

Case No. 12-15178

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANDANA FARHANG AND M.A. MOBILE LTD.
Plaintiffs-Appellees

v.

INDIAN INSTITUTE OF TECHNOLOGY, KHARAGPUR and
TECHNOLOGY INCUBATION AND ENTREPRENEURSHIP SOCIETY
Defendants-Appellants

Appeal from the United States District Court Northern District of California
Case No. CV 08-02658-RMW, The Honorable Ronald M. Whyte

**ANSWERING BRIEF FOR PLAINTIFFS-APPELLEES
MANDANA D. FARHANG AND M.A. MOBILE LTD.**

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INTRODUCTION

In the age of technology development and privatization, governments routinely rely on commercial transactions with the private sector to develop and implement technologies that may be of significant use to government agencies. Were foreign governments (or the U.S. government for that matter) able to breach commercial contracts at will merely by invoking sovereign immunity, private technology companies around the world would suffer unfair competitive advantage at the whim of state agencies. For this reason, Congress enacted the 1976 Foreign Sovereign Immunities Act (“FSIA”) and embraced the “restrictive” model of sovereign immunity. Under this restrictive model, the FSIA will pierce immunity where there is evidence of waiver or the foreign state engaged in clearly commercial acts.

Defendant-Appellant Technology Incubation and Entrepreneurship Training Society (the “Incubation Society” or “Society”), an entity created by and housed on the campus of Defendant Indian Institute of Technology, Kharagpur (“IIT”), asks the Court to “imagine” a different world, posing a hypothetical in their opening brief that harkens back more than two centuries to the absolute model of sovereign immunity where foreign states enjoyed pristine immunity from suit regardless of

their actions and where interests of comity trumped all legitimate interests of fairness in commercial transactions. The Incubation Society's illusory hypothetical, however, has no application here. Unlike the Incubation Society's fictional Indian entrepreneur who sought to do business with the FAA and the United States, Plaintiff Mandana D. Farhang ("Ms. Farhang") and her U.S. based subsidiary Plaintiff M.A. Mobile Ltd. ("M.A. Mobile") already owned valuable mobile technology that was based in the United States and was the subject of a then pending U.S. patent application. Unlike Appellant's imaginary FAA, the Incubation Society regularly seeks commercial collaborations in the United States. Indeed, immediately following an initial meeting in California, Defendant Partha Chakrabarti, the officer of IIT who would later create the Incubation Society, recognized the value of Ms. Farhang's technology, and immediately negotiated for the launch of a joint venture using Ms. Farhang's technology.

By August of 2003, one year before the Incubation Society was created, IIT executed a non-disclosure agreement ("NDA") (with an express U.S. choice of law and U.S. jurisdiction provision) by which Ms. Farhang agreed to disclose the technology to IIT to facilitate the formation and launch of a cross border joint venture. IIT signed the NDA with full understanding that Ms. Farhang solely owned and controlled M.A. Mobile, that she effectively owned and controlled all of the technology, and that both Ms. Farhang and M.A. Mobile were located in

California. IIT's knowledge was later directly transferred to the Incubation Society, which was founded and staffed by IIT. Indeed, the Incubation Society's founding officer had negotiated and executed the NDA on behalf of IIT in the first place.

By the fall of 2004, IIT, M.A. Mobile and Ms. Farhang, operating under the NDA, launched the joint venture to develop and commercialize Ms. Farhang's technology. As part of this joint venture, IIT agreed to provide technology incubation for the project. IIT then used Ms. Farhang's technology to develop numerous applications for mobile devices including mobile devices for railways, hospitals, and utilities. By the end of 2004, IIT had created the Incubation Society to provide the promised incubation services. In 2005, IIT disclosed to Ms. Farhang that, for strictly administrative and legal reasons, the Incubation Society would act as a placeholder for IIT in the ongoing joint venture but that the terms of the joint venture would remain the same. Ms. Farhang agreed and the joint venture continued.

During the course of the joint venture, the NDA remained operative and expressly provided that IIT would ensure that any parties accessing Ms. Farhang's technology would agree to the terms of the NDA. Thus, when IIT designated the Incubation Society as its vehicle for the joint venture and provided the Incubation Society access to Ms. Farhang's technology, the Incubation Society was required

to agree to the terms of the NDA to continue as IIT's placeholder in the joint venture.

The actual development of the technology during the joint venture occurred principally in both the United States and India. In fact, two of the four principal engineers (including the engineering "team leader") working for IIT and then on behalf of the Incubation Society were at various times located in the United States, one of them *throughout the entire joint venture*. Meanwhile, all central coordination for the project continued out of Tiburon, California, where M.A. Mobile was headquartered and where Ms. Farhang was based.

