UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEVAS (MAURITIUS) LTD, DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED, and TELECOM DEVAS MAURITIUS LIMITED, Plaintiffs, - against – AIR INDIA, LTD., Defendant.	:	Case No.: 21 Civ 5601 (PGG)

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

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PRELIMINARY STATEMENT

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

More fundamentally, Devas' motion to expedite should be denied because Devas utterly fails to show any urgency or need for discovery to proceed other than on the normal schedule and within the normal procedural safeguards applicable to an FSIA case, including providing Air India the opportunity to first file its motion to dismiss on threshold jurisdictional issues. Devas points to the impending sale of Air India to a private party, speculating that it will cause loss of evidence. But Devas has known about that sale since 2018, *before* Devas got its arbitration award in the first place. Devas has never plausibly alleged any connection between India's divestment efforts and Devas' Award, and any such allegation would be baseless. And as the sale process continued to move forward, Devas continued to sit on its hands. Thus, in June 2021, as it was widely reported that the sale of Air India would close this year, what did Devas do? Nothing. It did not run to the D.C. District Court, where it had sued India—the party selling Air India and the award-debtor itself—five months earlier. Devas did not run to this Court either, despite filing its action here just weeks after the 2021 closing was reported. And after Air India previewed its motion to dismiss in an August 23 letter, Devas did not say in its September 2 response that it required *any* discovery to oppose Air India's motion or to preserve evidence, let

alone expedited discovery in advance of the closing.

Rather, Devas first took the position that the sale created an "urgent" need for discovery only *after* another purported award-creditor of India, Deutsche Telekom, brought an action against Air India in this Court, and announced on November 9, 2021 that it intended to seek expedited discovery in aid of a pre-judgment attachment motion that was plainly barred as a matter of law under the FSIA. Only then—ten months after it commenced this action; five months after the 2021 closing of the sale was reported; and with a competing creditor attempting to race ahead—did Devas first inform Air India and the Court that the sale would allegedly deprive Devas of needed "jurisdictional" discovery. (Tellingly, Deutsche Telekom has now walked away from its "in aid of attachment" rationale for expediting discovery, and throws in with Devas' newfangled—and meritless—"evidence-preservation" theory.)

Given this history, it should come as no surprise that Devas' sole claim for urgency—the supposed risk of "lost evidence"—is based on nothing. Air India has appeared in this action and is prepared to defend itself. It has put in place a litigation hold. The forthcoming sale requires that Air India's new owner fire no one without cause for at least one year after the sale, thus assuring the availability of witnesses. Courts routinely deny expedition where, as here, the motion rests on baseless speculation.

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

BACKGROUND

The facts relevant to this motion, and Air India's parallel motion to stay discovery, are set

forth in Air India's motion to stay. *See* 21 Civ. 5601, Dkt. 33 at 3–5. We briefly set forth below those most relevant to Devas' motion to expedite.

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

On January 13, 2021, Devas filed a petition to confirm the Award against India in the District of Columbia District Court (the "D.D.C."). *See* 21 Civ. 106 (D.D.C.). India moved to dismiss for lack of subject matter jurisdiction, including because Devas failed to adequately allege any exception to India's sovereign immunity as a matter of law. *Id.*, Dkt. 15. India also moved to stay the D.D.C. action during ongoing litigation in the Netherlands and India concerning the validity of the Award. *Id.*, Dkt. 14. India's motions have been briefed and are *sub judice* before Judge Royce Lamberth as of October 4, 2021.

