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 SUPPORT OF PETITIONER'S MOTION FOR EXPEDITED DISCOVERY

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Petitioner Deutsche Telekom AG ("Deutsche Telekom") respectfully submits this memorandum in support of its motion pursuant to Federal Rule of Civil Procedure 26(d) requesting leave to seek expedited discovery from Respondent Air India, Ltd. ("Air India").

PRELIMINARY STATEMENT

India owes Deutsche Telekom over USD 132 million pursuant to a final and binding arbitration award. India has steadfastly refused to pay Deutsche Telekom, among other investors in a scuttled project to provide space-based internet and communications services in India. Deutsche Telekom has therefore been compelled to seek enforcement of the award in various jurisdictions in an effort to find assets against which it can execute the award and be made whole for India's misconduct.

Air India is India's national air carrier. As set forth in detail in Deutsche Telekom's Petition to Confirm Arbitration Award and Complaint for Declaratory Judgment (the "Complaint"), Air India is an alter ego of India. As a result of that alter ego relationship, Deutsche Telekom is entitled to seek recovery from Air India for the liabilities of India itself.

Air India and India have created urgency by announcing the imminent privatization of Air India while taking the position in these proceedings that the consummation of this transaction will moot the present action and prevent Deutsche Telekom from seeking any further remedies herein. By the present motion, Deutsche Telekom asks the Court to authorize it to take expedited discovery regarding three discrete issues that should be addressed as a matter of urgency. *First*, Deutsche Telekom seeks discovery probative of Air India's status as an alter ego of India. That discovery is central to expeditiously resolving threshold questions of immunity, as well as Air India's liability and Deutsche Telekom's ability to enforce against Air India's assets. *Second*, and perhaps most urgently, Deutsche Telekom seeks disclosure of the purchase agreement as well as any amendments thereto or side agreements necessary to understand the nature of this

imminent transaction. Such disclosure is necessary in order to test Air India's assertion that the consummation of the transaction will moot the present action. *Third*, insofar as Air India is taking the position that consummation of the transaction will cut off Deutsche Telekom's rights to execute against assets of Air India, Deutsche Telekom requires disclosure of what executable assets Air India has in the United States, so it can take a view as to whether it is appropriate to seek pre-judgment attachment of such assets in order to protect its right to recover.

STATEMENT OF FACTS

This action arises out of India's February 2011 decision to unilaterally annul a major commercial agreement between Antrix Corporation Ltd. ("Antrix"), an Indian state-owned company, and Devas Multimedia Private Limited ("Devas"), an Indian company in which Deutsche Telekom is an indirect minority shareholder. Until India's improper and unilateral annulment, the purpose of the agreement was the provision of satellite-based wireless broadband and audio-visual services across India.

Relying on the protections and dispute resolution provisions of a bilateral investment treaty between the Republic of India and the Federal Republic of Germany (the "Treaty"), Deutsche Telekom initiated arbitration before a panel of three distinguished arbitrators under the auspices of the Permanent Court of Arbitration, sitting in Geneva, Switzerland. On December 13, 2017, the arbitrators issued an Interim Award finding that the dispute between Deutsche Telekom and India was arbitrable, and that India had breached the Treaty protections owed to Deutsche Telekom. India attempted to set aside the Interim Award before the Swiss Federal Supreme Court—the highest court in Switzerland—but its arguments were rejected, with the Swiss court upholding the arbitrators' determinations.

On May 27, 2020, Deutsche Telekom successfully obtained a final and binding arbitral award (the "Award") against India in the amount of USD 132 million, plus interest that continues

to accrue. India did not seek to challenge the Final Award in Switzerland and the time for doing so has expired. Compl. ¶ 47. As a result, the Civil Court of the Republic and Canton of Geneva issued a Certificate of Enforceability on August 20, 2020. ECF 6-5.[1] Although the Treaty required India to "abide by and comply with the terms of [the arbitral tribunal's] award," ECF No. 6-3 at 34, India has refused to make payment to Deutsche Telekom and is actively seeking to avoid its obligations under the Award.

On April 19, 2021, Petitioner brought a petition to recognize and confirm the Award against India in the United States District Court for the District of Columbia. *Deutsche Telekom v. India*, No. 1:21-cv-01070 (D.D.C.).

