UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURKCELL İLETIŞIM HIZMETLERI A.Ş. AND EAST ASIAN CONSORTIUM B.V.,	)	
Plaintiffs,	)	Civil Action No. 12-00479 (RBW)
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
MTN GROUP, LTD. AND MTN INTERNATIONAL (MAURITIUS) LTD.,	)	
Defendants.	)	

RESPONSE STATEMENT OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE
TO CONDUCT JURISDICTIONAL DISCOVERY

FRESHFIELDS BRUCKHAUS DERINGER US LLP
701 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004-2692
Telephone: (202) 777-4500
Facsimile: (202) 777-4555

Attorneys for Defendants

TABLE OF CONTENTS

CLAUSE **PAGE**

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

Defendants MTN Group and MTNI[1] respectfully submit this statement of points and authorities in opposition to Plaintiffs' motion for leave to conduct jurisdictional discovery dated August 1, 2012.[2]

PRELIMINARY STATEMENT

Plaintiffs have tacitly conceded the deficiency of their jurisdictional allegations by moving the Court for leave to conduct jurisdictional discovery—but only "in the event that the Court determines that the Complaint does not contain sufficient factual allegations to support general personal jurisdiction over the Defendants." Disc. Mot. at 1. Plaintiffs' request for yet another opportunity to take early discovery is reminiscent of their aggressive and unjustified approach to their claims involving the License and is directly contrary to this Court's order barring further discovery absent "exigent circumstances." Order, May 14, 2012 [docket no. 13] ("It is further ORDERED that no party shall engage in further discovery prior to the Court's decision on the defendants' forthcoming motion to dismiss or a Rule 26(f) conference of the parties absent exigent circumstances, such as the imminent destruction of evidence.").

Even accepting the jurisdictional allegations in the Complaint as true, Plaintiffs have not alleged facts sufficient to show that this Court has general or specific personal jurisdiction over Defendants, and they do not deserve a second bite at the apple to

---

[1] Terms previously defined in the Statement of Points and Authorities in Support of Defendants' Motion to Dismiss or for a Stay, dated July 2, 2012 ("MTD") and in the Statement of Points and Authorities in further support of the MTD, dated August 15, 2012 ("Reply"), will have the same meanings where used herein. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Leave to Conduct Jurisdictional Discovery shall be referred to hereinafter as the "Discovery Motion" and cited to as "Disc. Mot."

[2] Plaintiffs' tactical decision to put this argument in a separate motion rather than their opposition to Defendants' motion to dismiss the Complaint is an obvious attempt to evade the page limit imposed by Local Civil Rule 7(e).

overcome that insufficiency. *See* Mot. at 30-40. The Complaint points to a handful of alleged facts that, even when taken together, are patently insufficient to subject two African corporations whose primary operations are in Africa and the Middle East to jurisdiction in Washington, D.C. *See id.*; Reply at 17-20. Further exploration of these insufficient contacts will not alter the jurisdictional outcome, so there is no reason to subject Defendants to burdensome and invasive discovery.

ARGUMENT

No matter how liberal they claim the standard for granting jurisdictional discovery to be, Plaintiffs should not be allowed to conduct yet another discovery exercise far in advance of the discovery phase of this case. Similar to Plaintiffs' prior discovery request, discovery here is neither necessary nor appropriate because Plaintiffs cannot establish "a good faith belief that such discovery will enable [them] to show that the court has personal jurisdiction over [Defendants]."[3] *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008) (internal quotations omitted). Plaintiffs' good faith belief must extend from some "colorable basis for jurisdiction" that would justify "subjecting [Defendants] to intrusive and burdensome discovery." *Savage v. BioPort, Inc.*, 460 F. Supp. 2d 55, 62 (D.D.C. 2006). Plaintiffs, however, have utterly failed to make such a showing. Rather, their request for jurisdictional discovery is nothing more than a "fishing

