UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TURKCELL İLETIŞIM HIZMETLERI A.Ş. and EAST ASIAN CONSORTIUM B.V. Plaintiffs, vs. **MTN GROUP, LTD. and MTN INTERNATIONAL (MAURITIUS) LTD.** Defendants.	Civil Action No.: 12-cv-00479 (RBW)

REPLY IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT JURISDICTIONAL DISCOVERY

Plaintiffs Turkcell İletişim Hizmetleri A.Ş. and East Asian Consortium B.V. (collectively, "Turkcell"), by and through their undersigned counsel, pursuant to Fed. R. Civ. P. 7 and 26(d)(1), respectfully submit this Reply in further support of their Motion for Leave to Conduct Jurisdictional Discovery (the "Motion"), and in support thereof aver as follows:

I. JURISDICTIONAL DISCOVERY IS APPROPARTE UNDER THE LAW OF THIS CIRCUIT

Defendants' opening volley in opposition to Turkcell's Motion is rife with erroneous arguments. At the outset, Defendants first claim that the Motion is an "obvious attempt to evade the page limitation imposed by Local Civil Rule 7(e)." Opposition ("Opp.") at 1 n.1. This represents a fundamental misunderstanding of the Rules. The District of Columbia Circuit has stated unambiguously that, "[t]o get [jurisdictional] discovery," a party has to "ask for it."[1] *GSS Group Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012). Fed. R. Civ. P. 7(b)(1), in

[1] Defendant's notion that a request for jurisdictional discovery, in and of itself, concedes a lack of personal jurisdiction is without merit. Were this the case, no court would ever have entertained a motion for jurisdictional discovery—an absurd result.

turn, provides that "[a] request for a court order must be made by *motion*" (emphasis added), not by opposition. *See also Second Amendment Found v. United States Conf. of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001) (rejecting request for jurisdictional discovery not made by motion). Turkcell's Motion is not an attempt to evade a page limitation, and it is properly before the Court.

With respect to the substance of the motion, Defendants first contend that jurisdictional discovery is inappropriate, arguing that the jurisdictional contacts alleged in the Complaint could not support personal jurisdiction in any event, and, oddly, that jurisdictional discovery would be inappropriate "in advance of the discovery phase of this case." Opp. at 2. Turkcell has explained the relevance and adequacy of Defendants' jurisdictional contacts with the District of Columbia at length in their Opposition to Defendants' Motion to Dismiss. *See* Opposition to Motion to Dismiss (Dkt. No. 37) at 23-28. The contention that jurisdictional discovery is inappropriate at this stage of the case—when Defendants are seeking to have it dismissed for lack of personal jurisdiction—makes so sense and is contrary to District of Columbia law. "A plaintiff faced with a motion to dismiss for lack of personal jurisdiction *is entitled to reasonable discovery*, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum." *Ventura v. Bebo Foods, Inc.*, 595 F. Supp. 2d 77, 84 (D.D.C. 2009) (emphasis added) (*quoting El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996)) (collecting cases).

Defendants next insinuate that Turkcell is erroneously claiming a liberal standard for granting jurisdictional discovery. Opp. at 2. Turkcell does not "claim" that the standard for granting jurisdictional discovery is liberal. The District of Columbia Circuit has said it is so. *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1352 (D.C. Cir. 2000)

(granting jurisdictional discovery even where there was "absolutely no merit" to plaintiffs' alter-ego claim); *Diamond Chem. Co. v. Atofina Chems., Inc.*, 268 F. Supp. 2d 1, 15 (D.D.C. 2003) ("This Circuit's standard for permitting jurisdictional discovery is quite liberal") (granting jurisdictional discovery even though plaintiff failed to allege *prima facie* case of jurisdiction).