On June 28, 2021, with its action against India pending in the D.D.C., and with the other litigations abroad still ongoing, Devas commenced this action against Air India. Devas makes no attempt here to confirm (that is, have this Court recognize and enforce) the Award against Air India. Rather, Devas seeks a declaration that it can collect on the unconfirmed Award by pursuing the U.S.-based assets of Air India, on the theory that Air India is the "alter ego" of India. Compl. ¶ 1. As Devas admits in its motion, it seeks to overcome Air India's presumptive sovereign immunity exclusively on the theory that *India* is subject to an immunity exception, and that the alleged exceptions should be imputed to Air India "as an alter ego of India." *See* Devas'

Opening Brief, 21 Civ. 5601 (S.D.N.Y.), Dkt. 30 ("Br.") at 12, 14. Whether India is subject to an immunity exception for an action to enforce Devas' award is precisely the issue *sub judice* before Judge Lamberth in the D.D.C. Promptly upon learning of this lawsuit and a substantially similar lawsuit filed by yet another award-creditor of India (Cairn), Air India implemented a litigation hold.

In 2018—before Devas got its Award—India publicly announced that it would divest Air India. *See* Compl. ¶ 65. India's divestment efforts have been well publicized throughout the sales process. In June 2021—after Devas got its Award—India announced that the divestment would be completed in 2021: "'Air India is getting disinvested. . . . I want to assure you that it (AI Disinvestment) will happen this year,' the Union Minister told ANI news agency."[1] In response, Devas did nothing. It did not seek discovery or expedition in the D.D.C. action. And despite filing its action here just weeks later, it did not seek discovery or expedition here, either.

On August 23, 2021, Air India filed a pre-motion letter previewing its anticipated motion to dismiss, which outlines exclusively legal arguments it intends to raise—including based on its sovereign immunity from suit—that do not put any facts in dispute, including its alter ego status. *See* 21 Civ. 5601 (S.D.N.Y.), Dkt. 17. On September 2, Devas responded, and said it would oppose the motion. *Id.*, Dkt. 20. But Devas did not seek jurisdictional discovery or expedition in aid of its opposition, or even suggest that discovery would be necessary, notwithstanding that it had been public knowledge for three months that Air India would be sold before the end of 2021.

In early October, additional details of the sale of Air India were reported in the press, including the identity of the buyer (an affiliate of Tata Sons, Air India's prior private owner),

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

some of the deal terms (including protections ensuring employees would not be fired for at least a year), and further confirmation that closing was expected in 2021.[2]

Again, Devas did nothing in response to this news. Rather, Devas first took the position that the sale created an "urgent" need for discovery after another award-creditor of India, Deutsche Telekom, brought an action against Air India in this Court, and announced on November 9 that it intended to seek expedited discovery in aid of a pre-judgment attachment motion barred as a matter of law under the FSIA. *See* 21 Civ. 9155 (S.D.N.Y.), Dkts. 10, 18. Only then, in a November 15 letter, did Devas inform Air India and the Court that the sale would allegedly deprive Devas of needed "jurisdictional" discovery. *See id.*, Dkt. 27.

ARGUMENT

I. THIS COURT SHOULD DENY ALL DISCOVERY AT THIS TIME

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

At the outset, Devas seeks discovery it concedes is irrelevant to whether an exception to immunity applies to Air India. Br. 16–18. That discovery is barred as a matter of law.

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

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

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

Devas acknowledges that this is the rule. *See* Br. 10 (district court has discretion "to order *jurisdictional* discovery where plaintiff has made out a prima facie case for jurisdiction.") (citation omitted). But in the next breath, Devas invites this Court to flout the rule by permitting expedited discovery into issues that Devas *admits* have no bearing on Air India's immunity. Specifically, "*[i]n addition* to jurisdictional discovery," Devas seeks "discovery into the nature of the contemplated transaction" privatizing Air India. Br. 16. That category of information has nothing to do with whether this Court may exercise jurisdiction over Air India, or "verify[ing] allegations of specific facts crucial to an immunity determination." *EM Ltd.*, 473 F.3d at 486. Rather, Devas says it seeks this information to probe the "motivations underlying India's decision to sell Air India" and to "test the legitimacy of that transaction." Br. 16. Because Devas does not even contend that these matters are "crucial to an immunity determination," but instead admits they are "*[i]n addition* to jurisdictional discovery," they cannot be a subject of discovery until *after* this Court has ruled on Air India's immunity defenses. *See, e.g.*, *3M Co. v. HSBC Bank USA, N.A.*, 2016 WL 8813992, at *1 (S.D.N.Y. Oct. 21, 2016) (Gardephe, J.) (denying merits-related discovery because "resolution of the FSIA's applicability to Plaintiff's proposed discovery [would] be required *before* discovery could be authorized").