While that action was pending, on October 8, 2021, India announced that it has reached an agreement to privatize Air India by selling the company to a wholly owned subsidiary of Tata Sons, a holding company for the Indian conglomerate Tata Group. The transaction is expected to be finalized by the end of this year. ECF No. 6-17.

In an attempt to protect its interests under the Award, less than a month later on November 4, 2021, Deutsche Telekom commenced the current action, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), for recognition and enforcement of the Award against Air India as the alter-ego of India and for declaratory relief based on Air India's status as an alter ego of India. Air India's operations in the United States are headquartered in New York. Compl. ¶ 1.

In subsequent submissions to the Court, Deutsche Telekom notified the Court of its intention to seek expedited discovery and attachment of Air India assets in order to secure its

1. An English language translation of the Geneva Court's Certificate of Enforceability is available at ECF 1-9 in *Deutsche Telekom v. The Republic of India*, Case No. 1:23-cv-01070.

ability to eventually execute on the Award. Air India, on the other hand, informed the Court of its intent to seek a stay of discovery until the resolution of a planned motion to dismiss.

This dispute should now be seen against the background of India's ongoing evasion of its obligations under the Devas-Antrix agreement and resulting arbitral awards against other investors and shareholders. In 2011, Devas initiated a commercial arbitration against Antrix before the International Chamber of Commerce ("ICC"). The ICC tribunal issued a final award ordering Antrix, a company wholly owned by India, to pay USD 562.5 million plus interest to Devas. ECF No. 6-3, ¶ 102. In 2020, the District Court for the Western District of Washington issued an order confirming that award, and Antrix has appealed the district court's order and refuses to pay the judgment. *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, Case No. 18-cv-01360 (W.D. Wash.), ECF No. 49; ECF No. 133, at 2. Antrix, together with India, has since taken steps to liquidate and to take control over Devas such that Devas shareholders have been forced to intervene in the enforcement action in that case to protect Devas' interests in collecting on its award. *Id*. Meanwhile, Devas shareholders (the "Devas Shareholders") in the related action of *CC/Devas (Mauritius) Ltd. Et. A. v. Air India, Ltd.*, 21-cv-05601, have likewise filed suit before this Court in an effort to establish alter ego liability over Air India.

ARGUMENT

I. Air India Has Created An Urgent Situation.

The urgency in these proceedings—including the need for expedited discovery—is a result of Air India's imminent privatization. Air India has indicated that its privatization transaction is "expected to close by year-end or early next-year." *CC/Devas*, ECF No. 23. Moreover, in the *CC/Devas* proceeding where the Devas Shareholders are likewise seeking to enforce an arbitral award against Air India as India's alter ego, Air India has told this Court that once the privatization is complete, Air India "intends to move this Court to allow it to

supplement its bases for dismissal of this action with the additional ground that the sale renders the Devas Shareholders' premature claims moot." *Id*. Air India went on to state:

> Once Air India is under private ownership, the Devas Shareholders no longer will have any purported basis for attaching Air India's assets on an alter ego theory. This is because the property that is subject to attachment and execution must be property in the United States of a foreign state . . . at the time the writ of attachment or execution is issued.

Id. at 1-2 (internal quotation marks and citation omitted). Air India will doubtless take the same position with respect to Deutsche Telekom's claims as well. What is more, Air India also asks this Court to stay any discovery until after the privatization transaction closes, at which point Deutsche Telekom will (according to Air India's reasoning) be wholly deprived of a remedy. In other words, Air India baldly admits that its intention for this proceeding—consistent with India's ongoing refusal to pay the final and binding Award—is to stall until Deutsche Telekom's claim is rendered "moot," regardless of the underlying merits of Deutsche Telekom's current alter ego claim and the enforceability of the Award. In the same breath, India argues that Deutsche Telekom's claim is nevertheless currently "premature."