Defendants attempt to counter this Circuit's liberal standard for granting jurisdictional discovery with a string of inapposite cases and fallacious arguments. Defendants first reiterate their claim that Turkcell has alleged insufficient facts to support personal jurisdiction. Opp. at 1-2. Turkcell disagrees, of course. In the event that the Court should determine that insufficient factual information is available to support personal jurisdiction, however, jurisdictional discovery is necessary and appropriate. For example, in *Burnett v. Al Baraka Investment and Development Corporation*, this Court considered whether to permit jurisdictional discovery with respect to a defendant Saudi Arabian bank. 274 F.Supp.2d 86, 97 (D.D.C. 2003). The only alleged contacts between the bank and the United States were litigation in Texas by a subsidiary and that the bank's "website informs its customers and potential customers that it provides a banking service to accomplish the quick transfer of funds to relatives here." *Id.* The *Burnett* plaintiffs requested leave to conduct jurisdictional discovery if the facts alleged "do not amount to a *prima facie* showing of personal jurisdiction[.]" *Id.* This Court noted that the plaintiffs' factual showing *did not* satisfy their jurisdictional burden, and therefore granted leave to conduct jurisdictional discovery. *Id.*

Defendants cite *Savage v. BioPort, Inc.*, 460 F.Supp.2d 55, 62 (D.D.C. 2006), arguing that jurisdictional discovery would be inappropriate where there is no colorable claim to personal jurisdiction. *BioPort*, however, considered whether there could be personal jurisdiction over a foreign corporation with no physical presence that "has never marketed or sold [its goods] for

distribution or use by the general public… [or] to a resident of the District of Columbia." *Id.* at 59. Not only has MTN advertised and sold its key product, telephone air time, in the District of Columbia, Turkcell attached a receipt for it to the Opposition to the Motion to Dismiss. *See* Lagoy Declaration (Dkt. No. 37-8).[2]

Defendants also compare this action to *Richards v. Duke University*, 480 F.Supp.2d 222 (D.D.C. 2007), arguing that the motion for jurisdictional discovery is a fishing expedition that the Federal Rules of Civil Procedure are designed to prevent. In *Richards*, a former Georgetown University law graduate sued Duke University and Georgetown University for, *inter alia*, calling on her in class, engaging in covert surveillance at her home and in her car; having law professors enter her home to move books; and altering a class syllabus to imply that she was homosexual. In the same action, she sued Microsoft for joining the conspiracy with the schools, alleging that Bill Gates had become physically attracted to her, leading to fears that he would leave Melinda Gates for the plaintiff. Microsoft allegedly stole her intellectual property to profit in the wireless technology market and included a picture of a pregnant woman on its website for the purpose of implying that the plaintiff was pregnant with Bill Gates' child. *Id.* at 228-29. The plaintiff sought jurisdictional discovery to flesh out the conspiracy between the defendants based on the allegation that they were "very much connected to each other." *Id.* at 231. This was the fishing expedition the Court refused to countenance. The instant action has no resemblance to the *Richards* case given the plethora of credible and substantiated contacts of MTN Group in the District of Columbia. Here, Defendants' reliance on *Richards* is, at best, misguided.

[2] As discussed in Turkcell's Opposition to Defendants' Motion to Dismiss at 25-26, Defendants' reliance on *FC Inv. Grp. LC v. IFX Mkts., Ltd.,* 529 F.3d 1087, 1-94 (D.C. Cir. 2008), is also inapposite, as the defendant in that case had specifically proffered the uncontested fact that it had only ever maintained a single account for a District of Columbia resident for less than a year. *Id.* at 1093.

Defendants fare no better with *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1089 (D.C. Cir. 1998), where there was not "a scintilla of evidence to suggest that [the defendant] has even the slightest connection with the District of Columbia," *id.* at 1083, and even in response to a motion to dismiss for lack of personal jurisdiction, the plaintiff "did not allege any facts remotely suggesting that [the defendant] had any connection to the District of Columbia." *Id.* at 1090. The comparison to this action, where Defendants have argued at length about the quality of alleged contacts with the District of Columbia, rather than their existence, is inapt.[3]

In short, Defendants cannot point to a single case remotely similar to this one, where a defendant has extensive contacts in the District of Columbia, denying jurisdictional discovery. This is unsurprising given that jurisdictional discovery would be appropriate even if Turkcell had been unable to make a *prima facie* allegation of personal jurisdiction. *See Burnett*, 274 F.Supp.2d at 97.