When both IIT and the Incubation Society inexplicably terminated the joint venture in June of 2006, Ms. Farhang subsequently realized that both IIT and the Incubation Society had not simply breached the terms of the joint venture but had also misappropriated her technology and violated the terms of the NDA which included strict confidentiality restrictions and return provisions requiring them to return copies of the technology to M.A. Mobile and Ms. Farhang in the United States. As a result of these numerous breaches, profits were not paid to M.A. Mobile at its principal place of business in Marin County, California, and to Ms. Farhang, individually, at her residence in Marin County, California. The U.S. based technology which had been disclosed to the Incubation Society suffered immediate devaluation as the core asset of M.A. Mobile and Ms. Farhang. And the

Incubation Society did not return copies of the misappropriated technology to the United States, flouting the express return obligations of the NDA. Shortly thereafter, the Indian Railways announced a multimillion dollar deal rolling out strikingly similar technology.

Against this backdrop, it is clear that the Incubation Society's actions fall squarely within the various FSIA immunity exceptions. As the placeholder for IIT in the joint venture, the Incubation Society engaged in commercial activities in India which had multiple direct effects in the United States, including preclusion of payment of profits to Ms. Farhang and M.A. Mobile in the United States, immediate diminution in value of their U.S. assets, and failure to return their technology to the United States per the express terms of the NDA. The District Court should also have recognized that: (i) agents of the Incubation Society were indeed engaged in commercial activity *in the United States*, and said activity is inextricably linked to all of the underlying causes of action; and (ii) the Incubation Society had impliedly waived its sovereign immunity when it became IIT's placeholder in the joint venture and thus was bound by the express consent-to-jurisdiction provisions of the NDA which IIT executed.

STATEMENT OF THE CASE

In May 2008, Plaintiff Mandana D. Farhang filed suit against IIT and the Incubation Society. The Third Amended Complaint alleges claims for breach of the NDA, breach of joint venture, and misappropriation of the technology against IIT, the Incubation Society, and Partha P. Chakrabarti. ER 69-168.

In July of 2009, IIT filed a motion to dismiss the original complaint and raised the defense of sovereign immunity, among others. ER 321. On January 26, 2010, the District Court issued an order denying IIT's motion. ER 7-16. On September 21, 2010, IIT filed an answer that included six counterclaims against Ms. Farhang and M.A. Mobile (including claims for breach of contract, misappropriation of technology, implied contract, and services rendered), thirty affirmative defenses, and a request for jury trial in California. Supplemental Excerpts of Record ("SER") 193-218.

Having good cause for delay, Plaintiffs were not able to serve the Incubation Society until the fall of 2010. SER 27. Once served, the Incubation Society filed numerous Fed. R. Civ. Pr. 12(b) motions to dismiss, including motions to dismiss on the grounds of improper service, insufficient service, and delay in prosecution,

all of which the District Court substantially denied on July 7, 2011. ER 345. On July 28, 2011, the Incubation Society filed an answer, twenty seven affirmative defenses, and a request for jury trial in California. SER 81-98.

One day later, on July 29, 2011, the Incubation Society filed more motions to dismiss including its own motion to dismiss on the basis of sovereign immunity. ER 346. On January 12, 2012, the District Court rejected the Incubation Society's numerous motions to dismiss including its claims of sovereign immunity. ER 29-32.

On January 25, 2012, IIT and the Incubation Society, as independent entities, jointly filed their respective notices of appeal in a single document. ER 2.

On February 21, 2012, the District Court, concluding that IIT's appeal was untimely, issued an order authorizing written discovery in connection with IIT and Mr. Chakrabarti and staying discovery only against the Incubation Society. SER 1. On March 20, 2012, in the midst of active discovery, IIT and the Incubation Society filed a Motion to Stay the entire District Court proceedings. Appellate Dkt. No. 8-1. On March 28, 2012, Ms. Farhang and M.A. Mobile opposed this Motion to Stay and suggested that the motions panel should *sua sponte* summarily dismiss IIT's appeal for lack of jurisdiction. Appellate Dkt. No. 10-1.