[3] Plaintiffs are developing a history of submitting unjustified discovery requests to this Court. For example, Plaintiffs certified to this Court that a *de bene esse* deposition of Mr. Christian Kilowan from April 30 through May 2, 2012, which Plaintiffs improperly rely on in their Opposition, was necessary because "Mr. Kilowan is expected to leave the United States at that time, and he will be thereafter outside the subpoena power of the Court and unavailable for examination in this country." Declaration of Timothy Harkness ("Harkness Decl."), Exh. A (Plaintiffs' Notice of Deposition of Unavailable Witness). Plaintiffs' representation was directly contradicted by Mr. Kilowan himself, who testified that he would make himself available for a trial in this case, as well as a continued deposition one or two months later (assuming he would be alive) and that Plaintiffs had not verified with him the certification that they made to this Court. *See* Harkness Decl., Exh. B 848:1-18, 851:4-853:5.

expedition that the rules of jurisdictional discovery are designed to prevent." *Richards v. Duke University*, 480 F. Supp. 2d 222, 231 (D.D.C. 2007). Consequently, as Plaintiffs' own authorities confirm, this Court should deny jurisdictional discovery because Plaintiffs have failed to allege contacts sufficient "to indicate that a court in the District of Columbia might constitutionally assert jurisdiction over [alien defendants]," like MTN Group and MTNI. *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1089 (D.C. Cir. 1998) (denying jurisdictional discovery because allegations that "'[defendant] sells . . . advertising time, primarily to U.S. companies,' and that [Defendant] 'made sales calls to U.S. companies nationally' and 'disseminated . . . brochures by hand and by the U.S. mail'" were too bare to support inference that defendant solicited companies in D.C., and in any event, such allegation would not support general jurisdiction anyway).

The series of irrelevant contacts alleged in the Complaint against MTN Group cannot support jurisdiction because courts have found them to be insufficient bases for jurisdiction. Moreover, the Complaint is devoid of any U.S. contacts by MTNI. Accordingly, the Discovery Motion should be denied because jurisdictional discovery will not "enable [Plaintiffs] to show that the court has personal jurisdiction over [Defendants]" and this Court should not encourage Plaintiffs' efforts to prolong this litigation in a manner that is unfair to both the Defendants and the Court. *See Roz Trading Ltd. v. Zeromax Group, Inc.*, 517 F. Supp. 2d 377, 388 (D.D.C. 2007) (denying jurisdictional discovery where plaintiffs "failed to present facts that could establish jurisdiction"); *Savage*, 460 F. Supp. 2d at 62 (denying request for jurisdictional discovery where "[a]dditional discovery of [defendant's] contacts will not affect the jurisdictional

outcome" because "[n]one of the contacts relate to or arise out of [Plaintiffs'] claim, nor could they conceivably lead any court to believe that general jurisdiction exists").

I. DEFENDANTS' ALLEGED CONTACTS DO NOT CONFER JURISDICTION

The "specific, targeted discovery" that Plaintiffs seek, Disc. Mot. at 3, should be denied because no discovery could enable Plaintiffs to demonstrate that the Court has personal jurisdiction over Defendants. Indeed, Plaintiffs have alleged only a handful of inconsequential contacts between MTN Group and the U.S. as a basis for exercising general personal jurisdiction over Defendants. As the Supreme Court recently reaffirmed, general personal jurisdiction cannot be based on "attenuated" contacts with the forum. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___,131 S.Ct. 2846, 2857 (2011) (*quoting Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1872-73 (1984)). Rather, it can only apply to "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities." *Id.* (*quoting Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 318, 66 S.Ct. 154, 159 (1945)).