Air India's position on the transaction's impact is ultimately incorrect as a matter of law. India owes a debt to Deutsche Telekom *now*; Air India is India's alter ego *now*. Air India is therefore currently liable to Deutsche Telekom. Air India cannot simply nullify its accrued liability because its ultimate ownership is transferred to a potentially *bona fide* third party, thereby destroying the original alter ego relationship. *See First Nat. City Bank v Banco Para El Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 633 (1983) ("Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the

requirements of international law simply by creating juridical entities whenever the need arises."); *Kensington Intern. Ltd. v. Republic of Congo*, No. 03-CV-4578, 2007 WL 1032269, at *13 (S.D.N.Y. Mar. 30, 2007) (applying *Bancec* and rejecting Congo's defense that an alter ego entity did not waive immunity because it was created after the contract which gave rise to Congo's liability); *cf. Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 60 (2d Cir. 2021) (scrutinizing evidence of alter ego status at the time a creditor initiated a renewal action to enforce an unpaid judgment arising out of an arbitration award against Moldova); *see also Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (under New York law, alter ego inquiry takes place "at the time of the transaction complained of").

Air India cannot have it both ways here. If Air India's argument regarding imminent mootness is to be given any credit at all, it means that there is at least some risk that Deutsche Telekom is weeks away from being wholly deprived of the ability to enforce the Award against an Indian alter ego with assets engaged in significant commercial operations in the United States. That risk alone, together with the Supreme Court's exhortation that courts decide issues of sovereign immunity as soon as practicable, requires speedy resolution. (Part III.A., below). And even aside from the precise question of *when* alter ego must be determined, Air India's privatization puts into jeopardy just *how* alter ego can be determined. Air India is certain to be in possession of non-public information highly probative to the determination of alter ego, among other narrow issues (*i.e.*, the status of potentially attachable assets), that could become altogether unavailable upon the company's privatization and transfer to new owners. (Part III.B, below).

II. Petitioner Seeks Narrow Discovery On Dispositive Issues, Including Jurisdiction.

Before addressing the need for expedited discovery, it is useful to describe the substance of the discovery being sought in the first place. Deutsche Telekom is not on a fishing expedition

or even seeking the type of multi-month merits discovery permitted by the Federal Rules of Civil Procedure. Since Air India's underlying liability stems from a final and binding arbitral award, not subject to appeal or re-litigation on the merits, discovery in this case is necessarily limited. Deutsche Telekom intends to seek targeted discovery on three narrow, interrelated issues, all of which are critical to the disposition of this matter.

First, Deutsche Telekom seeks discovery of facts probative of Air India's status as an alter ego of India. Deutsche Telekom's pleadings in this matter have already marshalled considerable evidence demonstrating Air India's alter ego status (Compl. ¶¶ 48-129), enabling Deutsche Telekom to formulate specific discovery requests (*e.g.*, relevant internal communications with the Ministry of Civil Aviation) with the aim of demonstrating that the Indian government carries out effective (and politicized) control over Air India's operations. As discussed further below, evidence of alter ego is not only dispositive of Air India's ultimate liability to Deutsche Telekom and Deutsche Telekom's ability to obtain pre-judgment attachment, but is also necessary to confirm that this Court has jurisdiction.

Second, Deutsche Telekom intends to seek specific discovery sufficient to understand the terms and status of Air India's privatization transaction. Those requests would cover the precise timing of the closing, any changes to the transaction terms in the coming weeks, and whether there is any relationship between the timing of the transaction and India's debts to Deutsche Telekom and others. Deutsche Telekom will also need to understand whether the terms of the deal leave the government of India with any ongoing control or other rights over Air India, the terms of the reported indemnity clause offered to Air India's purchaser (ECF No. 6-15), as well as if there are any plans for the disposition or transfer of Air India's assets located in the United States once there is a change in ownership. Indeed, by claiming that the privatization will

obliterate creditors' ability to seek alter ego liability against Air India, Air India itself has directly made the terms of the transactions relevant to an evaluation of alter ego. Given the imminent timing of that transaction, it also renders the request for transaction documents perhaps the most urgent of Deutsche Telekom's defenses, in that it would enable Deutsche Telekom (and this Court) to more readily establish the nature and potential impact of the privatization on the issues in this case. *Third*, and relatedly, Deutsche Telekom intends to seek discovery more generally into the status and location of any Air India assets against which the Award can ultimately be enforced. This information is necessary to protect Deutsche Telekom's interests in this action and eventually obtain attachment to secure Deutsche Telekom's ability to recover.