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

Rafidain Bank does not stand for the proposition that non-jurisdictional discovery can proceed before the Court has established its jurisdiction by ruling on an FSIA immunity defense. *Contra* Br. 16. In that case, there were two defendants, one (Rafidain) whom the court had already found waived immunity, and another (CBI) that still had an unresolved immunity defense. 150 F.3d 172, 177 (2d Cir. 1998). Citing the comity concerns that animate the FSIA, the district court denied jurisdictional discovery from *either* defendant. The Second Circuit approved of the denial of discovery *from CBI*, which remained presumptively immune; but it found that the district court had erred in denying further discovery *from Rafidain*—which, again, had already been found *not* to be immune—that the plaintiff could have used to further develop its jurisdictional arguments as to CBI. *Rafidain Bank* is thus consistent with the well-established rule that no merits-related discovery is authorized against a sovereign until the Court has established its jurisdiction by ruling on the sovereign's immunity-based defenses—a rule borne out repeatedly in the cases Devas itself cites.[4]

Devas nevertheless declares that "to the extent Air India intends to move to dismiss on the theory" that the sale of Air India will render Devas' claims moot, "the Devas shareholders must be allowed discovery to test it" now. Br. 17. Devas cites no authority for its *ipse dixit*, which provides no basis to disregard controlling Second Circuit law.

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

Devas also seeks purportedly "jurisdictional" discovery into whether Air India is the "alter ego" of India, on the theory that (i) India is allegedly subject to various immunity

[4] *See Funk v. Belneftekhim*, 861 F.3d 354, 366 (2d Cir. 2017) ("Because sovereign immunity thus shields a foreign state from litigation, this court has cautioned that, 'in the FSIA context, discovery should be ordered circumspectly and ***only*** to verify allegations of specific facts crucial to an immunity determination.'"); *see also id.* ("A district court is 'typically within its discretion' to order ***jurisdictional discovery*** where a plaintiff has 'made out a prima facie case for jurisdiction.'") (quoting *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 401–02 (2d Cir. 2009)).

exceptions, and (ii) Air India is allegedly subject to those same exceptions as an alter ego. Br. 12–16. The Court should deny this discovery at this time because (1) whether India is subject to an immunity exception, as Devas alleges, is already the subject of a fully-briefed motion in Devas' first-filed D.D.C. action, and there is no need to jump this duplicative action ahead; (2) Devas has not made a prima facie showing in this action that India (let alone Air India) is subject to an immunity exception; and (3) even if Devas had made a prima facie showing, Air India has jurisdictional and other threshold defenses that do not require resolution of the disputed alter ego issue, which should be decided *before* any discovery proceeds.

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

Before Air India's alleged alter ego status becomes even potentially relevant to Air India's immunity from suit—and thus a proper subject for jurisdictional discovery—the Court must first determine whether India retains its immunity. As Devas repeatedly makes clear in its brief, the only basis it alleges to overcome Air India's immunity is that *India* is subject to an immunity exception, and "[e]ach of the three exceptions at issue in this case—waiver, arbitration, and commercial activity—applies with equal force to Air India as India's alter ego." Br. 14; *see also id.* at 12 (India's alleged exceptions "apply to Air India *as an alter ego of India*."). Devas does not, and could not, plausibly allege that any immunity exception applies *independently* to Air India, as Air India had nothing to do with the underlying dispute or resulting Award. It follows that if *India* is immune, then *Air India* is also immune—regardless of whether Air India is an alter ego of India or not.