Plaintiffs' first and second requests, which concern (i) which entities related to Defendants are parties to roaming agreements with U.S. carriers, and (ii) "the volume of roaming minutes consumed on various U.S. carriers by MTN customers," cannot lead to material establishing jurisdictional contacts. Disc. Mot. at 3. These requests should be denied because even if MTN Group has roaming agreements with U.S. carriers, that fact would be insufficient to establish personal jurisdiction over MTN Group. In fact, "every

court to consider the question has held that 'roaming' agreements are not sufficient to establish personal jurisdiction over a cellular service provider, unless the dispute is directly related to the 'roaming' agreement." *Cmty Voice Line, L.L.C. v. MetroPCS Commc'ns*, Case No. C 11-4019-MWB, 2011 U.S. Dist. LEXIS 19350, at *5 (N.D. Iowa Feb. 25, 2011) (collecting cases from the Western District of Washington, the District of Maryland, the Western District of North Carolina, and the District of Puerto Rico, and dismissing case for lack of personal jurisdiction based on roaming agreements).

Further, roaming agreements could not possibly confer personal jurisdiction over MTN Group because it would violate Due Process. Due Process requires, among other things, that Defendants may not be haled into a court unless they have purposefully availed themselves of "the privilege of conducting activities within the forum state." *Telcordia Techs. Inc. v. Telkom SA, Ltd.*, No. 02-1990 (JR), 2003 U.S. Dist. LEXIS 23726, at *7 (D.D.C. July 20, 2003). However, a telecommunication company's "agreements with other wireless service providers that provide nation-wide roaming services for its customers . . . cannot be construed as the purposeful direction of activities" in the forum state. *Thomas v. Centennial Commc'n Corp.*, Case No. 3:05CV495, 2006 U.S. Dist. LEXIS 92555, at *10 (W.D.N.C., Dec. 19, 2006). Accordingly, the first two discovery requests in Plaintiffs' Discovery Motion should be denied, because no amount of discovery concerning the alleged roaming agreements could support general jurisdiction over Defendants. *See FC Inv. Grp. LC*, 529 F.3d at 1094 (denial of request for jurisdictional discovery is proper where no amount of discovery would help plaintiff demonstrate that the court could exercise personal jurisdiction over defendant).

Plaintiffs' third and fourth requests, seeking discovery regarding "the contractual structure of MTN's Top-Up service" and the "frequency and volume of business MTN does through the interactive Top-Up website and at storefront locations here," should also be denied. Disc. Mot. at 3. Neither of these topics warrants jurisdictional discovery. First, the top-up website cited in the Complaint, www.mtntopup.com, is not a contact of MTN Group or MTNI sufficient to confer general jurisdiction over Defendants because, as the website indicates, it is powered by a company called Sochitel. Harkness Decl., Exh. C. According to that website, Sochitel acts as a distributor for Defendants' products. *Id*. Thus, jurisdictional discovery is not appropriate because no amount of discovery into the sale of MTN top-up minutes by the website powered by Sochitel—a third party distributor—is likely to lead to material that would allow this Court to exercise jurisdiction over MTN Group.[4] *See Formica v. Cascade Candle Co.*, 125 F. Supp. 2d 552, 555 (D.D.C. 2001) (citing *Asahi Metal Industry Co., Ltd. v. Superior Ct. of Cal.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032 (1987) and finding no personal jurisdiction where nationwide third-party distributor of defendant's product distributed product in D.C. because there was no purposeful availment directed toward D.C., and further denying request for jurisdictional discovery).

Further, the alleged sales of any top-up service at 7-Eleven stores in D.C. is insufficient to confer general jurisdiction over Defendants, regardless of the "frequency and volume" of business that they do through the 7-Eleven stores or "their value relative

[4] In fact, MTN Group has its own website, www.mtn.com, which does not appear to sell MTN Group products. Harkness Decl., Exh. D. In this regard, the MTN Group website itself is a passive website that, while accessible from the U.S., is insufficient to confer general jurisdiction over defendants. *See Parisi v. Sinclair*, 806 F. Supp. 2d 93, 97 (D.D.C. 2011) ("[I]t is well established in [the D.C.] Circuit that the ability of District residents to access a defendant's website does not, by itself, show any 'persistent course of conduct' in this District.").

