UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

AIR INDIA'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO STAY DISCOVERY

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PRELIMINARY STATEMENT

This action against Air India is a follow-on to an action filed by the same plaintiff against India in the District Court for the District of Columbia. In the prior-filed action, the core issue of subject matter jurisdiction as to India, a foreign sovereign, is *sub judice*. There is no possibility of subject matter jurisdiction here as to Air India, an instrumentality and the alleged alter ego of India, if the United States courts are found to lack subject matter jurisdiction as to India with respect to the action to confirm the arbitration award at issue. Permitting discovery here when predicate subject matter jurisdiction issues as to the presumptively immune defendant are being litigated elsewhere is neither appropriate nor efficient.

DT wishes to rush forward here so that it may obtain discovery and relief against Air India before a pending sale of Air India closes (in December of this year or January of next). But the law does not allow that, and in any event, DT cannot beat the clock. The Second Circuit has been clear that, where a foreign sovereign or its instrumentality has been hauled into court, its immunity from suit is the first issue to be decided, and all else—including in particular merits discovery—must await that determination.

Moreover, while narrow *jurisdictional* discovery may be permitted in some cases, this Court should not allow it here. Instead, that, and any other proceedings in this action, should be on hold pending resolution of India's motion to dismiss for lack of subject matter jurisdiction in the D.C. District Court. A ruling in India's favor would moot all further proceedings here. Once the D.C. District Court rules, this Court can decide whether any discovery here is appropriate and whether it is necessary to rule on any substantive motions. There is no reason to risk an inconsistent ruling or waste judicial and party resources where a prior action has the potential to dispose of this one.

The Court should at a minimum deny any jurisdictional discovery until after it has decided Air India's motion to dismiss. India (in D.C.) and Air India (here) both challenge the legal sufficiency of DT's allegations that India (and thus, Air India) waived its sovereign immunity—challenges that have nothing to do with whether Air India is the alter ego of India and that do not involve disputed facts. Until those facial challenges are resolved, this Court cannot find that DT has alleged a prima facie case for jurisdiction, and thus should not permit jurisdictional discovery. And denying any merits discovery until subject matter jurisdiction is addressed follows this Circuit's precedent admonishing that litigation burdens on sovereigns and their instrumentalities should be minimized.

Denying discovery pending, at a minimum, a ruling in the D.D.C. will not unfairly prejudice DT. *First,* with or without discovery (expedited or not), DT cannot possibly obtain a judgment against Air India in time to secure relief before the pending sale of Air India closes (which is expected to occur within roughly 60 days at the outside). *Second*, DT is unwilling to commit to the premise that the Air India sale transaction will render this action moot—it only says it "may"—meaning DT at least reserves the argument that it can get relief after Air India is sold, which further undermines any claim of urgency.

All discovery should be stayed. If India is found not to be immune from suit, Air India will move to dismiss this case (on independent subject matter and other grounds addressed in pre-motion letters and further elaborated on below). Only if that motion is denied and, to the extent it raises issues that are immediately appealable, affirmed, should any discovery proceed.

BACKGROUND

A. DT obtains the Award against India—not Air India—in May 2020

Air India had no involvement with the underlying transaction that forms the basis of the dispute between DT[1] and India. *See* Compl. (Dkt. 1) ¶¶ 22, 24. It finds itself a defendant in this action for the sole reason that it is 100% owned by India. Air India is a corporation organized under the laws of India with its own, separate, legal existence.

In May 2020, in an arbitration concerning the underlying India-DT dispute, a tribunal issued a Final Award against India ordering it to pay damages to DT (the "Award"). *Id.* ¶ 37. Air India was not a party to any of these proceedings.

B. DT commences confirmation proceedings against India in the D.D.C. in April 2021, which remain pending

On April 19, 2021, almost a full year after the Award was rendered in Switzerland, DT filed a petition to confirm the Award against India in the District of Columbia District Court (the "D.D.C."). *See* 21-cv-01070 (D.D.C.). India moved to dismiss for lack of subject matter jurisdiction, including because DT failed to allege any exception to India's sovereign immunity. *Id.*, Dkt. 11 at 23–45. India's motion to dismiss was fully briefed and is *sub judice* before Judge Richard Leon as of November 12, 2021.

