UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CC/DEVAS (MAURITIUS) LTD., DEVAS EMPLOYEES MAURITIUS PRIVATE LTD., and TELCOM DEVAS MAURITIUS LTD., *Plaintiffs*, -*v.*- AIR INDIA LTD., *Defendant*.	No. 21-cv-5601

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT AIR INDIA LTD.'S MOTION TO STAY DISCOVERY

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Plaintiffs CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Ltd., and Telcom Devas Mauritius (collectively Plaintiffs or the Devas Shareholders) respectfully submit this memorandum of law in opposition to Defendant Air India Ltd.'s (Air India) motion to stay discovery, ECF Nos. 32, 33.

PRELIMINARY STATEMENT

Air India argues that this Court should stay all discovery in this case until the Court has resolved its yet-to-be-filed motion to dismiss. But the discovery that the Devas Shareholders seek, ECF Nos. 29, 30, is *jurisdictional* discovery that is *necessary* for this Court to decide Air India's forthcoming motion to dismiss. That reality alone defeats Air India's motion.

Detailed allegations in the Complaint show that Air India is an alter ego of India. Indeed, even Indian courts hold that Air India is "for all purposes [the] State," *Lena Khan v. Union of India*, (1987) 2 SCC 402, *see* ECF No. 30 at 8–9. In view of these rulings of the courts of India, there can be no serious doubt that the Devas Shareholders have stated a prima facie case justifying jurisdictional discovery. *See* ECF No. 30 at 7–9, 14–15. To the extent Air India contests this—and it hardly bothers to, instead hiding behind its argument that its impending sale to the Tata Group will render this case moot—this Court thus has an obligation to "take evidence and resolve relevant factual disputes" "as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316, 1317 (2017). Resolution of those factual disputes requires jurisdictional discovery. A stay of discovery, on the other hand, only will hinder this Court's ability to resolve the factual disputes that the Supreme Court says this Court must address "as near to the outset of the case as it reasonably possible."

Air India also argues that jurisdictional discovery should nonetheless be stayed because it is disguised "merits discovery." ECF No. 33 at 1, 2, 20. *Helmerich & Payne* demolishes this

argument, too: The mere fact that "merits and jurisdiction will sometimes come intertwined" is no reason to postpone resolution of the dispute—"the court must still answer the jurisdictional question." *Helmerich & Payne*, 137 S. Ct. at 1319. "If to do so, [the court] must inevitably decide some, or all, of the merits issues, so be it." *Id.* So be it.

Perhaps alert to *Helmerich & Payne*'s clear instruction, Air India gestures toward a broader argument—that this Court should stay the action in its entirety pending the outcome of the Devas Shareholders' enforcement action against India in the District of Columbia. That argument also lacks merit.

For starters, Articles V and VI of the New York Convention itself set forth the circumstances when a stay of an enforcement action is appropriate, and Air India does not even advert to those provisions, much less argue those standards. And since the New York Convention is part of federal statutory law, India cannot invoke common-law principles of equity in an effort to obtain a stay.

In any event, Air India's suggestions that litigation of this Court's jurisdiction will risk "duplication" and "conflicting rulings" are insubstantial. Controlling precedent in both the D.C. and Second Circuits establishes that India waived its sovereign immunity from suits enforcing New York Convention arbitral awards when it signed the New York Convention. There will be no conflicting rulings. India's motion to dismiss in the D.D.C. proceeding thus provides Air India no cover here. If, as the Devas Shareholders allege, Air India is India's alter ego, then the Devas Shareholders may enforce their award against Air India as if it were India and this Court has jurisdiction to consider the Devas Shareholders' petition for that relief. And the question whether Air India is India's alter ego is not at issue in the D.D.C. action. There accordingly is no reason for this Court to stay this action pending the outcome of the D.C. case against India.

Indeed, because Air India argues that India's sale of Air India to the Tata Group will moot this action, this Court should *expedite* resolution of its jurisdiction over Air India and the merits of this action. A stay is a form of equitable relief and Air India's request is fundamentally inequitable. Air India contends that because, under its theory, its transfer into private ownership will "render[] the Devas Shareholders' . . . claims moot," ECF No. 23 at 1, this Court should stay an action that *is not presently moot* until it becomes moot. Air India is wrong about mootness, but even if it were correct, it is not entitled to freeze adverse litigation in the hopes that a delay will defeat this Court's jurisdiction. To the contrary, no stay would be appropriate here unless this Court concludes that the proposed sale of Air India will *not* impact the Devas Shareholders' claims to Air India's assets, at the risk of obvious prejudice to the Devas Shareholders' ability to enforce their arbitral award against India.