III. There is Good Cause for Ordering Expedited Discovery.

In light of the urgency presented by these proceedings, and the narrow and targeted discovery sought by Deutsche Telekom, there is "good cause"—and it is otherwise "reasonable"—to grant Deutsche Telekom the expedited discovery it seeks.

Federal Rule of Civil Procedure 26(d) provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26(d)(1). Courts in this Circuit apply a "good cause" or "reasonableness" standard in determining whether to grant expedited discovery. *In re Keurig Green Mtn. Single-serve Coffee Antitrust Litig.*, No. 14-CV-4242, 2014 WL 12959675, at *1 (S.D.N.Y. July 23, 2014). Courts may find "good cause" when "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *N. Atl. Operating Co., Inc. v. Evergreen Distributors, LLC*, 293 F.R.D. 363, 367 (E.D.N.Y. 2013) (citation omitted). The "reasonableness" prong "requires the party seeking the discovery to prove that the requests are reasonable under the circumstances." *Id; see also*, *e.g. Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y.

2005) (finding "reasonableness and good cause" for expedited discovery (and attachment) "in consideration of the fact that defendants are foreign individuals and corporations who have both incentive and capacity to hide their assets, there is considerable urgency to plaintiff's need to seek information about the location of defendants' possible assets within the United States.").

While disfavored, some courts have also looked to factors articulated in *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982), in deciding whether to grant expedited discovery, namely: "(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." *Notaro v. Koch*, 95 F.R.D. at 405. The recent trend in this Circuit has been to consider the *Notaro* factors without finding them dispositive. *L.T. v. Howard A. Zucker*, 2021 WL 4775215, at *12 (N.D.N.Y. Oct. 13, 2021) ("[W]hile the Court has not found a likelihood of irreparable harm, this fact is not dispositive."); *N. Atl. Operating Co., Inc. v. Evergreen Distributors, LLC*, 293 F.R.D. at 368 (finding that "the third and fourth factors of the *Notaro* test are relevant to a finding of good cause).[2]

2. "In recent years . . . courts in this District have shifted away from the *Notaro* test and moved towards a more flexible 'good cause' or 'reasonableness' standard." *In re Keurig Green Mtn. Single-serve Coffee Antitrust Litig.*, No. 14-CV-4242, 2014 WL 12959675, at *1 (S.D.N.Y. July 23, 2014). *See also Directory Assistants, Inc. v. Doe*, No. 3:10-CV-548 CFD, 2010 WL 10128887, at *1 n.1 (D. Conn. Apr. 28, 2010) ("The recent trend [in this Circuit] . . . rejects the *Notaro* approach, instead applying the more flexible 'good cause' standard."); *Stern v. Cosby*, 246 FRD 453, 457 (S.D.N.Y. 2007) ("the more flexible approach is the better approach"); *Oneida Group Inc. v. Steelite Intl. U.S.A. Inc.*, 122 U.S.P.Q.2d 1694, 2017 WL 1954805, at *23 (E.D.N.Y. May 10, 2017) ("the more flexible approach is proper"). Courts reject the *Notaro* test because it "is similar to the analysis necessary to justify the far more dramatic decision to grant a preliminary injunction," *Ayyash v. Bank Al-Madina*, 233 F.R.D. at 326, and "have even suggested that strict adherence to the *Notaro* factors is inconsistent with FRCP 1 and 26(d)." *Zucker*, 2021 WL 4775215, at *12.

Here, Deutsche Telekom's request for expedited discovery more than satisfies the standards of "good cause" and "reasonableness." Deutsche Telekom can demonstrate "reasonableness" and "good cause" because expedited discovery will (*a*) assist this Court in more rapidly resolving the question of Air India's alter ego status, thereby also resolving the question of Air India's sovereign immunity and underlying liability (Part A, below); and (*b*) ensure that Deutsche Telekom is able to obtain appropriate discovery before Air India's privatization risks depriving it of probative information altogether (Part B, below). The discovery sought by Deutsche Telekom further meets the standard of "reasonableness" because it is limited in scope to narrow and outcome-determinative issues needed to simultaneously establish jurisdiction and liability, while protecting Deutsche Telekom from prejudice.