II. TURKCELL IS ENTITLED TO JURISDICTIONAL DISCOVERY WITH RESPECT TO MTN GROUP

Defendants argue that Turkcell is not entitled to discovery regarding MTN Group's contacts with the District of Columbia regarding roaming agreements, MTN's Top-Up service, and MTN's other business in the United States. Opp. at 6-8. First, Defendants argue that the subject contacts, standing alone, are insufficient to confer personal jurisdiction. *Id.* This argument ignores that Defendants' jurisdictional contacts must be considered in the aggregate, not standing along. *See Marshall v. I-Flow, LLC*, 2012 U.S. Dist. LEXIS 55514 (D.D.C. April

[3] In *Roz Trading Ltd. v. Zeromax Group, Inc.*, 517 F.Supp.2d 377, 388 (D.D.C. 2007), the Court rightfully denied jurisdictional discovery when the discovery sought was aimed solely at establishing that two parties were alter egos, when neither party could be subject to the personal jurisdiction of the Court. Here, by contrast, there are ample allegations that MTN Group is subject to personal jurisdiction here, and that MTN International is its alter ego.

20, 2012) (considering effect of multiple contacts unrelated to cause of action to find general personal jurisdiction); *Cossaboon v. Me. Med. Ctr.*, 600 F.3d 25, 33 (1st Cir. 2010) ("exercise of general jurisdiction ultimately depends upon those contacts viewed in the aggregate"); *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995) ("COPSA wrongly attempts to treat each category of these numerous and significant communications separately"); *Grand Entertainment Group v. Star Media Sales*, 988 F.2d 476, 482 (3d Cir. 1993) (considering aggregated contacts); *Bigelow Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060, 1063 (5th Cir. 1981) (court looks at relevant contacts in the "totality of circumstances" rather than whether "each standing alone would have been sufficient to sustain jurisdiction"); *Lettieri's Inc. v. McLane Co.*, 2003 U.S. Dist. LEXIS 20313 (D. Minn. Nov. 10, 2003) ("Granted, none of these contacts alone would justify a finding of general personal jurisdiction, but the Court must look at the aggregate contacts and the totality of the circumstances").

Next, Defendants challenge the adequacy of the contacts themselves. While Defendants point to a number of cases where roaming agreements have been found insufficient to confer general personal jurisdiction, authority on the issue is split. *See e.g.*, *Americatel El Sal., S.A. de C.V. v. Compania De Telecomunicaciones De El Sal., S.A. de C.V.*, 2008 U.S. Dist. LEXIS 32267 at *4 (S.D. Fla. Apr. 19, 2008) (finding general personal jurisdiction over an El Salvadoran telecommunications company based on its interconnection agreements with United States wireless carriers). As in *Americatel*, entering into agreements for the express purpose of offering wireless telephone service to MTN customers in the District of Columbia and throughout the United States, from which MTN derives significant revenue, is the type of continuous and systematic business activity that should result in general personal jurisdiction

here. Even if the Court should disagree, MTN's roaming agreements are but one of several elements to consider, along with its multiple other contacts, in analyzing the personal jurisdiction issue.

Defendants next argue that MTN's Top-Up service does not warrant further inquiry into the frequency of use and volume of business through its website. Opp. at 6. Yet these are exactly the bases on which Defendants challenged the adequacy of the contact in their Motion to Dismiss. *See* Statement of Points and Authorities in Support of Defendants' Motion to Dismiss at 35 (arguing that the test for personal jurisdiction "requires an examination of the frequency and volume of the [defendants'] transactions with [D.C.] residents." Turkcell agrees. There should be an examination of the frequency and volume of those transactions. The instant motion seeks leave to conduct that examination.

Defendants argue that the Top-Up service is somehow "powered" by a company call Sochitel, Opp. at 7, and that the presence of a third party distributor negates this contact, citing *Formica v. Cascade Candle Co.*, 125 F.Supp.2d 552, 555 (D.D.C. 2001). In *Formica*, a wholesaler defendant sold candles to a distributor; the distributor, in turn, sold them to a retailer in the District of Columbia. *Id.* at 5. The Court noted that there were insufficient jurisdictional contacts because the defendant did not receive revenue from candles sold in the District of Columbia, having first sold them to a distributor. *Id.* Here, there is no indication of what role Sochitel may play in the sale of MTN airtime, other than a mention that on the website that Sochitel "powers" the Top-Up service. Jurisdictional discovery will allow Turkcell to explore just what kind of relationship exists between Sochitel and MTN, and whether MTN receives revenue from the sale of its airtime here. This is a classic case where a Defendant should not be

permitted to defeat jurisdiction by withholding facts. *Ventura v. Bebo Foods, Inc.*, 595 F. Supp. 2d 77, 84 (D.D.C. 2009).[4]