DT has not sought any discovery in the D.D.C. action.

C. DT commences parallel proceedings here in November 2021, which require determination of the same issues currently pending before the D.D.C.

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

[1] Petitioner Deutsche Telekom ("DT") is a company incorporated under the laws of Germany. Through its subsidiary, DT held a minority interest in Devas Multimedia Private Limited ("Devas Ltd."). *See* Compl. ¶¶ 2, 14, 23.

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. Compl. ¶ 48. Similarly, DT seeks to overcome Air India's sovereign immunity principally on the theory that *India* has waived its immunity, and that this waiver should be imputed to Air India as an alter ego of India. *Id.* ¶ 18 (alleging that India became a signatory to the New York Convention,[2] and thereby purportedly waived immunity under § 1605(a)(1)); *id.* (alleging that India agreed to arbitrate its disputes with DT, and thereby waived immunity under § 1605(a)(6)); *see also infra* pp. 9 - 12. Whether India waived immunity or agreed to arbitrate are precisely the issues *sub judice* with Judge Leon.

D. India concludes a sale process for Air India that it began in 2018—years before DT obtained the Award

Years before and throughout the foregoing U.S. proceedings, India has been engaged in a public effort to divest Air India. In early 2018—years before DT obtained the Award—India issued a preliminary information memorandum publicizing its sale efforts.[3] A second preliminary information memorandum was issued in January 2020, resulting in a successful bid.[4] Both of these memoranda were public information. News that the disinvestment would be completed in 2021 or early 2022 became public in June of this year,[5] and in early October, *The Wall Street Journal* reported that an affiliate of Tata Sons had secured the winning bid.[6] DT admits having notice of the sale efforts since 2018, and of the winning bid by Tata Son's affiliate

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See Federal Arbitration Act,* 9 U.S.C. § 201.
[3] *See Preliminary Information Memorandum* (March 28, 2018), https://tinyurl.com/pvwdnwxk
[4] *See Preliminary Information Memorandum* (January 27, 2020), https://tinyurl.com/k68a9jd3
[5] *See*, *e.g.*, Livemint.com, *Air India disinvestment will be completed in 2021, says aviation minister* (June 4, 2021), https://tinyurl.com/49s8t23u
[6] Wall Street Journal, *India's Tata Sons to Buy Air India for $2.4 Billion* (October 8, 2021), https://tinyurl.com/a9utyn9p

since at least October 1, 2021. Compl. ¶¶ 63, 133 & fns. Nevertheless, until its November 9, 2021 letter to this Court, it never sought any relief—expedited or otherwise—on the basis of the sale.

The sale is expected to close in December of this year or January of next year.[7] The sale is structured as a purchase, by the Tata Sons affiliate, of 100% of the shares of Air India, from India, and all ownership and control rights will pass to the new owner upon the closing.[8] The agreement also provides that no employee of Air India may be terminated (except for cause) within one year of the closing.[9]

ARGUMENT

I. THE COURT MUST STAY MERITS AND ATTACHMENT DISCOVERY

A. Air India is presumptively immune from discovery under the FSIA

The Supreme Court "consistently has recognized that foreign sovereign immunity 'is a matter of grace and comity.'" *Rubin v. Islamic Republic of Iran,* 138 S. Ct. 816 (2018); *see also Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.,* 137 S. Ct. 1312, 1320 (2017). The FSIA codified the principle of sovereign immunity, and provides the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.,* 109 S.Ct. 683, 688 (1989).

Because a "foreign state" under the FSIA includes "an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), Air India is a foreign state. *See, e.g., Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.,* 476 F.3d 140 (2d Cir. 2007) (affirming immunity of company, created and supervised by Korean government, as organ of state).

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[7] *See* Government of India, Ministry of Finance Press Release (October 8, 2021), https://tinyurl.com/rph9d8rc

[8] *Id*.