But the issue of whether India is immune is already the subject of India's motion to dismiss in the D.D.C., which is *sub judice* before Judge Lamberth. *See* 21 Civ. 106 (D.D.C.), Dkts. 15, 32 (setting forth India's immunity-based defenses). Accordingly, this Court cannot

reach that predicate issue now without creating a risk of inconsistent rulings and a certainty of wasted judicial and party resources. *See Curtis v. Citibank, N.A.,* 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit"). Rather than permit duplicative litigation in this later-filed action, the Court should stay all proceedings pending Judge Lamberth's ruling, which will either obviate this action in its entirety (if India is found immune) or narrow the issues this Court must decide (if India is found not to be immune). *Hulley Enterprises Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 276 (D.D.C. 2016) ("[A] stay may be warranted where the resolution of other litigation will likely 'narrow the issues in the pending cases and assist in the determination of the questions of law involved.'") (quoting *Landis v. N. Am. Co.,* 57 S.Ct. 163, 164 (1936)); *see generally* 21 Civ. 5601 (S.D.N.Y.), Dkt. 33 at 9–12 (Air India's motion to stay on these grounds).

Devas barely mentions its prior-filed action against India in the D.D.C., where it sat on its hands for 11 months without seeking any discovery from India, expedited or not, while the public sale process of Air India (begun in 2018) continued to play out and ultimately concluded. Thus, Devas "has not proffered any special circumstances which would warrant maintaining the instant suit" in the face of the first-filed D.D.C. action, where identical issues are pending decision by another federal court. *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997) (citing *First City Nat. Bank & Tr. Co. v. Simmons*, 878 F.2d 76, 79–80 (2d Cir. 1989)), *aff'd*, 173 F.3d 844 (2d Cir. 1999).

To support its request for expedition, Devas argues that the sale creates urgency, but that is not true. Air India will be sold long before Devas could attach any assets here, whether this Court permits "jurisdictional" discovery or not—and no matter how "expedited" that discovery

may be. ***Pre***-judgment attachment is barred as a matter of law, and Devas does not contend otherwise. (Tellingly, Devas' fellow award-creditor, Deutsche Telekom, all but abandons its dead-on-arrival pre-judgment attachment theory in its motion to expedite discovery. *See* 21 Civ. 9155 (S.D.N.Y.), Dkt. 24 at 6–8.) And, as Air India demonstrated in its motion to stay, Devas has no hope of obtaining ***post***-judgment attachment before the privatization sale closes this coming December or January. *See* 21 Civ. 5601 (S.D.N.Y.), Dkt. 33 at 14–15. Again, Devas does not contend otherwise, and its motion does not indulge any notion that this derivative (and duplicative) FSIA case could be concluded in mere weeks. And because Devas does not quixotically seek ultimate relief before the sale concludes, whether or not the sale will "moot" Devas' claims has no bearing on this motion. *Contra* Br. 16–18.

Instead, Devas now seeks expedited discovery solely on the theory that the sale might render evidence unavailable. Br. 18 (sale purportedly creates a "risk that full discovery may not be possible"). Devas' professed fears—which it incredibly discovered only *after* its competing award-creditor Deutsche Telekom threatened to surge ahead of Devas—have no basis in the record. Air India's documents are preserved pursuant to a litigation hold, and a condition of sale requires the new owner to retain all current Air India employees for at least one year following completion of the sale. *Supra* 2. So if Devas defeats India's immunity motion in the D.D.C., and Air India's immunity motion here, it will have an opportunity to preserve witness testimony. Baseless speculation is not nearly enough to warrant jumping this action ahead of the prior-filed and duplicative action pending in the D.D.C. *Infra* Point II.B (detailing lack of urgency).