ARGUMENT

I. No Stay Of Discovery (Nor Of This Action) Is Warranted On The Basis Of The Enforcement Action Against India.

Air India urges the Court to stay this action pending resolution of the Devas Shareholders' enforcement proceeding against India in the District of Columbia because this case otherwise will cause "duplicative litigation" and risk "conflicting rulings." ECF No. 33 at 12–13, 16–17. Air India's argument misapprehends the requirements for a stay of an enforcement action under the New York Convention.

At the threshold, the Second Circuit has emphatically rejected the notion that an arbitral award holder need obtain "confirmation" of an arbitral award before proceedings to file "enforcement" actions. Instead, the Second Circuit has made clear that an award creditor may bring multiple "enforcement" actions simultaneously, before the resolution of any confirmation action filed at the seat of the arbitration. *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 72

(2d Cir. 2017); *see also Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003) (noting New York Convention explicitly contemplates "concurrent enforcement . . . actions" as well as "simultaneous enforcement actions").[1]

The New York Convention itself provides the requirements for a stay of enforcement proceedings and courts have held that "a court may adjourn enforcement proceedings *only on the grounds explicitly set forth in Article V(1)(e)* of the Convention." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012) (reversing stay of enforcement proceeding that was granted by the lower court pending outcome of related litigation in another secondary jurisdiction) (emphasis added). Article V(1)(e) of the New York Convention contemplates a stay of enforcement proceedings only upon "proof that . . . [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the" nation of primary jurisdiction, here, the Netherlands. *See* Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 Article V(1)(e); *see also id.*, Article VI.[2] Air India does not—because it cannot—invoke this provision. The Quantum Award is binding and enforceable.[3] Having failed to invoke the carefully crafted stay provision authorized by the Convention (and in turn by Congress in adopting the Convention), Air India cannot now ask this Court to impose a

[1] *CBF* also dispenses with Air India's frivolous suggestion that this is not an action under the New York Convention. ECF No. 33 at 19. It is.

[2] Article V(1)(e) of the Convention provides that "[r]ecognition and enforcement of the award may be refused . . . only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Article VI, in turn, permits adjournment of an enforcement action pending resolution of a set aside proceeding referenced in Article V(1)(e).

[3] The Dutch courts—the primary jurisdiction—have already granted an exequatur order permitting full enforcement of the Quantum Award against Indian property in the primary jurisdiction. That enforcement authority is unaffected by India's ongoing attempt to set aside the Quantum Award.

stay under some other standard. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) ("[I]f Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that itself may 'amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy.'" (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

Air India's arguments for a stay fail on their own terms in any event. The D.D.C. proceeding presents no real risk of duplication or conflicting rulings because the overlapping immunity arguments are controlled by binding precedent in both the D.C. and Second Circuits. Specifically, Air India argues that it is subject to the same immunity arguments India makes there, but India's arguments have been rejected by precedent in the D.C. Circuit, which is on all fours with controlling precedent in this Circuit. India is a signatory to the New York Convention, which covers investor-state arbitration like the BIT award at the heart of this dispute. As both the Second Circuit and D.C. Circuits have held, "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory states," thereby waiving its immunity. *Blue Ridge Investments, LLC v. Republic of Argentina*, 902 F. Supp. 2d 367, 373 (S.D.N.Y. 2012) (quoting *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. Kommanditgesellschaft v. Nvimpex Centrala Navala*, 989 F.2d 572, 578f (2d Cir. 1993)), *aff'd* 735 F.3d 72 (2d Cir. 2013) (holding that acceptance of the New York Convention expressly waives immunity from enforcement actions in foreign states); *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (agreeing that "when a country becomes a signatory to the [New York] Convention" it waives immunity from enforcement (quoting *Seetransport Wiking*, 989 F.2d at 578)); *Tatneft v. Ukraine*, 771 F. App'x 9, 10 (D.C. Cir. 2019) (per curiam) (same).