Defendants oppose jurisdictional discovery into other contacts with the United States, arguing that any such inquiry would be a "fishing expedition" and "rank inquiry." Opp. at 8. Defendants again ignore the many jurisdictional contacts specifically identified in the Complaint and in the Opposition to the Motion to Dismiss, including extensive dealings with Western Union, Facebook, Intelsat, and others. *See* Opposition to Motion to Dismiss at 27-28. Discovery regarding known and documented contacts with the United States is anything but a fishing expedition. It is an exploration of the nature of such contact to determine whether it supports personal jurisdiction.

Jurisdictional discovery is further necessitated by the fact that information regarding Defendants' United States contacts available through public sources continues to amass following the recent filing of Defendants' Opposition. For example, through press articles, Turkcell recently learned that Defendants have been actively engaged in lobbying the United States government to enable it to move funds out of Iran, notwithstanding U.S. sanctions that hinder repatriation of profits to South Africa. *See* Exhibit 1 (collecting articles). Given that Defendants have accrued those profits only as a result of their scheme of corruption in South Africa, Iran and before the IAEA—facts likely omitted from their lobbying efforts—such contacts may further support personal jurisdiction here.

[4] Defendants' comparison of MTN's Top-Up service with other allegedly similar services is unhelpful. Opp. at 7 & Harkness Decl., Exh. G-I. None of the materials supplied show how either service operates or what role various telecommunications companies play in them.

III. TURKCELL IS ENTITLED TO JURISDICTIONAL DISCOVERY WITH RESPECT TO MTN INTERNATIONAL

Turkcell has alleged that MTN Group's jurisdictional contacts are attributable to MTN International under either the alter-ego test or the agency test, among others. *See Diamond Chemical Co. v. Atofina Chems. Inc.*, 268 F.Supp.2d 1, 14 (D.D.C. 2003); *Khatib v. Alliance Bankshares Corp*, No. 12-56 (CKK), 2012 WL 668594, at *39 (D.D.C. Mar. 1, 2012). Defendants use their opposition to the instant Motion merely to rehash the same arguments already argued in the Motion to Dismiss, namely, that Turkcell has not satisfied the requirements of the alter-ego test. Opp. at 10. As discussed at length in Turkcell's Opposition to the Motion to Dismiss, however, the Complaint, standing alone, contains adequate allegations that: (1) MTN Group and MTN International have a unity of interest and ownership, and (2) that, due to MTN Group's control over MTN International in orchestrating the scheme of corruption, it would be inequitable to treat the two separately. *See* Opposition to Motion to Dismiss at 30-33.

In any event, this is precisely the area of inquiry where the standard for granting jurisdictional discovery is most liberal.

> [A]s the record now stands, there is absolutely no merit to GTE's bold claim that the parent companies and subsidiaries involved in this lawsuit should be treated identically. Jurisdictional discovery will help to sort out these matters…. We cannot tell whether jurisdictional discovery will assist GTE on this score, but it is entitled to pursue precisely focused discovery aimed at addressing matters relating to personal jurisdiction.

GTE New Media Services Inc. v. BellSouth Corp., 199 F.3d 1343, 1352 (D.C. Cir. 2000). The law of this Circuit unambiguously supports Turkcell's right to conduct jurisdictional discovery. In the event that the Court determines that additional factual development would permit Turkcell to supplement their jurisdictional allegations if necessary, the Court should grant the Motion.

IV. CONCLUSION

For the foregoing reasons, in the event this Honorable Court should require additional evidence of Defendants' contacts with the United States and the District of Columbia, Turkcell respectfully requests that the Court grant their Motion for Leave to Conduct Jurisdictional Discovery and grant such additional relief as the Court deems just and proper.

Respectfully submitted,

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Date: August 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2012, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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