to MTN's other operations." Disc. Mot. at 3. Indeed, Plaintiffs allege that the sale of Defendants' top-up minutes is made in cooperation with Sochitel, Compl. ¶ 43, and the distribution by Sochitel, a third-party distributor, of Defendants' top-up minutes to 7-Eleven, a global retailer, cannot be sufficient to confer jurisdiction over MTN Group in D.C. or in the U.S.[5] *See* Harkness Decl., Exh. F (displaying international locations of 7-Eleven stores); *Formica*, 125 F. Supp. 2d at 555 (no personal jurisdiction over defendant where nationwide third-party distributed defendant's product in D.C.).[6] Accordingly, because no amount of discovery on this issue will assist Plaintiffs in demonstrating that the Court could exercise jurisdiction over MTN Group, Plaintiffs are not entitled to discovery on such issues.

Moreover, if this Court were to hold that the sale of top-up services by a third-party over a website or at retail locations could provide a basis for jurisdiction, then this Court could likely assert personal jurisdiction over almost every foreign telecommunications company in the world. For example, at least one third-party provider claims to have partnerships with 200 mobile phone operators/countries globally, and purchases of the top-up minutes can be made from the U.S. *See* Harkness Decl., Exh. G-I (Ezetop website pages). Asserting jurisdiction over these foreign operators could not

---

[5] Notably, to the extent any residents in D.C. actually purchase MTN airtime through the top-up services, such airtime is most likely going to be used in Africa or the Middle East, the only locations in which MTN Group operates. *See* Harkness Decl., Exh. E (MTN Group company profile).

[6] Even assuming *arguendo* that MTN Group were selling its top-up minutes directly to 7-Eleven, it would be insufficient to confer general jurisdiction over MTN Group because sales of a product to 7-Eleven, which has retail locations all over the world, is insufficient to confer general jurisdiction over MTN Group in D.C. or the U.S. *See Formica*, 125 F. Supp. 2d at 555 (no personal jurisdiction over defendant where nationwide third-party distributed defendant's product in D.C. because defendant lacked the "substantial connection . . . necessary for a finding of minimum contacts.") (internal citation omitted).

comport with "traditional notions of fair play and substantial justice." *Nat'l Resident Matching Program v. Elec. Residency LLC*, 720 F. Supp. 2d 92, 98 (D.D.C. 2010).

Plaintiffs' seventh and eighth requests, seeking invasive discovery of the "scale and scope of MTN's business operations with U.S. banks, securities brokers, and financial institutions, and whether any related to the Iranian transactions at issue here" and "MTN's other business relationships in the United States," should also be denied. Disc. Mot. at 4. These discovery topics are not only extremely unclear, but they also constitute nothing but an impermissible fishing expedition, which D.C. courts routinely deny. *See Richards*, 480 F. Supp. 2d at 231 (denying motion for leave to take jurisdictional discovery where requested discovery was "the sort of fishing expedition that the rules of jurisdictional discovery are designed to prevent"); *Bastin v. Fed. Nat'l Mortg. Assoc.*, 104 F.3d 1392, 1396 (D.C. Cir. 1997) (affirming district court decision denying jurisdictional discovery where plaintiffs offered nothing "but rank speculation" to support their request for jurisdictional discovery, and explaining that district courts do not abuse their discretion where they "den[y] a discovery request that would amount to nothing more than a fishing expedition"). Accordingly, Plaintiffs are not permitted to seek discovery in the hopes that it may reveal "other business relationships in the United States, as outline[d] [sic] in the Complaint *and otherwise*." Disc. Mot. at 4 (emphasis added).

II. PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY REGARDING MTNI'S OPERATIONS

Plaintiffs' fifth and sixth discovery requests seek discovery regarding "the identity of the officers and directors of MTN International" and "MTN International's operations,

centralized control with MTN Group, and financial control." Disc. Mot. at 3. Plaintiffs are presumably seeking this discovery because they have not alleged a single contact between MTNI and the U.S., and they are hoping to dig up some evidence of an alter ego relationship to attribute MTN Group's alleged jurisdictional contacts to MTNI. Neither discovery request, however, is appropriate.