India is also not immune in the D.D.C. proceeding because it is an action to enforce an arbitral award. A foreign sovereign is not immune in any case "in which the action is brought . . . to enforce an agreement made by the foreign state . . . to submit to arbitration" any dispute between the parties. 28 U.S.C. § 1605(a)(6); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993). By joining the India-Mauritius BIT, India consented to arbitration with private investors, including the Devas Shareholders. Now that the Devas Shareholders have been awarded a favorable decision in that arbitration, the Foreign Sovereign Immunities Act (FSIA) empowers them to enforce the award against India in federal courts.[4] *Blue Ridge*, 902 F. Supp. 2d at 375; *see also* ECF No. 30 at 12–13. And because Air India is an alter ego of India, India's waivers must be ascribed to it. *Kensington Int'l Ltd. v. Republic of Congo*, 2007 WL 1032269, at *15 (S.D.N.Y. Mar. 30, 2007) ("Congo's waivers, consents, agreements, and designations, including its waiver of sovereign immunity and consent to jurisdiction and venue in this Court, may be imputed to" its alter ego). Air India's immunity here thus turns on whether Air India is subject to India's waiver as India's alter ego. This issue is not relevant to, and will not be resolved in, the D.D.C. proceeding.

Third, even with some overlap, the D.D.C. proceeding is not duplicative litigation that would justify a stay—there is simply nothing unusual about simultaneously pending enforcement proceedings. Indeed, the New York Convention explicitly contemplates "concurrent enforcement and annulment actions" as well as "simultaneous enforcement actions" in multiple jurisdictions and countries. *Karaha Bodas*, 335 F.3d at 367.[5]

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[4] Air India is also not immune because this action relates to India's "commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). Because Air India is India's alter ego, that same commercial activity can be ascribed to Air India. *See* ECF No. 30 at 13; ECF No. 1 ¶ 16.

[5] In an attempt to give credence to the notion that the enforcement proceedings in D.D.C. may be stayed on the basis of set aside proceedings, Air India points to the spurious allegations of

Since it cannot rely on the New York Convention, Air India relies on a hodgepodge of caselaw involving stays of duplicative proceedings, none of which apply here. For example, in *Huntington Ingalls Inc. v. Ministry of Defense of Bolivarian Republic of Venezuela*, the plaintiffs first brought their claims in a lawsuit filed in the Southern District of Mississippi, which compelled the international arbitration of the dispute and expressly "retain[ed] jurisdiction in order to bring this matter to conclusion after arbitration." 2019 WL 2476629, at *1 (D.D.C. June 13, 2019) (quoting *Northrup Grumman Ship Sys. Inc. v. Ministry of Defense of Republic of Venezuela*, 2010 WL 5058645, at *5 (S.D. Miss. Dec. 4, 2010)). Recognizing that it had no obligation to dismiss or stay when "a similar case or claims are merely *pending* in another federal court," *id.* at *5 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 14 (2012)), the court made a discretionary choice to dismiss in favor of the Mississippi proceeding. That is far from this case—this dispute was not brought as a lawsuit in D.D.C., and the D.D.C. has not presided over this dispute for seventeen years, as was the case in *Huntington Ingalls*. *Id.* at *1. Both *Mazlin Trading Corp. v. WJ Holding Ltd.* and *Mourick Int'l B.V. v. Reactor Servs. Int'l, Inc.*, involved parallel litigation in federal and state courts. *Colorado River* abstention, the doctrine on which both decisions are based, is rooted in federalism concerns and is relevant only when the allegedly parallel litigation is pending in a

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fraud against Devas and its principals that India has employed elsewhere. ECF No. 33 at 3. Those accusations are utterly without foundation and are part of the campaign of intimidation and unsubstantiated innuendo that India has employed in its multi-national campaign to thwart the arbitral process. ECF No. 30 at 5–7. Indeed, in proceedings in the Western District of Washington to enforce Devas's related arbitration award against India's alter ego Antrix, the court rejected the request of an Indian government official to stay enforcement of that court's nearly $1.3 billion judgment in favor of Devas, characterizing the official's accusations of fraud against Devas as merely one more instance of the "hindrance and delay" that India and its agencies have repeatedly employed to "delay these proceedings, as well as [Devas's and its shareholders'] right to recover on the Award." Order Denying Stay, *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, ECF No. 132 at 1, 2, No. 2:18-cv-1360 (W.D. Wash. Aug. 9, 2021).