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

If the Court does not stay this action in its entirety pending resolution of the first-filed D.D.C. proceeding, it should nevertheless deny jurisdictional discovery because Devas has not

alleged a prima facie case of jurisdiction. "The Second Circuit has made clear that plaintiffs facing a sovereign immunity challenge have no automatic right to discovery." *Consulting Concepts*, 2021 WL 1226361, at *7. Rather, Devas "***must*** 'establish a prima facie case that the district court ha[s] jurisdiction . . . .' ***before*** discovery is granted." *Id.* (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998)); *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528 (5th Cir. 1992) (reversing jurisdictional discovery for abuse of discretion).[5]

Here, Devas has not "to date, made out a prima facie case for the Court's exercise of jurisdiction over [Air India], because [Devas has] not offered facts demonstrating that the presumption of immunity can be overcome." *Consulting Concepts*, 2021 WL 1226361, at *7. Critically, Devas' 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, Devas' efforts to overcome Air India's immunity are entirely derivative of its allegations that *India* waived *its* immunity. *Supra* 8 (citing Br. 12, 14). But for the reasons set forth in India's pending motion to dismiss in the D.D.C., Devas' allegations are legally insufficient with respect to India. *See* 21 Civ. 106 (D.D.C.), Dkts. 15, 32. *A fortiori*, those allegations do not make out a prima facie case for jurisdiction over Air India here.

In arguing otherwise, Devas not only asks this Court to front-run Judge Lamberth on the issue of whether India is immune. It also asks the Court to make the determination of whether it has made out a prima facie case without an adequate record. Ordinarily, the question of whether jurisdictional discovery should be permitted is determined *after* the parties have briefed a Rule 12(b)(1) motion to dismiss—as numerous cases reflect. *See, e.g.*, *In re Terrorist Attacks on*

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

September 11, 2001, 349 F. Supp. 2d 765 (2005) (*after* thoroughly analyzing fully-briefed Rule 12(b)(1) motion, denying without prejudice and permitting jurisdictional discovery because immunity was "not determinable on the current record"); *see also Robinson v. Government of Malaysia,* 269 F.3d 133 (2d Cir. 2001) (collecting cases where prima facie jurisdiction determined on fully-briefed Rule 12(b)(1) motions). And for good reason: Only *after* the parties have briefed the legal sufficiency of the complaint's allegations, and proffered any factual support already on hand, could a court possibility determine what factual disputes, if any, are "crucial" to determining the Court's jurisdiction. *EM Ltd.*, 473 F.3d at 486; *see, e.g.*, *Gualandi v. Adams*, 385 F.3d 236, 244–45 (2d Cir. 2004) (jurisdictional discovery appropriately denied post-briefing on Rule 12(b)(1) motion where "appellants were unable to demonstrate that additional discovery was needed to decide the jurisdictional issue"). Indeed, Devas cites no case where the plaintiff was found to have met its prima facie burden *except* in the context of an order denying a fully-briefed motion to dismiss under Rule 12(b)(1).

This case illustrates the wisdom of the prevailing approach: Absent a stay of all proceedings, Air India intends to move to dismiss on the grounds, among others, that Devas has failed to sufficiently allege an immunity exception as to India (the issue pending in the D.D.C.), and that even if it has sufficiently alleged an exception to India's immunity, that exception does not extend to Devas' declaratory judgment action. *See* 21 Civ. 5601 (S.D.N.Y.), Dkts. 17 & 33 at 18–20. This Court should resolve that motion—and the attendant question whether any "crucial" jurisdictional facts are in dispute—after due deliberation, on the basis of full briefing, and with the benefit of the parties' arguments. It should not assume, let alone predetermine, the (antecedent) question of the legal sufficiency of Devas' "waiver" allegations against either India or Air India by unnecessarily jumping ahead to the (subsequent) alter ego question. Indeed, to

do so—particularly in the context of a rushed motion to expedite discovery—would be contrary to the Second Circuit's clear instruction to minimize the burdens of discovery on sovereigns and permit discovery "***only***" as to "***crucial***" issues of jurisdiction. *EM Ltd.*, 473 F. 3d at 486.