As a preliminary matter, Plaintiffs have failed to meet their burden of demonstrating that MTN Group is subject to personal jurisdiction in D.C., and accordingly, it is irrelevant whether MTNI is an alter ego of MTN Group for jurisdictional purposes. *See* MTD at 30-40 and Reply at 17-18.

In any event, to attribute the contacts of MTN Group to MTNI, Plaintiffs would need to adequately allege a unity of interest and ownership between MTN Group and its subsidiaries, which they have not. *See Mazza v. Verizon Wash. D.C., Inc.*, Case No. 11-719 (EGS), 2012 U.S. Dist. LEXIS 43314, at *32-33 (D.D.C. Mar. 29, 2012). "Unity of interest is measured by 'the nature of the corporate ownership and control; failure to maintain corporate minutes or records; failure to maintain corporate formalities; commingling of funds and assets; diversion of one corporation's funds to the other's uses; and use of the same office or business location." *AGS Int'l Servs. S.A. v. Newmont USA Ltd.*, 346 F. Supp. 2d 64, 90 (D.D.C. 2004). Plaintiffs presumably seek discovery into MTNI's officers and directors to show common leadership between MTN Group and MTNI, but even if Defendants shared officers and directors, this one fact on its own would be insufficient to demonstrate a unity of interest between MTN Group and MTNI.[7]

[7] Plaintiffs' reliance on *I Mark Marketing Services, LLC. v. Geoplast, S.p.A.*, 733 F. Supp. 2d 141 (D.D.C. 2010) is misplaced. The *I Mark* court highlighted that the defendant's managing director was the U.S. subsidiary's president and sole director and stated, "In this case, more than just common corporate

Tall v. Comcast of Potomac, LLC, 729 F. Supp. 2d 342, 348 n.5 (D.D.C. 2010) ("[T]he mere fact that [one company] may share executives with [a related company's] parent company says nothing about the relationship between [the two companies]. And, in any event, shared executives, by itself, does not demonstrate that two corporations are alter egos."). Accordingly, discovery into this issue would not assist Plaintiffs in demonstrating that MTNI is an alter ego of MTN Group. [8]

The Complaint also lacks *any* allegations that MTN Group and MTNI share common operations, financial control or any of the other factors that D.C. courts consider when deciding whether to attribute contacts of one company to a related company. Accordingly, Plaintiffs' sixth request for discovery regarding MTNI's operations,

---

ownership exists. [Defendant] has *complete* control over [the U.S. subsidiary], as [the U.S. subsidiary's] president and only director—Mr. Pegoraro—is also [defendant's] managing director." *Id.* at 152. Plaintiffs do not and cannot allege the "complete" control that was found in *I Mark*. Moreover, the *I Mark* court found that the defendant and its U.S. subsidiary were alter egos based on many additional factors. *See id.* Accordingly, it does not compel the same result here, where none of the other factors D.C. courts consider in assessing unity of interest are alleged.

[8] In Plaintiffs' Opposition to Defendants' MTD, Plaintiffs claim that Defendants only addressed the "alter ego" test for attributing the jurisdictional contacts of one entity to another, when this Court applies four tests: the "agency" test, the "alter ego" test, the "instrumentality" test, and the "integrated enterprise" test. *See* Opp. at 31. Plaintiffs' argument in this regard is misplaced. Specifically, in *Diamond Chemical Co. v. Atofina Chems., Inc.*, the very case that Plaintiffs cite for their argument that the Court applies four tests for attributing the jurisdictional contacts of one entity to another, the court explicitly rejected the plaintiff's argument that those four tests apply. *See* 268 F. Supp. 2d 1, 14 (D.D.C. 2003). The court explained,

> Plaintiff's reliance on this line of analysis [discussing the "agency," "alter ego," "instrumentality," and "integrated enterprise" tests] is misplaced. The issue of whether or not to hold [a successor company] liable for the actions of its acquired subsidiaries is separate and distinct from the threshold question of whether or not this Court has jurisdiction over TFE. The Court interprets Plaintiffs argument as a request that the Court engage in the same "alter ego" analysis as was done *supra* with regard to the question of whether this Court has general jurisdiction over [the defendant] through the contacts of its subsidiaries….