[9] The New Indian Express (October 9, 2021), https://tinyurl.com/e36nn7e6

The FSIA thus establishes as to Air India a "baseline ***presumption of immunity*** from suit," *Federal Republic of Germany v. Philipp,* 141 S. Ct. 703, 709 (2021) (emphasis added), and from the burdens of suit, including discovery, *Gabay v. Mostazafan Foundation of Iran,* 151 F.R.D. 250, 256 (S.D.N.Y. 1993) (the FSIA provides "not merely a defense to liability, but immunity from the burdens of litigation as well."). The FSIA is interpreted "to avoid, where possible, 'producing friction in our relations with other nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'" *Philipp,* 141 S. Ct. at 714, citing *Helmerich,* 137 S. Ct. at 1322. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." Restatement (Third) of Foreign Relations Law of the United States § 442, Reporters' Notes ¶ 1 (1987).

Thus, Air India is entitled to "a threshold determination of immunity" under the FSIA before it can be compelled to defend the merits of this action. *Process & Indus. Devs. v. Fed. Republic of Nigeria*, 962 F.3d 576, 585 (D.C. Cir. 2020). And until DT overcomes Air India's presumptive immunity from suit, it cannot obtain any discovery except as necessary to overcome an immunity defense. This is because, "in the FSIA context," prior to jurisdiction having 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); *see also e.g.*, *3M Co. v. HSBC Bank USA, N.A.*, 2016 WL 8813992, at *1 (S.D.N.Y. Oct. 21, 2016) (denying discovery because "resolution of the FSIA's applicability to Plaintiff's proposed discovery [would] be required before discovery could be authorized.").

B. The discovery DT seeks is not permitted at this stage of this action

DT seeks discovery that indisputably goes beyond "verify[ing] allegations of specific facts crucial to an immunity determination," and is therefore barred by the FSIA. In its pre-motion conference letter, DT previewed that it seeks "discovery in aid of its motion for attachment, namely: (1) information necessary to identify assets held by Air India in New York and elsewhere in the United States; and (2) information relevant to [its] likelihood of success on the merits in its motion for attachment." Dkt. 10 at 3. This discovery has nothing to do with Air India's immunity from suit under the FSIA and therefore is barred by controlling Second Circuit cases. *EM Ltd.*, 473 F.3d at 486.

DT cannot claim that its discovery regarding India's assets is permissible as in aid of ***pre***-judgment attachment, a remedy that is only available where there has been an explicit waiver. *See* 28 U.S.C. §1610(d)(1); *EM Ltd.*, 473 F.3d at 486 (affirming denial of discovery where plaintiff did not demonstrate a basis for pre-judgment attachment). No such waiver is claimed here. Should such a claim be made, Air India respectfully requests an opportunity to brief the issue. *See* 21 Civ. 9155, Dkt. 18 at 2-3 (previewing why pre-judgment attachment is unavailable).

Finally, as DT is not a judgment creditor, there can be no need at this juncture for Rule 69 discovery. Fed. R. Civ. P 69(a)(2); *cf. Republic of Argentina v. NML Cap., Ltd.*, 134 S.Ct. 2250, 2256 (2014) (Rule 69 discovery allowed against sovereign post-judgment).

II. THE COURT SHOULD NOT PERMIT "JURISDICTIONAL" DISCOVERY

DT has candidly labeled the discovery it seeks for what it is: an effort to take discovery on the merits and "in aid of" an attachment remedy that does not exist. But to the extent DT seeks to pivot and call that discovery "jurisdictional"—on the theory that DT must prove Air India's alter ego status to overcome its immunity from suit—the Court should hold in abeyance

alter ego discovery, and any other purportedly "jurisdictional" discovery, in its discretion. *See Hulley Enterprises Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 279–80 (D.D.C. 2016) ("*Hulley I*") (court has power to issue a stay prior to determining subject matter jurisdiction under FSIA).

The Court should stay "alter ego" discovery pending a jurisdictional ruling in the D.D.C.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 57 S.Ct. 163, 165-166 (1936); *see also Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (courts "have 'inherent power' to grant stays in certain circumstances."). A discovery stay is warranted here for at least two reasons.

1. The Court should stay jurisdictional discovery because threshold immunity issues are duplicative of the prior-filed action in the D.D.C.