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

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

A prima facie showing is necessary to get jurisdictional discovery, but it does not create an entitlement to it. *See Funk*, 861 F.3d at 366 ("A district court is 'typically *within its discretion*' to order jurisdictional discovery where a plaintiff has 'made out a prima facie case for jurisdiction.'"). Here, the Court should decline to order immediate discovery in its discretion because, as further detailed in Air India's motion to stay discovery, Air India intends to move to dismiss on several grounds, none of which turns on whether or not Air India is an alter ego. Dkt. 33 at 18–20. This Court should decide these defenses before it permits any "jurisdictional" discovery into Air India's alter ego status.

"If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first," because "[i]t would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal." *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998), *superseded by statute on other grounds*. Thus, the D.C. Circuit—which oversees the court where venue for sovereign claims is presumptively appropriate, 28 U.S.C. § 1391(f)(4)—holds that "jurisdictional discovery . . . should not be

authorized *at all* if the defendant raises either a different jurisdictional or an 'other non-merits ground,'" "the resolution of which would impose a lesser burden upon the defendant." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Thus, "where a colorable claim of immunity is made, a trial court should—at least if the defendant so argues—normally consider other potentially dispositive jurisdictional defenses *before* allowing FSIA discovery, with an eye towards minimizing the total costs imposed on the defendant." *In re Papandreou*, 139 F.3d at 254; *see also* Dkt. 33 at 20.

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

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

To the extent the Court allows any discovery to proceed at this time, it should deny expedition. "Courts in this circuit apply a 'flexible standard of reasonableness and good cause' in evaluating motions for expedited discovery." *3M Co.*, 2016 WL 8813992, at *1. This approach may be informed (but is not controlled) by the four-factor test established in *Notaro v. Koch*, which considers whether the movant has shown: "(1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result

without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted." 95 F.R.D. 403, 405 (S.D.N.Y. 1982).

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

This Court has recognized that discovery against foreign sovereigns presents unique barriers to proceeding on an expedited timeline, and those same barriers are present here. In *3M Co. v. HSBC Bank USA, N.A.*, this Court rejected a request for a two-week discovery schedule against Ziraat Bank, a Turkish instrumentality, because "service of [those] requests . . . present[ed] issues under the Foreign Sovereign Immunities Act." 2016 WL 8813992, at *1. Because Ziraat Bank had raised colorable claims of FSIA immunity, "resolution of the FSIA's applicability to [the] proposed discovery w[ould] be required before the discovery could be authorized," and such briefing would "significantly delay the resolution of [plaintiff's underlying] motion." *Id.* Thus, the court concluded that a two-week discovery schedule was unreasonable when "[b]riefing and resolution of the underlying legal issues alone would likely consume a number of months, not including any appeal." *Id.* at *2.

Here, the Court should not order any jurisdictional discovery—expedited or otherwise—until it has had an appropriate opportunity to assess whether any jurisdictional facts need to be resolved. *Supra* Point I.B. As in *3M*, resolving Air India's challenges to the sufficiency of Devas' jurisdictional allegations (which would also require resolving India's challenges, unless the Court allows Judge Lamberth to rule first), will "likely consume a number of months." 2016 WL 8813992, at *2. Devas' proposed four-week schedule for expedited discovery is simply not feasible given the threshold issues that still must be determined.

Devas cites *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* for the uncontroversial proposition that a court should resolve FSIA immunity issues "as near to the outset of the case as is reasonably possible," 137 S. Ct. 1312, 1316–17 (2017), but that case

cuts the opposite way here. The Supreme Court gave its admonition in the context of approving of an FSIA dismissal **without** jurisdictional discovery where the parties had stipulated to the relevant facts, and the question before it was thus "purely a legal one [that] can be resolved at the outset of the case." *Id.* at 1324. Here, by contrast, Devas asks this Court to order jurisdictional discovery despite the existence of Air India's still-unresolved "purely legal" challenges that could promptly dispose of the case. *Id.* at 1316, 1324 (discovery may be appropriate "where jurisdictional questions turn upon further factual development," and "[i]f a decision about the matter requires resolution of factual disputes"). Following the Supreme Court's direction here thus requires that the Court address the potentially dispositive legal challenges before embarking on potentially unnecessary "jurisdictional" discovery, rather than the other way around.