state court.[6] Even then, the Supreme Court has made clear that this abstention should apply only in "exceptional circumstances" based on the "clearest of justifications." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983). In *Mazlin*, abstention was justified because the plaintiff brought the federal suit only after repeated losses in state court in an attempt to use the federal proceeding to evade those adverse rulings and engage in forum shopping. 2021 WL 1164127, at *6 (S.D.N.Y. Mar. 26, 2021). And in *Mourik*, the federal lawsuit was brought only after a state court had taken jurisdiction of tangible property at the center of both lawsuits and issued a temporary restraining order controlling its disposition. 182 F. Supp. 2d 599, 603 (S.D. Tex. 2002). No competing jurisdiction over any specific property exists here.

II. Air India Cannot Show Good Cause To Stay Discovery.

No stay of jurisdictional discovery is warranted on the basis of Air India's impending motion to dismiss, as Air India also argues. Indeed, the opposite is true because that motion creates a need for jurisdictional discovery. A party must show "good cause," Fed. R. Civ. P. 26(c), to depart from the ordinary rule that discovery "should not be routinely stayed simply on the basis that a motion to dismiss has been filed," *Republic of Turkey v. Christie's Inc.*, 316 F. Supp. 3d 675, 677 (S.D.N.Y. 2018) (quoting *Hong Leong Fin. Ltd. (Singapore) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69, 72 (S.D.N.Y. 2013)). In considering a request for such a stay, the court must consider "(1) the breadth of discovery sought, (2) any prejudice that would result, and (3) the strength of the motion." *Hong Leong*, 297 F.R.D. at 72. None of these factors favor Air India,

[6] Air India could not meet this standard, as it requires a showing that there is a "substantial likelihood that the state litigation will dispose of all claims presented in the federal case." *Stone v. Patchett*, 2009 WL 1108596, at *14 (S.D.N.Y. Apr. 23, 2009). Here, the D.D.C. action will not dispose of the alter ego and asset questions at the heart of this case. And the only issue that potentially exists in both cases—whether India itself is immune—is unlikely to result in conflicting rulings because there is controlling precedent—in the Devas Shareholders' favor—in both Circuits. *See supra*, Section I.

and indeed, the Supreme Court has held that when a sovereign party asserts an immunity defense, the Court "should normally resolve those factual disputes [concerning jurisdiction] and reach a decision about immunity *as near to the outset of the case as is reasonably possible.*" *Helmerich & Payne*, 137 S. Ct. at 1316–17 (emphasis added).

A. The Devas Shareholders Seek Targeted Discovery On Core Jurisdictional Issues.

The Plaintiffs have sought discovery on two defined issues that go to the core of the jurisdictional challenges Air India itself has raised: (i) whether Air India's relationship to its owner, India, renders it an alter ego subject to India's waiver of immunity; and (ii) the terms of the Tata Group's acquisition of Air India from India, given Air India's contention that this transaction will render this action "moot," and thus deprive this Court of jurisdiction, and given the possibility that one motivation for the sale is India's desire to avoid enforcement of the Devas Shareholders' award against it, which would also undermine Air India's suggestion of "mootness." ECF No. 30 at 15-17; *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983) ("*Bancec*"). Air India can have no complaints about discovery on these topics, which are derived from the bases for dismissal it has alleged. *See* ECF No. 17 (Air India stating that it intends to move to dismiss on the basis that that Air India is immune from suit under the FSIA); ECF No. 23 (stating that it intends to move to dismiss on the basis that once Air India is sold to the Tata Group, this action will be moot).

As to the first basis, Air India acknowledges that "Air India could be deemed to have waived immunity [] if the Court finds that Air India is India's alter ego." ECF No. 23, at 4. But as set forth in Section I, India's arguments against waiver have been rejected by the D.C. and Second Circuits. Both jurisdiction and the merits of this case thus boil down to whether Air India is India's alter ego. And denying jurisdictional discovery is appropriate only when the Complaint fails to "ma[ke] out a prima facie case for jurisdiction," which is simply not the case here.