Although "no precise rule has evolved" where two federal court actions present the same issues among the same parties, "the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 96 S.Ct. 1236, 1246 (1976) (citing *Landis*, 299 S.Ct. at 165). "Accordingly, a federal court may dismiss a suit 'for reasons of wise judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal court' or in the same federal court." *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 664 (S.D.N.Y. 1997) (citation omitted), *aff'd*, 173 F.3d 844 (2d Cir. 1999). The Second Circuit does not prescribe a "rigid test," but instructs district courts to "consider the equities of the situation when exercising its discretion" to "stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). "Balancing factors of convenience is essentially an equitable task," so "an 'ample degree of discretion' is afforded to the district courts in determining a suitable forum." *First City Nat. Bank & Tr. Co. v. Simmons*, 878 F.2d 76, 80 (2d Cir. 1989).

Here, the D.D.C. action will address the same underlying subject matter jurisdiction issue (and New York Convention issues) as that present here: whether India is immune from DT's attempt to enforce the award against it in the United States. If it is, Air India is also immune, because no independent basis to overcome Air India's immunity is alleged, and this action must therefore be dismissed. *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 91 (2d Cir. 2015) (instrumentality independently entitled to immunity). The actions are duplicative at least as to the subject matter jurisdiction issue, and because the D.D.C. action is much further along, further proceedings in this action should await a resolution of the subject matter jurisdiction issue in that one.

a. The same issues are being litigated in the D.D.C.

"[T]he true test" of whether a later-filed action should be stayed or dismissed as duplicative is "the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit." *Curtis*, 226 F.3d at 138 (quoting *United States v. The Haytian Republic*, 14 S.Ct. 992, 994 (1894)).

Here, the core issues in this case are entirely duplicative of the core issues in the D.D.C. *First,* resolution of the subject matter jurisdiction issue in the D.D.C. action is a necessary prerequisite to resolving it here. DT cannot establish an exception to Air India's immunity as a sovereign instrumentality that is independent of the immunity exceptions it alleges against India in the D.D.C.; indeed, DT hardly even tries. Rather, the immunity exceptions DT principally relies upon to sustain this Court's jurisdiction over Air India are based on *India's* conduct, not Air India's. *See* Compl. ¶ 18 (alleging that *India* became a signatory to the New York Convention, and thereby waived immunity under § 1605(a)(1)); *id.* (alleging that *India* agreed to arbitrate its disputes with DT, and thereby waived immunity under § 1605(a)(6)). And while DT also alleges that "this action is based on" Air India's "commercial activity," that is plainly not

true, because Air India's alleged liability is entirely derivative of India's termination of an agreement between Devas Ltd. and an Indian company called Antrix, which dispute has nothing to do with Air India, much less any of its commercial activities in the United States; DT asserts no claim "based on" any activity of Air India, commercial or otherwise. *Saudi Arabia v. Nelson,* 113 S.Ct. 1471, 1477 (1993) (defining "based on" in §1605(a)(2) as referencing "gravamen of the complaint"); *EM Ltd. v. Banco Cent. de la Republica Argentina,* 800 F.3d 78 (2d Cir. 2015) (commercial activity exception did not apply where instrumentality's actions in the U.S. were incidental to gravamen of complaint); *Rudersdal, EEOD v. Harris,* 2020 WL 5836517, at *9 (S.D.N.Y. 2020) (commercial activity exception did not apply to instrumentality absent any "indication that [instrumentality] directly participated in the commercial activity" nor "a basis to impute" activity). It follows that if India is immune under the FSIA, then Air India is immune under the FSIA, too.

Second, DT relies exclusively on its alter ego theory to hold Air India liable by way of its confirmation claim in this action. Because Air India is not a party to the Award, no judgment could be entered against Air India itself unless Air India is India's alter ego. *See* 9 U.S.C. § 207 (confirmation of award pursuant to the New York Convention may only be sought against party to award). DT alleges no independent basis to hold Air India liable on the Award, and there is none, as Air India was not involved in the arbitration in which the Award was entered or the underlying dispute. So again, if India is not liable under the Award, then Air India is not liable, either.