Expedited discovery additionally outweighs any prejudice to Air India (Part C, below), and in any case satisfies the *Notaro* factors, particularly given Air India's likelihood of prevailing on alter ego liability (Part D, below).

A. Expedited Discovery Will Permit the Court to Resolve Immunity At the "Outset of the Case".

Air India intends to file a motion to dismiss on jurisdictional grounds and argues that "Air India is immune from suit under the [Foreign Sovereign Immunities Act]," 28 U.S.C. § 1604 ("FSIA"). ECF No. 18 at 3-4. The Supreme Court has instructed that

> [W]here jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes. But, consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision about immunity 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); *see also Verlinden B.V. v. C. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983)

("At the threshold of every action in a District Court against a foreign state . . . the court must satisfy itself that one of the exceptions [to foreign sovereign immunity] applies.").

An assertion of sovereign immunity does not automatically insulate Air India from this Court's power to order discovery. Mindful of the protections afforded by sovereign immunity, courts are directed to order discovery "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). Air India does not dispute this Court's ability to take limited jurisdictional discovery notwithstanding the protections of the FSIA. ECF No. 18 at 3-4. Before discovery is granted, "plaintiffs must 'establish a prima facie case that the district court has jurisdiction over the defendant' before discovery is granted." *Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, No. 19-CV-11787, 2021 WL 1226361, at *7 (S.D.N.Y. Apr. 1, 2021).

Deutsche Telekom has made out a *prima facie* case for jurisdiction. *See* Part D, below (discussing Deutsche Telekom's likelihood of prevailing on alter ego liability against Air India). This court has jurisdiction over Air India and this dispute because India waived its sovereign immunity vis-à-vis Deutsche Telekom, most plainly by both entering into the New York Convention and by agreeing to arbitrate with investors like Deutsche Telekom.[3]

The sole fact-based inquiry to determine jurisdiction over Air India—as well as Air India's underlying liability to Deutsche Telekom—is thus the question of alter ego. The most

3. As outlined in the Complaint, this Court has subject matter jurisdiction over this proceeding because it is an action to enforce an international arbitration award under the New York Convention and is therefore "deemed to arise out of the laws and treaties of the United States." 9 U.S.C. § 203. Compl., ¶ 16. This Court also has subject matter jurisdiction over this action because it is brought against a foreign state within the meaning of 28 U.S.C. § 1603 and, for the reasons explained below (*see* Part D, below), Air India does not enjoy immunity from jurisdiction under the FSIA. 28 U.S.C. § 1330(a).

probative evidence on that question is in the non-public custody of Air India and only obtainable through discovery. Expedited discovery on the threshold jurisdictional question of alter ego is therefore necessary here to carry out the Supreme Court's instructions to resolve such issues "as near to the outset of the case as is reasonably possible." *Helmerich*, 137 S. Ct. at 1317.

Furthermore, if Air India is correct (which it is not) that the privatization transaction will altogether moot Deutsche Telekom's ability to obtain relief from Air India, expedited determination of the alter ego question is necessary to avoid irreparable harm to Deutsche Telekom. If Deutsche Telekom is to have any hope of using highly probative discovery from Air India to prove alter ego prior to the privatization of Air India, Deutsche Telekom will require expedited discovery. And even if alter ego discovery cannot be completed in advance of the privatization transaction itself, targeted discovery on the question of alter ego may nevertheless be supportive of Deutsche Telekom's likelihood of success on the merits of its alter ego allegations so as to support pre-judgment attachment of Air India's assets under New York law. *See* N.Y. CPLR § 6212.[4]

B. Without Expedited Discovery Deutsche Telekom May Be Unable to Obtain Relevant Information Currently Within Air India's Control.