Funk v. Belneftekhim, 861 F.3d 354, 366 (2d Cir. 2017) (quoting *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 401 (2d Cir. 2009)). Air India does not even attempt to dispute that the Complaint sets forth a prima facie case that Air India is India's alter ego. *See* ECF No. 30 at 11–18. That is sufficient to require jurisdictional discovery. Once the plaintiff lays out a "reasonable basis for assuming jurisdiction," the Court should "allow[] limited discovery with respect to the jurisdictional issue" and may also permit "other discovery" on relevant issues. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176–77 (2d Cir. 1998); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 1995 WL 686715, at *2 (S.D.N.Y. Nov. 17, 1995) ("The scope of discovery in [FSIA] cases must necessarily be narrow, yet afford the parties an opportunity to develop an adequate factual basis for supporting the claim of jurisdiction."); *Glencore Denrees Paris v. Dep't of Nat. Store Branch 1*, 2008 WL 4298609, at *3, *6 (S.D.N.Y. Sept. 19, 2008) (granting plaintiff limited jurisdictional discovery to "explore the status" of entities that were alleged alter egos of Vietnam).[7] To the extent Air India ultimately disputes the facts set out in the Complaint demonstrating India's control and domination of Air India, it has the ultimate burden of persuasion. *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001).

[7] In the non-FSIA context, this Circuit also routinely permits discovery into the level of control between two entities to help decide jurisdictional issues. *See, e.g.*, *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206, 208 (2d Cir. 2003) (remanding because "plaintiffs should have been afforded an opportunity to engage in jurisdiction[al] discovery" into the "extensive control" of one party over another and that it was "premature to grant dismissal"); *Blockchain Mining Supply & Servs. Ltd. v. Super Crypto Mining, Inc.*, 2020 WL 7128968, at *1 (S.D.N.Y. Dec. 4, 2020) (granting "limited jurisdictional discovery regarding . . . alter ego status" because "[a]t the current stage of litigation, Plaintiff has made a sufficient threshold showing"); *Strat-agem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535, 548 (S.D.N.Y. 1994) (where plaintiff "made a sufficient start" towards establishing jurisdiction, permitting jurisdictional discovery to help "elucidate the degree of control" between two entities to determine whether jurisdiction existed); *cf. Ayyash v. Bank Al-Madina*, 2006 WL 587342, at *6 (S.D.N.Y. Mar. 9, 2006) (where jurisdictional discovery would assist in "clarifying the nature of the . . . transactions," "the Court declines to rule on the issue of subject-matter jurisdiction until such discovery has occurred").

The Supreme Court has held that when a sovereign party asserts an immunity defense, the Court "should normally resolve those factual disputes [concerning jurisdiction] and reach a decision about immunity *as near to the outset of the case as is reasonably possible.*" *Helmerich & Payne*, 137 S. Ct. at 1316–17 (emphasis added). That jurisdictional discovery into the alter ego issues may overlap with merits issues is simply irrelevant. *U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras*, 1999 WL 307642, at *6 (S.D.N.Y. May 17, 1999) ("Where a determination of the existence or absence of a principal-agent or alter ego relationship also determines immunity from suit, the parties must be afforded a fair opportunity to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." (quotation marks and citation omitted)); *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) ("[W]hen the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.").

As to the second basis for dismissal, Air India's contention that the sale of Air India to the Tata Group will moot the Devas Shareholders' claims here, the Devas Shareholders disagree with that premise,[8] but if it is credited or not yet determined by this Court, discovery into the terms of that transaction and India's motivations for it is warranted. In particular, as Air India tacitly admits, if India's "motivation behind [its] privatization is to shield Air India from enforcement of [Plaintiffs'] award," Air India's argument for mootness would be undermined. ECF No. 23 at 2.

[8] The sale of Air India will not impact its liability for the arbitral award because the relevant time periods for alter ego analysis are before the Complaint was filed. *See* ECF No. 30 at 17. Ordinary principles of corporate law provide that alter ego liability arises when the disputed events occur (here, at the issuance of the arbitral award or, at the very latest, the filing of the Complaint). ECF No. 30 at 16–17

The Devas Shareholders' motion for discovery is thus appropriately limited to the jurisdictional issues central to this Court's authority to reach the merits of this action. Discovery should proceed.[9]

B. A Stay Would Prejudice The Devas Shareholders.

Air India asks this Court to stay discovery for an indefinite period—either until this Court resolves its as-yet-unfiled motion to dismiss, or until a different court resolves a motion in a different case on a schedule beyond the control of this Court or these parties. Air India at the same time contends that its sale to Tata Group, a sale that is scheduled to take place "in December of this year,"[10] ECF No. 33 at 5, will moot this case, ECF No. 23 at 1.