Thus, to determine at the threshold whether Air India is immune under the FSIA, and to ultimately determine whether Air India is liable on the Award, a determination must first be made as to whether *India* is immune under the FSIA, and whether *India* is liable on the Award.

Those are precisely the issues that are before Judge Leon in the D.D.C., including in connection with India's fully-submitted motion to dismiss on immunity grounds. *See* 21 Civ 1070 (D.D.C.), Dkts. 11, 17 (setting forth India's immunity-based defenses). As such, this Court could not reach these issues in this action without creating a risk of issuing an inconsistent ruling, and certainty of wasting judicial (and party) resources. In these circumstances, this later-filed action should be stayed (or dismissed). *Howard*, 977 F. Supp. at 664 ("Because suits brought against partners of a signatory to an arbitration agreement are duplicative of suits against the signatory," later-filed suit "is duplicative" and should be dismissed), *aff'd* 173 F.3d at 844.

It is no answer for DT to say that the defendants in the two actions are different; DT's own theory (alter ego) is that they are the same.[10] And because one is a sovereign and the other its instrumentality, and the subject matter of the actions is the same, resolving subject matter jurisdiction in the first action has the potential to do so in the second. "Litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests." *Novenergia II - Energy & Envt. (SCA) v Kingdom of Spain*, 2020 WL 417794, at *2 (D.D.C. Jan. 27, 2020) (internal citiations omitted).

The only way to avoid duplication is to wait for Judge Leon to rule: If India's motion to dismiss is granted, then this Court can immediately dismiss this action against Air India, as no other basis for jurisdiction or liability is asserted here. Conversely, if India's motion to dismiss

[10] The "same principles" of privity developed "in the context of claim preclusion [also] apply in the context of the rule against duplicative litigation," *Sacerdote v. Cammack Larhette Advisors, LLC*, 939 F.3d 498, 506 (2d Cir. 2019), and alter egos are routinely found to be in privity with one another. *See, e.g.*, *Cardell Fin. Corp. v. Suchodolski Assocs., Inc.*, 2012 WL 12932049, at *39 (S.D.N.Y. July 17, 2012), *report and recommendation adopted* 896 F. Supp. 2d 320 (S.D.N.Y. 2012); *see also 7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *26 (S.D.N.Y. Mar. 31, 2015) (Gardephe, J.) ("privity" includes "'a relationship with [the] party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.'") (citation omitted; applying New York law), *aff'd*, 771 F. App'x 498 (2d Cir. 2019).

is denied, then Air India would be left with only its *own* immunity-based defenses, and this Court would avoid ruling on *India*'s immunity defenses altogether. Even the possibility of a preclusive ruling from the D.D.C. justifies staying proceedings here now. *See Curtis*, 226 F.3d at 138 (even when faced with "obvious difficulties of anticipating the claim or issue-preclusion effects of a case that is still pending, a court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions").

b. The Second Circuit's *CBF* decision does not displace the Court's power to stay later-filed duplicative suits

DT has claimed in pre-motion letters that the Second Circuit's decision in *CBF* blessed the duplicative litigation strategy DT pursues here. 21 Civ. 9155, Dkt. 20 at 2 (citing *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. 2017)). Not so. Rather, *CBF* merely explains that where a foreign arbitral award is at issue, as here, "recognition and enforcement" are the same process under the New York Convention, and can be pursued together in a single "confirmation" action before a U.S. District Court under the FAA. *Id.* at 72-73. *CBF* says nothing about the simultaneous pursuit of two separate federal court actions seeking resolution of identical issues against identical parties, and certainly does not overrule decades of law giving district courts the power to stay or dismiss duplicative suits.