In order to fully understand India's role in the management of Air India—critical to the question of alter ego—Deutsche Telekom needs to obtain through discovery an understanding of Air India's current operations. The same is true of Deutsche Telekom's need to understand the

4. Documents concerning India's assets are also relevant to Deutsche Telekom's assertion that Air India has waived immunity under the "commercial activity" exception of the FSIA. 28 U.S.C. § 1605(a)(2). Air India meanwhile challenges Deutsche Telekom's ability to altogether obtain pre-judgment attachment due to the protections of the FSIA, 28 U.S.C. § 1610(d). To the extent Air India is afforded any such protections from pre-judgment attachment, Deutsche Telekom will explain that India—Air India's alter ego—has explicitly waived such protections when this Court schedules Deutsche Telekom's motion for attachment.

location and status of any Air India assets that may be subject to attachment and execution in satisfaction of the Award.

With the sale of Air India to a Tata Sons' subsidiary imminent, there is a real danger that Deutsche Telekom will be unable to obtain a satisfactory "snap-shot" of Air India through discovery once the privatization is completed. The privatization will not only change the landscape of Air India's internal management, but Air India's new owners may lack knowledge of document location, inventory, and legacy operations. There may be a change in key leadership and personnel, including current managers who may leave the jurisdiction altogether, such that crucial information that could be gained through discovery now—including through a Rule 30(b)(6) deposition—will be lost after the sale. Given the well-documented unprofitability of Air India's U.S. operations, Compl. ¶¶ 62-64, Air India's new private owners may also be inclined to liquidate material portions of its U.S. business or otherwise remove or repatriate assets currently deployed for commercial use in the U.S.

The only way to mitigate the risk of this loss in institutional knowledge and Deutsche Telekom's ability to obtain probative discovery (if not eventually execute upon assets themselves), is therefore to permit expedited discovery to begin in earnest prior to the closing of the transaction.

C. The Need for Expedited Discovery Outweighs Any Prejudice to Air India.

Deutsche Telekom's requested discovery will not prejudice Air India. Here, Deutsche Telekom seeks limited discovery relevant to establishing alter ego liability and protecting its interests in enforcing the Award. Given the narrowness of the relevant issues, the requested information should be easy to locate without a time-consuming document collection process. *See New York v. Mtn. Tobacco Co.*, 953 F. Supp. 2d 385, 392 (E.D.N.Y. 2013) (granting expedited discovery where the requests were "narrowly tailored"). Nor can Air India complain

about being compelled to provide jurisdictional discovery (from which sovereign entities are not strictly exempt) on an expedited basis, while having itself taken the position that its imminent privatization will put its assets permanently out of the reach of India's creditors. As an international carrier, Air India is also engaged in sophisticated commercial operations in the U.S; and complying with U.S. discovery does not therefore present the same burdens as might be the case if discovery were sought from a purely political or diplomatic state organ that has no presence here.

Furthermore, to the extent that Air India intends to move to dismiss this case on sovereign immunity grounds, Deutsche Telekom's need for discovery on alter ego issues is not at all prejudicial because it will address facts that Air India has itself placed in issue. To the contrary, Air India's sovereign immunity arguments are likely to turn on factual matters that Deutsche Telekom would not be able to dispute without necessary discovery, causing prejudice to Deutsche Telekom. Deutsche Telekom should be entitled to test, through discovery, the factual assertions Air India is likely to make in seeking to dispute its alter ego status.

Indeed, if Deutsche Telekom is forced to wait to obtain the requested information, the potential prejudice to Deutsche Telekom is significant and may be irreparable. Without expedited discovery, Deutsche Telekom is unlikely to obtain access to dispositive information supporting alter ego jurisdiction and liability at a moment when time is of the essence, especially if Air India's claims of imminent mootness are to be believed.

D. Expedited Discovery Also Satisfies the *Notaro* Factors, Including Deutsche Telekom's High Probability of Success.

Deutsche Telekom's request for expedited discovery also satisfies the four *Notaro* factors.[5] For the reasons discussed above, if Deutsche Telekom is not permitted expedited discovery to establish alter ego jurisdiction and liability, it suffers a risk of irreparable injury, while expedited discovery is a necessary condition to, at a minimum, obtain necessary information (if not relief altogether) before Air India's privatization is completed. The relative balance of hardships—the inconvenience to Air India of some discovery versus the risk that Deutsche Telekom altogether lose the ability to recover against Air India—also strongly counsels in favor of expedited discovery.