Id. While some courts have applied an "agency" test, *see Khatib v. Alliance Bankshares Corp.*, Civ. Action No. 12-00056 (CKK), 2012 WL 668594, at *39 (D.D.C. Mar. 1, 2012), Plaintiffs have failed to plead allegations sufficient to show an agency relationship, and the case law they cite does not support their argument that D.C. courts apply an "instrumentality" or "integrated enterprise" test to determine whether to attribute the jurisdictional contacts of one entity to another.

centralized control with MTN Group, and financial control is an impermissible fishing expedition and should be denied. *See supra* at 8.

In addition to Plaintiffs' failure to demonstrate a unity of interest and ownership between MTN Group and MTNI, Plaintiffs fail to satisfy the second prong for demonstrating alter ego jurisdiction because they have not adequately alleged that treating MTNI's alleged wrongful acts as those of MTNI alone would be inequitable, *see Mazza*, 2012 U.S. Dist. LEXIS 43314, at *32-33, nor are they seeking discovery to prove that. Accordingly, Plaintiffs have not adequately alleged that MTNI is an alter ego of MTN Group, and they are not entitled to the sweeping jurisdictional discovery regarding MTNI's operations that they seek in these requests.

Finally, Plaintiffs' Discovery Motion is unclear as to whether they are requesting discovery regarding the alleged U.S. contacts of MTN Group's non-party subsidiaries.[9] To the extent Plaintiffs are requesting discovery regarding MTN Group's non-party subsidiaries' contacts with the U.S., such discovery is impermissible because Plaintiffs have not adequately alleged—nor are they seeking discovery to allege—that MTN Group's non-party subsidiaries are mere alter egos of MTN Group. *See* MTD at 31-32. Because any contacts of MTN Group's non-party subsidiaries would not be attributable

[9] For example, although Plaintiffs define "MTN" in their Complaint as the "MTN companies," which includes MTN Group's subsidiaries, in their Motion for Jurisdictional Discovery, they change the definition so that "MTN" encompasses only MTN Group and MTNI. Disc. Mot. at 1. Accordingly, to the extent Plaintiffs seek discovery regarding "MTN" in their Motion for Jurisdictional Discovery, Defendants have assumed that the discovery is limited to discovery regarding alleged contacts for MTN Group and MTNI. Disc. Mot. at 3. To the extent Plaintiffs argue in their reply that, contrary to the definition in their Motion for Jurisdictional Discovery, their discovery requests concerning "MTN" also includes MTN Group's non-party subsidiaries, Defendants oppose such request and request leave to file a sur-reply to argue why such discovery would not "enable [Plaintiffs] to show that the court has personal jurisdiction over [Defendants]" and would therefore be improper.

to MTN Group, discovery regarding those contacts would be irrelevant and should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to Conduct Jurisdictional Discovery and granting such additional relief as the Court may deem just and proper.

Dated: August 15, 2012

Respectfully submitted,

FRESHFIELDS BRUCKHAUS DERINGER US LLP

/s/ Timothy J. Coleman
Timothy J. Coleman (#436415)
Timothy P. Harkness (admitted *pro hac vice*)
Jessica R. Simonoff (admitted *pro hac vice*)
Pamila Gudkov (admitted *pro hac vice*)
Mia L. Havel (#994371)
701 Pennsylvania Avenue, N.W., Suite 600
Washington, DC 20004-2692
tim.coleman@freshfields.com

Attorneys for Defendants