With one exception, none of the expedited discovery cases Devas cites involved a foreign sovereign. The exception, meanwhile—*Cassirer v. Kingdom of Spain*, 2006 WL 8423211, at *1 (C.D. Cal. Apr. 27, 2006)—proves the rule. There, the defendant moved to dismiss on immunity grounds and the plaintiff opposed (neither of which has happened yet here). *Id.* In its opposition, the plaintiff—who sought to recover a family painting from a Spanish national museum—relied on the "expropriation" exception to sovereign immunity and requested "immediate discovery to determine whether the 'commercial activity' element of the exception is satisfied." *Id.* The court initially *denied* that request, however, instead ordering further briefing on a legal question concerning the interpretation of the phrase "in violation of international law" as used in the statutory exception. As the court explained, it "made the request [for additional briefing] because, if the 'violation of international law' language required the museum to have obtained the painting illegally under international law, then the discovery request would be mooted." *Id.* Only *after* receiving the additional briefing and determining that resolution of the

disputed factual question was *necessary* to resolve jurisdiction did the court order a 60-day period of "expedited" discovery directed to a narrow issue.

This Court should follow the same approach and decide the legal issues first.

B. Devas identifies no urgency warranting expedition

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

Devas' sole claim of urgency—the rank speculation that evidence relevant to jurisdiction will somehow be lost when the sale closes—has no support in the record. Expedited discovery to preserve evidence is permitted only when a substantial, non-speculative showing has been made that the discovery is likely to disappear. *See, e.g.*, *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 395 (D.D.C. 2014) (noting the court had allowed expedited deposition of important witness in his late 90's because he "[could not] be long for this earth"), *aff'd in part, rev'd in part on other grounds*, 812 F.3d 127 (D.C. Cir. 2016); *Stern v. Cosby*, 246 F.R.D. 453, 457–58 (S.D.N.Y. 2007) (allowing expedited discovery in light of apparent criminal witness tampering and bribery after commencement of action). By contrast, such discovery is appropriately denied where the alleged loss of evidence is speculative. *Best v. AT & T, Inc.*,

2014 WL 1923149, at *2 (S.D. Ohio May 14, 2014) (as here, "[t]here [wa]s no evidence to support plaintiff's speculative assertion that the defendants will destroy the requested discovery"); *Complaint of Akropan Shipping Corp. v. Nat'l Enter. Sonatrach*, 1990 WL 16097, at *2–3 (S.D.N.Y. Feb. 14, 1990) (no jurisdictional discovery on speculative theory that witness in dangerous profession was "liable to die suddenly").

Here, Devas offers nothing but baseless speculation that evidence may be lost. As noted, Air India's records are subject to a litigation hold and its employees cannot be terminated (without cause) for at least a year after the sale closes. *Supra* 2. This case is therefore nothing like those Devas cites, where the defendants had not even been identified, let alone appeared to defend the action. In those cases, the plaintiffs were necessarily unable to complete a Rule 26(f) conference with their (non-appearing) adversary, and thus could not get any discovery *except* by way of motion for "expedition" under Rule 26(d).[6] By contrast, Air India has appeared, and stands prepared to defend itself. And while document preservation concerns may be reasonable where a non-appearing defendant (or unserved third party) has in place routine document destruction policies, that concern is obviated by Air India's litigation hold here. *See Synopsys, Inc. v. AzurEngine Techs., Inc.*, 401 F. Supp. 3d 1068, 1076 (S.D. Cal. 2019) (denying expedited discovery in part because litigation hold obviated any risk of spoliation).