The remaining *Notaro* factor asks the Court to evaluate whether Deutsche Telekom has "some probability of success on the merits." 95 F.R.D. at 405. Bearing in mind that the questions of alter ego will resolve both questions of Air India's sovereign immunity (jurisdiction) *and* its liability for the Award against India (merits), Deutsche Telekom can readily show a high likelihood of success on the merits.

1. The Underlying Award Is Subject to Recognition and Enforcement.

There can be little doubt that the underlying arbitral Award rendered against India is final, binding and subject to recognition and enforcement by U.S. courts. The New York Convention applies to the Award, and provides for limited grounds on which a U.S. court may

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5. While the *Notaro* test and its factors are no longer the accepted standard for evaluating expedited discovery requests, as discussed above, it is nevertheless illustrative of the need for expedited discovery here. The four factors are: "(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." *Notaro v. Koch*, 95 F.R.D. at 405.

refuse to confirm an Award. 9 U.S.C. §§ 202, 207. *Zurich American Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 587 (2d Cir. 2016) (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) ("'To avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation,' arbitral awards 'are subject to very **limited** review.'") (emphasis in original)). A "party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies. Art. V(1); *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir.1998). The burden is a heavy one, as 'the showing required to avoid summary confirmance is high.'" *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005) (internal citation omitted).

Neither India or Air India can establish any grounds for the non-recognition and enforcement of the Award. Tellingly, in the D.C. District Court, India has rehashed arguments that Deutsche Telekom was neither an "investor" nor held an "investment" in India under the bilateral investment Treaty in which India offered to arbitrate with German investors. *Deutsche Telekom v. India*, No. 1:21-cv-01070 (D.D.C.), ECF No. 11-1, at 24-42. These arguments have already been made by India and rejected not only by a distinguished panel of arbitrators, but also by the Swiss Federal Supreme Court, rendering them foreclosed under the doctrine of *res judicata*. *Id*., ECF No. 14, at 3-22.

India has also repackaged its defenses under the New York Convention as arguments that it remains entitled to sovereign immunity because it did not actually agree to arbitrate with Deutsche Telekom and thereby did not waive sovereign immunity. *Id*., ECF No. 11-1, at 23-25, 42-45. None of these arguments have merit. *First*, Air India's alter ego, India, is a party to the New York Convention which the Second Circuit has found to constitute a waiver of immunity in

proceedings to confirm the Award. 28 U.S.C. § 1605(a)(1); *Blue Ridge Inv. L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (holding that a foreign sovereign implicitly waived its immunity "by becoming a party to the [New York] Convention"). *Second*, Air India is not immune because this is an action to "confirm an award made pursuant to . . . an agreement to arbitrate" and 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," *i.e.*, the New York Convention. 28 U.S.C. § 1605(a)(6). As discussed above, India's attempt to evade its agreements to arbitrate have already been rejected in two previous forums and there is no reason to believe its attempts to escape the Award in U.S. courts will fare any better.[6] *See also* Compl, ¶ 18 (discussing third basis of non-immunity under 28 U.S.C. § 1605(a)(2), since a significant portion of the shareholding in Devas is held by venture capital and private equity funds in the United States).

2. Air India Is Liable For The Award As An Alter Ego of India.

The Second Circuit has held that an arbitration award can be enforced against a third party under an alter-ego theory of liability. *CBF Indústria de Gusa S/A v. AMCI Holdings Inc*., 850 F.3d 58 (2nd Cir. 2017). That same authority makes clear that Deutsche Telekom may seek enforcement of an arbitral award against "a third party not named in an arbitral award . . . under a

6. India's conflation of Article V defenses (*i.e.*, whether its dispute with Deutsche Telekom was itself subject to arbitration), into FSIA defenses (*i.e.*, whether India agreed to waive sovereign immunity by agreeing to arbitrate) has also been repeatedly found improper by the D.C. Circuit. *See LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021) ("the arbitrability of a dispute is not a jurisdictional question under the FSIA. . . We construe Moldova's arbitrability argument as a defense under Article V(1)(c) of the Convention."); *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205-206 (D.C. Cir. 2015) ("Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention . . . The dispute over whether [Chevron's activities] were 'investments' for purposes of the treaty is properly considered as part of review under the New York Convention.").

theory of alter-ego liability" and, thus, that Deutsche Telekom is not required to first confirm the Award against India before seeking to enforce the Award against its alter ego, Air India. *Id.*, at 74-75. Air India's assertion that this "dispute is not ripe because the underlying award . . . has not been confirmed into an enforceable U.S. judgment," ECF No. 20, at 2, is thus contrary to the law of this Circuit.