Courts before and after *CBF* have dismissed duplicative federal court actions seeking to confirm awards pursuant to the New York Convention and the FAA. *See, e.g.*, *Huntington Ingalls Inc. v. Ministry of Def. of Bolivarian Republic of Venezuela*, 2019 WL 2476629, at *9 (D.D.C. June 13, 2019) ("[T]he FAA plainly permits an international arbitration award winner to choose the federal district court in which the award will be confirmed ('enforced') *in the absence of any prior and pending assertion of jurisdiction over those same arbitration proceedings by*

another federal district court.") (emphasis added). Indeed, federal courts have stayed or dismissed actions under the New York Convention in favor of prior pending *state court* proceedings, even under the more exacting abstention doctrine applicable to parallel state and federal lawsuits. *See, e.g.*, *Mazlin Trading Corp. v. WJ Holding Ltd.*, 2021 WL 1164127, at *6 (S.D.N.Y. Mar. 26, 2021); *Mourik Int'l B.V. v. Reactor Servs. Int'l, Inc.*, 182 F. Supp. 2d 599, 605 (S.D. Tex. 2002) (recognizing that *Colorado River* state-federal abstention more limited than federal-federal abstention, but nevertheless dismissing later-filed federal suit seeking confirmation under New York Convention and FAA). *CBF* has no bearing on this motion.

c. No special circumstances—and certainly not any manufactured "urgency" or "prejudice"—weigh against a stay

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. *Howard*, 977 F. Supp. at 664 (S.D.N.Y. 1997), *aff'd*, 173 F.3d at 844 (citing *First City*, 878 F.2d at 79–80).

DT has argued that the privatization of Air India creates urgency, but that is not true. Air India will be sold long before DT could attach any assets in New York, whether this Court permits immediate "jurisdictional" discovery or not—and no matter how "expedited" that discovery may be. Again, ***pre***-judgment attachment is barred as a matter of law (*supra* p. 7), and DT has no hope of obtaining a ***post***-judgment attachment before the privatization sale closes this coming December or January.

As the Second Circuit recently observed "a plaintiff seeking to drag a foreign government into court has her work cut out for her." *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse,* 999 F.3d 808, 817 (2d Cir. 2021). Consider what must happen before a post-judgment attachment could be ordered:

- This Court must decide Air India's immunity defenses before merits discovery can begin.[11] Assuming no stay, briefing on Air India's immunity motions will only begin after this Court decides the current round of discovery-related motions (Dkt. 21 at 3), and if the Court orders jurisdictional discovery in advance of motion practice (over Air India's objection), briefing will not begin for several more weeks (or months). *See* 21 Civ. 5601, Dkt. 22-1 (Devas Case Management Proposal) (calling for 4 weeks of jurisdictional discovery). By then, the sale likely will have already closed.

- Even assuming the parties could brief, and the Court could decide, Air India's immunity motion prior to the closing—which in the real world cannot happen absent a lengthy delay in the transaction timeline—Air India would be entitled to an immediate interlocutory appeal of any ruling denying it immunity.[12] District Courts are deprived of their jurisdiction when an appeal from orders denying immunity is pending.[13] If Air India took an appeal and obtained a stay, merits-related discovery could not begin until well into 2022—many months *after* the sale had already closed.

- Following a decision on appeal, Air India still would be entitled to merits discovery, dispositive briefing, and, if factual disputes exist, a trial. That process would take several months, at least. *See, e.g.* 21 Civ. 9155, Dkt. 20-1 (DT Case Management Plan) (suggesting four months for merits discovery). Pending the resolution of an appeal, this multi-month period, might not commence for another year. Even without an appeal, dispositive motions are unlikely to be submitted before late 2022.

- Finally, even after a judgment is entered, plaintiffs must wait a "reasonable period" to obtain post-judgment attachment. 28 U.S.C. § 1610(c). That is typically found to be at least six weeks from the issuance of the final judgment.[14]

Ultimately, the earliest DT might *hope* to get any attachment of Air India's U.S. assets is early 2023—even if the Court ordered the absurd discovery schedule DT has cavalierly proposed (calling for all the discovery sought to be completed in mere weeks). The sale will have closed

[11] *EM Ltd.*, 473 F.3d at 486 (prior to establishing jurisdiction under the FSIA, discovery is appropriate against a sovereign "*only* to verify allegations of specific facts crucial to an immunity determination."); *Process & Indus. Devs.*, 962 F.3d at 585 (sovereign entitled to "a threshold determination of immunity" before it can be compelled to defend the merits of challenges under the New York Convention).

[12] *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 87–88 & n.36 (2d Cir. 2015) (Second Circuit has "consistently held that [a] threshold sovereign-immunity determination is immediately reviewable under the collateral-order doctrine.").