When considering a stay, the court must weigh "whether a stay would unduly prejudice of present a clear tactical disadvantage to the *nonmoving* party." *Rosco, Inc. v. Mirror Lite Co.*, 2007 WL 2296827, at *3 (E.D.N.Y. Aug. 6, 2007) (emphasis in original) (quoting *Medicis Pharm. Corp. v. Upsher-Smith Labs., Inc.*, 486 F. Supp. 2d 990, 993 (D. Ariz. 2007)). In order to obtain a stay, the movant must show "that no prejudice will attend the party opposing the motion."[11] Air India

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[9] Air India will have an opportunity to dispute specific discovery requests once the Court has ordered jurisdictional discovery and the Devas Shareholders have served their discovery requests. It is premature to argue that hypothetical requests do not speak to jurisdictional issues before Air India has even filed its motion contesting this Court's jurisdiction. ECF No. 33 at 7 (opposing asset-related discovery).

[10] Considering that Air India is uniquely knowledgeable of the details of its sale to the Tata Group, it is odd that Air India has chosen to rely solely on newspaper reports and press releases to substantiate its characterization of the impending sale. If Air India believes that the privatization is of such a nature that it would sever the Devas Shareholders' ability to reach its assets, it is the party best positioned to substantiate that assertion with documents showing the sale terms or declarations describing those terms. But rather than introduce any such evidence, Air India points solely to a single Indian government press release and cursory, unsubstantiated news reports. ECF No. 33 at 5 nn. 5–9.

[11] Although prejudice to Air India, as the moving party, is not part of the standard, Air India could not show prejudice in any event. Air India's only suggestion of prejudice is its insistence that its immunity protects it from all the burdens of litigation, including discovery. That is wrong. "To accept the view that [a] limited grant of jurisdictional discovery infringes on sovereign immunity would render exceptions to the FSIA meaningless by making it impossible

cannot possibly make this showing given that under its own theory—the merits of which the Devas Shareholders contest—the stay that is seeks will not only "prejudice" the Devas Shareholders' claims, *Hong Leong*, 297 F.R.D. at 72, it will utterly destroy them. Air India's own argument contradicts its request for a stay.

Air India admits, however, that if a "motivation behind [its] privatization is to shield Air India from enforcement of [Plaintiffs'] award," Air India's argument for mootness would be undermined. ECF No. 23 at 2. And the transfer of control, when it occurs, could endanger the Devas Shareholders' ability to get discovery because Air India's new owners may lack knowledge of document location and inventory, and the chain of command between Air India and the Indian officials who exercise near complete control over the airline as a state-owned entity will be severed. And as Air India concedes by dismissing these concerns on the basis that the Tata Group has allegedly provided assurances that it will not terminate Air India's employees for a year, and will allegedly preserve documents pursuant to a litigation hold, ECF No. 33 at 16, all of this may depend on the terms of the transaction. Air India provides no evidentiary support for its assurances, nor does it dispute that the privatization may make it more difficult, if not impossible, to obtain documents and information from the Indian government officials who currently control Air India, nor does Air India provide any assurance that Air India's new owners have the institutional knowledge to ensure full and complete discovery. Thus, the sale of Air India could have the practical effect of complicating the Devas Shareholders' efforts to prove their alter ego allegations and eventually to execute on Air India's assets. This constitutes prejudice, warranting denial of Air India's motion for a stay of discovery. *See Mirra v. Jordan*, 2016 WL 889559, at *2–3 (S.D.N.Y. Mar. 1, 2016)

(absent an admission from the defendant sovereign) for a plaintiff to present a court with an evidentiary basis for an exception." *Licea v. Curacao Drydock Co.*, 870 F. Supp. 2d 1360, 1368 (S.D. Fla. 2012).

(finding prejudice because "the witnesses' memories are fading with time"); *O'Sullivan v. Deutsche Bank AG*, 2018 WL 1989585, at *9 (S.D.N.Y. Apr. 26, 2018) (permitting discovery into particular item[s]" of "non-burdensome discovery . . . in danger of being lost absent plaintiffs' ability to use the discovery process.").

