proceed in a timely manner. *See* Resp. Br., at 13-14; *see also* Pet. Br., at 4-6. Air India's position is that pre-judgment attachment is not at all available to Deutsche Telekom. Resp. Br., at 13. That remains a point of dispute between the parties and will require briefing, including on the issue of whether India explicitly

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3 See, e.g., Am. S.S. Owners Mut. Protec. and Indem. Ass'n, Inc. v. Lafarge N.A., Inc., 474 F. Supp. 2d 474, 491 (S.D.N.Y. 2007), aff'd sub nom. New York Marine and Gen. Ins. Co. v. Lafarge N.A., Inc., 599 F.3d 102 (2d Cir. 2010) (denying stay and reasoning, "if I were to grant a stay, the American Club would have to litigate the remaining issue of legal expenses incurred by Lafarge in this forum upon the conclusion of the direct action lawsuits. That means that this question will be reopened regardless of what happens there, and, due to the unavoidable delays inherent in such a large proceeding, the American Club may have to wait years for a decision. This is precisely the sort of substantial prejudice to a party that the law seeks to avoid").

waived the protections of pre-judgment attachment. 28 U.S.C. § 1610(d). Air India then casually offers that "DT has no hope of obtaining a ***post***-judgment attachment before the privatization sale closes this coming December or January," Resp Br. at 13, at which point, Air India insists that this case will be "mooted" by the privatization. In so doing, Air India essentially admits that time is of the essence and that any delay risks harming Deutsche Telekom. Deutsche Telekom of course disputes Air India's notion that Air India can unilaterally extinguish its liability to Deutsche Telekom through privatization. *See* Pet. Br. at 5-6.

India's conclusions of "hopelessness" are also based on its self-serving timelines, which make reference to the need for prolonged future "merits" discovery, even if jurisdictional discovery takes place now. Resp. Br., at 14. But there *is* no true merits discovery needed here. Aside from Deutsche Telekom's need for some discovery to identify assets for attachment, the remaining discovery needed in this case is jurisdictional in that it goes to the question of alter ego, and will thus resolve both questions of Air India's sovereign immunity *and* its liability for the Award. *See Helmerich*, 137 S. Ct. at 1319 ("[M]erits and jurisdiction will sometimes come intertwined. . . If so, the court must still answer the jurisdictional question. If to do so, it must inevitably decide some, or all, of the merits issues, so be it.").

In any event, the upshot of Air India's position is that, because Deutsche Telekom is urgently facing a potentially prejudicial obstacle to its recovery (*i.e.*, the privatization), this Court should tailor these proceedings to ensure that this prejudice is realized by staying discovery altogether. This would be the opposite of fair: at the very minimum, immediate discovery is needed here, particularly on the terms of the privatization transaction and the issue of alter ego so that Deutsche Telekom can obtain critical discovery that may no longer be available after the privatization goes through. *See also* Pet. Br. at 13.

Dated: November 26, 2021

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