[13] *See Princz v. Fed. Rep. of Germany*, 998 F.2d 1 (D.C. Cir. 1993) (holding that an appeal of a denial of sovereign immunity deprives the district court of jurisdiction, which "cannot proceed to trial until the appeal is resolved.").

[14] *See, e.g.*, *Pharo Gaia Fund Ltd. v. Bolivarian Republic of Venezuela*, 2021 WL 2168916, at *1 (S.D.N.Y. May 27, 2021) (collecting cases finding between six weeks and five months reasonable periods of time).

for almost a year at that point. So, whether or not the sale will have any effect on DT's rights, no amount of "jurisdictional" discovery or expedition is going to change that.

Leaving aside that there is no possibility of this action being concluded and attachment being granted before the sale closes, there also is no need. Leaving room for its inevitable pivot, DT says the sale "may" moot its claims against Air India, *see* 21 Civ. 9155, Dkt. 10 at 1-2; Air India has taken the unequivocal position that it will. But assuming Air India is right, there is still no need for immediate "jurisdictional" discovery because—leaving aside its inefficacy—there has been no showing that DT requires access to Air India's U.S. assets to satisfy its Award against India. To the contrary, India is presumed solvent as a sovereign nation, and courts routinely grant stays without requiring security for that very reason. *See, e.g.*, *Hulley Enterprises Ltd. v. Russian Fed'n,* 502 F. Supp. 3d 144, 164 (D.D.C. 2020) ("*Hulley II* ") ("[T]he Russian Federation is a sovereign country with economic tendrils that cross the globe, not an insecure potential debtor that must be required to post security lest there be no assets to seize at a later date.").

2. Resolution of pending motion in the D.D.C. will narrow the issues in this action

Even if this action were not entirely duplicative of DT's prior-filed action in the D.D.C., Judge Leon's decisions on DT's pending motions will inevitably narrow the issues in this action.

Courts have inherent power to stay "where a separate proceeding bearing upon the case is pending." *Hulley I*, 211 F. Supp. 3d at 276. "'This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.'" *Id.* (quoting *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979); *see also Landis*, 299 U.S. at 165(rejecting "the suggestion that before proceedings in one suit may be stayed to abide

the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical."). Rather, "[i]n the case of independent proceedings, 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.'" *Hulley I*, 211 F. Supp. 3d at 276 (quoting *Landis*, 299 U.S. at 164).

Resolution of India's motion to dismiss on immunity grounds will resolve the issue—which would otherwise need to be litigated here—whether Air India is immune from suit because *India* is immune from suit. This Court need not and should not decide issues already pending elsewhere.[15]

At a minimum, the Court should stay "jurisdictional" discovery pending decision on Air India's previewed motion to dismiss.

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1. DT has not made a prima facie showing that India or Air India has waived its sovereign immunity

"The Second Circuit has made clear that plaintiffs facing a sovereign immunity challenge have no automatic right to discovery." *Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, 2021 WL 1226361, at *7 (S.D.N.Y. Apr. 1, 2021) (citation omitted). Rather, a plaintiff "***must*** 'establish a prima facie case that the district court ha[s] jurisdiction over [the defendant]' before discovery is granted." *Id.* (citing *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 186 (2d

[15] *See, e.g.*, *LaSala v. Needham & Co., Inc.,* 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005) (granting stay, noting "a court might, in the interest of judicial economy, enter a stay pending the outcome of proceedings which bear upon the case, even if… not necessarily controlling"); *Credit Suisse Sec. (USA) LLC v. Laver,* 2019 WL 2325609, at *3 (S.D.N.Y. May 29, 2019) (same).

Cir. 1998)); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528 (5th Cir. 1992) (reversing grant of jurisdictional discovery for abuse of discretion).[16]

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. But 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. 107 (D.D.C.), Dkts. 11, 17 (setting forth India's immunity-based defenses). *A fortiori*, those allegations do not make out a prima facie case for jurisdiction over Air India here, either.