Finally, Devas' claim of urgency is "clearly belied by [its] own dilatory behavior." *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F. Supp. 2d 417 (S.D.N.Y. 1998) (denying expedited discovery). Devas, like the rest of the informed public, has known that India has been

[6] *See Digital Sin, Inc. v. Does 1-27*, 2012 WL 2036035, at *4 (S.D.N.Y. June 6, 2012) (noting inability to identify defendants without pre-Rule 26(f) discovery); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (same); *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 171–72 (S.D.N.Y. 2012) (same); *see also Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326–27 (S.D.N.Y. 2005) (noting it was "futile to anticipate a prompt Rule 26(f) conference").

trying to divest Air India since 2018. *Supra* 1. If Devas thought the sale would affect its access to discovery relevant to its claims against Air India, it could have sought that discovery from Air India any time after it filed this action in June of this year. (Indeed, on Devas' theory, it also could have sought the evidence from India in the D.D.C., where its action has been pending since January.) *See Pearson Educ., Inc. v. Doe*, 2012 WL 4832816, at *4–5 (S.D.N.Y. Oct. 1, 2012) (denying expedition where movant had not exhausted less burdensome means).

But Devas never did any of that. Rather, Devas was only spurred into action *after* its competing award-creditor, Deutsche Telekom, came forward in this Court with its doomed request for pre-judgment attachment and expedited discovery in aid of that unavailable remedy. Thus, Devas' only "urgency" here was to race Deutsche Telekom to the trough. *See Major, Lindsey & Africa, LLC v. Mahn*, 2010 WL 3959609, at *7 (S.D.N.Y. Sept. 7, 2010) (denying expedited discovery where delay belied claim of urgency); *Park West Radiology v. Carecore Nat. LLC*, 240 F.R.D. 109, 112 (S.D.N.Y. 2007) (same). Air India should not be made to suffer an absurd discovery schedule in response to Devas' made-up claims of urgency.

C. Expedition would substantially prejudice Air India

The Court should also deny expedition because it would unduly prejudice Air India. As in *3M*, "determining the availability of" documents relating to "transactions that took place in [India] between [Indian] entities" would be time consuming and burdensome. 2016 WL 8813992, at *2. Thus, courts often acknowledge that discovery against a foreign instrumentality concerning actions abroad creates practical burdens that impede the fact-gathering process. For example, the Fifth Circuit reversed as an abuse of discretion the grant of jurisdictional discovery as to a foreign instrumentality where the alter ego question "[could not] be proved without massive, intrusive discovery in Mexico on highly sensitive domestic issues." *Arriba*, 962 F.2d at 534, 536–37; *see also In re Arb. between Monegasque De Reassurances S.A.M. v. Nak Naftogaz*

of Ukraine, 311 F.3d 488, 500 (2d Cir. 2002) (affirming dismissal for *forum non-conveniens* where alter ego issue required "extensive discovery" outside the U.S., including witnesses "beyond the subpoena power" and "pertinent documents" in foreign language).

Here, Air India would face the same challenges. Devas' requests regarding Air India's relationship to India relate to actions "that took place in [India] between [Indian] entities." *3M*, 2016 WL 8813992, at *2. Responsive documents reside in India on Indian servers. Gathering such documents would require extensive communication with Air India officials, who are native speakers of languages other than English, located thousands of miles away in a time zone 10.5 hours ahead of New York. *See Monegasque De Reassurances S.A.M.*, 311 F.3d at 500 (noting difficulties of obtaining discovery from foreign sovereign). Given these inefficiencies, "it is highly unlikely that [Devas] will be able to complete the contemplated discovery on the 'expedited' schedule that it suggests." *3M*, 2016 WL 8813992, at *2.

Devas claims that Air India "would suffer little hardship" from expedition because the information sought "would later be produced in the normal course of discovery." Br. 19 (citing *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276–77 (N.D. Ca. 2002)). But that just begs the question. If India is entitled to immunity as a matter of law, then Air India necessarily is too, and there will have been no need for any discovery at all. On the other hand, if the Court allows immediate, expedited discovery now, then Air India will be exposed to the burdens of "jurisdictional" discovery for no reason other than that Devas requested, and this Court granted, expedited discovery in advance of Air India's motion to dismiss. The Court cannot simply assume that Devas will make out a prima facie case for jurisdiction, or that factual development will become necessary to resolve Air India's immunity defenses.

CONCLUSION

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

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