And there is no doubt that, if this Court stays this action for any period of time, Air India will then argue that the privatization of Air India has mooted the case. ECF No. 23. That result would be deeply inequitable, as it would allow Air India to manipulate the schedule in this proceeding in order to deprive the Devas Shareholders of a hearing. If the Court grants a stay, therefore, it should prevent this inequitable outcome by making a determination that Air India's privatization will have no impact on the outcome of the proceeding.[12]

C. Air India's Motion To Dismiss Is Unlikely To Succeed.

A request for a stay pending resolution of a motion to dismiss must "be supported by 'substantial arguments for dismissal,' . . . or—in what we view as an equivalent formulation—that there has been 'a strong showing that the plaintiff's claim is unmeritorious.'" *Hong Leong*, 297 F.R.D. 69, 72 (S.D.N.Y. 2013); *see Giminez v. Law Offices of Hoffman & Hoffman*, 2012 WL 2861014, at *2 (E.D.N.Y. July 11, 2012); *Ellington Credit Fund, Ltd. v. Select Portfolio Servs., Inc.*, 2008 WL 11510668, at *3 (S.D.N.Y. June 12, 2008) (noting that the "arguments are potentially dispositive and sufficiently substantial to support a stay of discovery"); *Telesca v. Long Island Hous. P'Ship, Inc.*, 2006 WL 1120636, at *1 (E.D.N.Y. Apr. 27, 2006); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002). This requires

[12] The Court could foreclose Air India's mootness argument by determining either (a) that the alter ego analysis is rightly addressed on the relationship between Air India and India at the time of the arbitral award, or (b) that, regardless of the otherwise applicable standard for alter ego, Air India abandoned its ability to argue that the case has become moot by seeking the stay.

a "*strong* showing that a motion to dismiss the case in its entirety would be granted." *Medina v. City of New York*, 2020 WL 3050971, at *2 (S.D.N.Y. June 8, 2020) (emphasis in original).

Although Air India has yet to file a motion to dismiss, the arguments anticipated in its pre-motion letters do not withstand scrutiny. First, Air India suggests that this action is not ripe and must await resolution of the D.D.C. proceeding. As set forth in Section I, that position misunderstands binding Second Circuit interpretation of the New York Convention that, in secondary jurisdictions, "[r]ecognition and enforcement occur together, as one process." *CBF Industria*, 850 F.3d at 72. The fact that other enforcement actions are also pending does nothing to undermine the Devas Shareholders' claims or render this controversy "speculative or hypothetical." *Kensington Int'l*, 2007 WL 1032269, at *18. To the contrary, because the Complaint "specifies the precise declaratory relief it is seeking" and because it identifies the "obligations" "presently . . . owed to" the claimants, the Complaint lays out "an active, actual controversy between the parties" that is ripe for adjudication. *Id.* (allowing declaratory judgment and enforcement action to proceed in parallel with multiple other enforcement actions).

Air India next suggests that the Devas Shareholders lack a cause of action. The Devas Shareholders brought this action to enforce an arbitral award under the terms of the New York Convention against their arbitral award debtors, the Republic of India, in the form of India's alter ego, Air India. ECF No. 1 ¶¶ 16, 25–27. This states a cause of action. *See Aurelius Capital Master Ltd. v. Republic of Argentina*, 2010 WL 103868, at *2 (S.D.N.Y. Jan. 13, 2010) ("there exists a separate valid cause of action against Defendants to have BCRA declared an alter ego of Argentina").

Finally, Air India argues that it is immune under the FSIA but resolution of the only immunity argument truly at issue here, and uniquely before this Court—whether Air India is India's

alter ego and thus subject to India's waivers of sovereign immunity—requires discovery. This action falls under multiple FSIA exceptions. *See supra*, Section I. None of Air India's anticipated arguments provide a serious, much less "*strong* showing that a motion to dismiss the case in its entirety would be granted." *Medina*, 2020 WL 3050971, at *2. India's arguments in the D.D.C. proceeding—which Air India alternately offers as a basis for the stay of this action—are even less serious.

CONCLUSION

The Court should deny Air India's request to stay this action, or to stay discovery pending resolution of its motion to dismiss, and should grant the Devas Shareholders' request for expedited jurisdictional discovery.

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