The Court should therefore deny all jurisdictional discovery, at least until a finding is made that DT has alleged a prima facie case for jurisdiction over Air India. Should the Court decline to stay all discovery (Point II.A *supra*), Air India respectfully requests an opportunity to brief whether DT has made a sufficient prima facie case for jurisdiction.

[16] *See also, e.g.*, *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 401-02 (2d Cir. 2009) (affirming denial of jurisdictional discovery where district 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) ("The plaintiffs' motion for jurisdictional discovery and an evidentiary hearing regarding subject matter and personal jurisdiction is denied because they failed to meet their burden of proffering evidence to demonstrate even prima facie the existence of such jurisdiction.").

2. 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. Rather, in keeping with Circuit precedent in FSIA cases, the Court should decide Air India's previewed motion to dismiss before permitting any "jurisdictional" discovery to proceed.

As previewed (Dkt. 18), Air India intends to move to dismiss on the following grounds, in addition to all of the grounds asserted by India in the D.D.C.:

- *First*, DT's declaratory judgment claim is not ripe (under Article III or the Declaratory Judgment Act) unless and until DT obtains a judgment in the D.D.C. action. DT's complaint makes plain the prematurity of its action, as it based on an "*anticipated* judgment" that DT "*expect[s]* to be awarded against India." Compl. ¶¶ 1, 18. Meanwhile, DT's confirmation claim is identical to its prior-pending claim in the D.D.C., and should be dismissed on that ground, leaving no justiciable controversey in this Court. *See* 21 Civ. 9155, Dkt. 18 at 4-5.

- *Second*, the sovereign immunity exceptions upon which DT principally relies—the "waiver" and "arbitration" exceptions—apply *only* to a confirmation proceeding brought pursuant to the New York Convention. But once DT's duplicative confirmation claim is dismised, DT is left with a declaratory judgment action only, as to which DT has no plausible waiver argument.

- *Third*, because this action, once trimmed of the duplicative confirmation claim, does not arise under the New York Convention, and because neither the Declaratory Judgment Act nor the FSIA creates any substantive rights, the relief DT seeks is not based on any cognizable cause of action.

None of the foregoing defenses turns on whether Air India is the alter ego of India, or any other disputed fact, rendering "jurisdictional" discovery on alter ego unwarranted at this time. And because Air India is presumptively immune from discovery, this Court should decide these defenses before it permits any "jurisdictional" discovery into Air India's alter ego status. Jurisdictional discovery against a sovereign is narrowly, not liberally, allowed; indeed, it is reserved only for "specific facts *crucial* to an immunity determination." *EM*, 473 F.3d at 486.

Because other threshold immunity defenses exist that do not turn on Air India's alter ego status, alter ego discovery is not "crucial" at this stage in the litigation and should therefore be stayed.

"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 District Court where venue for sovereign claims is presumptively appropriate, 28 U.S.C. § 1391(f)(4)—has held 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) (emphasis added). 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, with an eye towards minimizing the total costs imposed on the defendant." *In re Papandreou*, 139 F.3d at 254 (emphasis added).

Similarly, the Second Circuit has instructed that, "[b]ecause of the primacy of jurisdiction, 'jurisdictional questions ordinarily must precede merits determinations in dispositional order.'" *Frontera,* 582 F.3d at 397 (2d Cir. 2009). DT's requested discovery into the alleged alter ego relationship and the impending sale goes directly to the merits of the dispute.

Finally, a stay of alter ego discovery is appropriate because addressing the alter ego issue now would require the Court to resolve complicated and disputed issues of fact, imposing a

heavy burden on Air India, particularly under the expedited schedule that DT envisions. Even in an actual confirmation action—which, again, this is not—the Court generally should not delve into complicated questions of alter ego status while other confirmation-related issues remain disputed. *Cf. Daebo Int'l Shipping Co. v. Americas Bulk Transp. (BVI) Ltd.,* 2012 WL 6212614, at *3 (S.D.N.Y. Dec. 13, 2012) ("[U]nder Second Circuit precedent, a petition to confirm a foreign arbitral award is an inappropriate forum to adjudicate alter-ego collection proceedings.").

CONCLUSION

For the foregoing reasons, the Court should deny all discovery and stay this action.

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Dated: November 22, 2021