What remains then is the question of establishing that Air India is, in fact, India's alter ego. Here too, Deutsche Telekom's probability of success is clear.

An instrumentality of a sovereign is an "alter-ego" and, therefore, can be held liable for actions of the sovereign when the instrumentality 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).

Determining whether an instrumentality is "extensively controlled" by the sovereign is "fact-intensive," and the Second Circuit looks 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).

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)).

Deutsche Telekom is likely to succeed on its claim that Respondent is an alter ego of India and is thus liable for the Award. Deutsche Telekom's allegations are not speculative but supported by ample evidence, including over 100 exhibits. As described in greater detail in the Complaint, India dominates Air India's activities to such an extent that its relationship is clearly one of principal-agent. The pertinent facts are summarized in the Complaint as follows:

> a) From its nationalization after WWII, Air India has been treated as an alter ego of India and not as a separate company with independent personality.
>
> b) India deprives Air India of independence from close political control through its economic ownership and Air India's Articles of Association. Under Air India's Articles of Association, India has the authority to appoint the Chairman and Directors of Air India's Board of Directors and set their remuneration. India may also issue directives to the company and government approval is also required for certain aspects of Air India's daily operations.
>
> c) India maintains its control by ensuring that Air India's leadership is comprised of government officials and persons who have strong links with the government. As a result, Air India's Board is lacking in experience in the airline industry and regularly makes decisions based on political interests, often to the financial detriment of Air India.
>
> d) India dictates Air India policy and manages it on a day-to-day basis. Indian law grants India the power to actively supervise numerous aspects of Air India's operations, including budgets, employee matters, matters relating to fares, passengers' complaints, and aircraft acquisition. India also exercises its control through regular audits of Air India's operations. India exercises its control to subordinate Air India's operations to its own political interests, placing Air India in a precarious financial position.
>
> e) India exerts a high level of economic control over Air India and ignores ordinary corporate formalities. India supports Air India financially

> through grants, capital contributions, guarantees, loans, and special tax treatments. In addition, India controls all aspects of Air India's financial affairs, including (1) Air India's access to other sources of funding, (2) Air India's earnings from air-service operations, and (3) Air India's spending.
>
> f) India treats the property of Air India as its own. India regularly uses Air India's services – for which it does not pay – and assumes Air India's debts directly, transferring that debt as it pleases.
>
> g) India's own courts, in interpreting the Indian Constitution, have held that Air India is one and the same with the State.

Compl. ¶ 53.

In short, the evidence that Air India is India's alter ego is already nearly overwhelming. What is required now is rapid and targeted discovery to confirm the salient facts establishing that the elements of the alter ego test are met.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's motion for expedited discovery. Deutsche Telekom therefore respectfully requests the Court order expedited discovery on a schedule that requires Air India's substantial completion by the earlier of the submission of its motion to dismiss, or a week prior to the closing of the privatization transaction.[7]

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7. Deutsche Telekom respectfully submits that if its motion for expedited discovery is granted, the timing of discovery should be based on the timing of these events, which, for the reasons discussed above, threaten to cause prejudice to Deutsche Telekom if they take place without adequate discovery. This reflects a modification of the proposal in Deutsche Telekom's initial proposed case management plan, which contemplated highly focused initial discovery in conjunction with, and in support of, a motion to attach, with any follow-on discovery on a lengthier schedule. In light of the deferral of granting Deutsche Telekom leave to make a motion to attach, as well as the need to resolve Air India's immunity defenses, the substantial completion of discovery before the privatization is a reasonable target. At a minimum, regardless of the date ultimately set for the close of discovery, Deutsche Telekom should be permitted to obtain critical discovery into the terms of the privatization transaction, access to a corporate representative with knowledge of legacy Air India operations, and information sufficient to identify commercial assets in the U.S., in sufficient advance of the closing.

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Respectfully submitted,

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