On June 13, 2012, two days before this brief was filed, this Circuit issued an order dismissing IIT's appeal and denying Defendant-Appellants' Motion to Stay

pursuant to 28 U.S.C. § 2107(a) and Fed. R. App. Pr. 4(a)(1)(A). Appellate Dkt. No. 24.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Chakrabarti, the Incubation Society's founding officer and permanent board member who is also the head of IIT's strategic consultancy division, routinely travelled to California to forge partnerships and collaborations with U.S. based companies and entrepreneurs during the relevant time period. SER 223, 225-226, 271-272; *see also* ER 48-50. In fact, one year before creating the Incubation Society, Mr. Chakrabarti corresponded with Ms. Farhang in the United States regarding mobile technology which Ms. Farhang had acquired. ER 91, 212-213, 221. By June of 2003, Ms. Farhang accepted an invitation to meet with Mr. Chakrabarti and IIT Life Fellow Bijoy Chatterjee (father of Counselor I. Neel Chatterjee, who is lead counsel for the Incubation Society on this matter and for this appeal) *in California* to discuss the technology collaboration by which Ms. Farhang would disclose the confidential and proprietary mobile technology she owned (hereinafter "Technology") to IIT and its agents for development of mobile applications. ER 77-78; SER 271

By August of 2003, Ms. Farhang, through M.A. Mobile which she owned and controlled, entered into a non-disclosure agreement with IIT by which she

agreed to disclose the Technology on a strictly confidential basis. ER 232-233. The NDA contained an express U.S. choice of law and U.S. jurisdiction clause. *Id.* The NDA also specifically provided that IIT would ensure that any other individual or entity accessing the Technology would be bound by the terms of the NDA. *Id.*

Prior to the execution of the NDA and on numerous occasions thereafter, it was made expressly clear to Mr. Chakrabarti and to IIT that Ms. Farhang was the ultimate owner of the Technology, that she was the sole owner of M.A. Mobile Ltd., that M.A. Mobile was being used as a vehicle for the planned transactions, and that she controlled the intellectual property and would receive *in the United States* one hundred percent of any profits or revenue derived by M.A. Mobile from any exploitation of the technology. ER 72, 212, 216-217.

For example, emails sent by Ms. Farhang to IIT's representatives before execution of the NDA and before commencement of the joint venture clearly state that Ms. Farhang had significant interests in the Technology: "Although I left the mobile company in late 2000, as of last week, *I own all of its intellectual property* [emphasis added] and I am in the process of evaluating the best way to go forward." ER 72-73. IIT clearly understood that Ms. Farhang *as an individual* controlled M.A. Mobile Ltd and the Technology. She expressly told Mr. Chakrabarti "prior to the execution of the NDA and subsequently that she

maintained significant financial interest in M.A. Mobile and the use and protection of the Technology directly impacted said financial interests.” ER 72, ER 216-217. The NDA executed between the parties was signed by Ms. Farhang, consistent with her status as the beneficial owner of M.A. Mobile Ltd. Mr. Chakrabarti’s cover letter with the executed NDA was directly addressed to Ms. Farhang as an individual, not to M.A. Mobile. ER 236-237, 241.

In addition, the draft Letters of Intent which memorialized the ongoing joint venture explicitly designated Ms. Farhang as a named individual and member of the proposed Joint Venture: “This letter will confirm the shared intention of M.A. Mobile Ltd. (the “Company”), Ms. Mandana Farhang (“Ms. Farhang”), Dr. Partha Pratim Chakrabarti (“PPC”), and the Indian Institute of Technology Kharagpur (“IIT”) (collectively, the “Parties”) to form an Indian joint venture for the purpose of developing and marketing certain patent-pending technology. . .” ER 270. Finally, communications between Ms. Farhang’s counsel and Mr. Chakrabarti refer to “my client Ms. Mandana Farhang”, not M.A. Mobile, as the relevant client in connection with the structuring of a cross border joint venture. ER 73.

Mr. Chakrabarti’s knowledge of Ms. Farhang’s interests in the Technology and M.A. Mobile was directly transferred to the Incubation Society and was undeniably institutional knowledge of the Incubation Society itself. Mr. Chakrabarti was not just the principal representative of IIT but also was one of the

key founding officers and permanent board members of the Incubation Society. ER 44, 48. Indeed, the charter documents of the Incubation Society state that “the first named members of the Governing Body, as stated in the Memorandum of Association, shall be the permanent members.” ER 48. The Memorandum specifically lists Mr. Chakrabarti as one of the initial board members. ER 43. Moreover, the Regulations of the Incubation Society specifically designate that the Chairman and Secretary of the board of the Incubation Society shall always be the Director and Dean (SRIC) of IIT. ER 47. The Regulations further state that the Secretary, i.e. Mr. Chakrabarti, was responsible for all compliance and documentation within the Society. ER 50. Thus, when the Incubation Society acted as a placeholder for IIT in the joint venture, all of Mr. Chakrabarti’s knowledge of the terms of the NDA, of Ms. Farhang’s ownership in the Technology, and of Ms. Farhang’s status as owner of M.A. Mobile, automatically transferred to the Society where Mr. Chakrabarti was a founding officer and board member. ER 103-105, 112.

On a related note, it is also evident that the Incubation Society was created to be, and remains to this day, a creature of IIT. For example, in numerous communications to Ms. Farhang, the Incubation Society¹ was presented as a branch

¹ The Incubation Society is often referred to as TIETS in numerous documents, e-mails and docket filings, as well as the District Court’s orders. ER 25. TIETS is

of IIT. ER 104, 158. To this day, IIT continues to represent the Society as an IIT entity with no practical independent existence. SER 102-111. The Memorandum of Association and Regulations of the Incubation Society defined the organization as an institution “drawing upon the intellectual and infrastructural resources of IIT Kharagpur,” created a board that is majority IIT controlled, and stipulated that at all times the Chairman and Secretary of the Incubation Society’s board would be the Director of IIT and the Dean of IIT’s strategic consultancy division (the position then and now held by Mr. Chakrabarti). ER 40, 43-44, 47-50.

By the winter of 2004, the joint venture was active and ongoing, and Mr. Chakrabarti and his engineers were actively exploiting the Technology, including source code, patent application documents, and trade secret business specifications describing confidential trade secret mobile business applications. ER 87. The specifications included specific proposals for deployment of the technology in various *worldwide* vertical markets such as transportation and utilities. *Id.* It was expressly disclosed to Mr. Chakrabarti that the Indian Railway deployment would be a pilot implementation, and that Ms. Farhang was forming a global company out of the United States that would target worldwide customers. ER 87-89.

The joint venture was in full swing by the end of 2004 and the Incubation Society’s counsel’s characterization to the contrary is an egregiously misleading

the acronym for “Technology Entrepreneurship and Training Society”, the name of the Defendant-Appellant as it appears on the pleadings. ER 69.

characterization of the record. ER 103-124; *see also* SER 112-163. The District Court has already rejected IIT's attempts to argue, in the face of a clear factual record, that the joint venture did not exist or was being negotiated for two years. ER 21-28.

As the District Court concluded, the material terms of the joint venture were as follows: IIT (and later the Incubation Society as its placeholder) would receive a 28% equity share in profits (3% allocated to IIT and 25% allocated to Chakrabarti for distribution among the engineering team) in return for their development of the Technology and their ability to secure the Indian Railways as a first pilot customer. ER 15-16, 27, 95-100, 116. These terms were definite, agreed upon, and reflected in numerous e-mails, and expressly included an "incubation" component. ER 100. Specifically, in 2004, Mr. Chakrabarti wrote: "Dear Ron, IIT has approved the signing of the agreement. The only change suggested now is that regarding incubation, 2% should be made 3%. Please let me know the next steps. Regards PPC." *Id.* The Third Amended Complaint uses actual quotes from e-mails showing how Plaintiffs complied with this request and how the joint venture continued with this modification. *Id.*

Indeed, after agreeing to accept increased equity for the incubation, on December 16, 2004, Mr. Chakrabarti wrote the following: "The Company [i.e. the joint venture with Plaintiffs] is a . . . joint venture between the Co-Founders

[Farhang and Chakrabarti] and IIT KGP, **and is [emphasis added] a member of IIT's technology incubation program.**" ER 101. It was indeed expressly and repeatedly represented to Plaintiffs that the joint venture was moving forward and that any further approvals were a matter of administrative formality. ER 96, 104-105.

Throughout the joint venture, the NDA was the operative document governing the confidentiality and maintenance of secrecy over all of Ms. Farhang's and M.A. Mobile's Technology. ER 91-95, 105. Mr. Chakrabarti recognized the primacy of the NDA and its provisions when he expressly told Ms. Farhang that anyone accessing the Technology would be required to sign the NDA. SER 54.

At this juncture, it is critical to understand precisely how the Incubation Society was incorporated into the joint venture. As set forth above, incubation at IIT was a promised component of the joint venture and one that IIT expressly agreed to provide in the Fall of 2004. ER 100. The Incubation Society was set up by IIT on the IIT campus and remains as an IIT entity on the IIT campus to this day. ER at 27; *see also* SER 102-111. In 2005, while the joint venture was ongoing, Mr. Chakrabarti disclosed that there were possible legal complications surrounding IIT's participation in the joint venture. ER 116. Mr. Chakrabarti however assured Ms. Farhang that these issues would not disrupt the ongoing joint venture, and then disclosed that the Incubation Society would from then onwards

act as a placeholder for IIT in the joint venture. ER 116, 118-119, 121. In this manner, the actual administrative process of “admission” to the Incubation Society itself was never a requirement and was viewed as a formality because Mr. Chakrabarti, as an officer of IIT and the Incubation Society, had assured Ms. Farhang that the incubation at IIT and joint venture were already underway by the end of 2004 and then told Ms. Farhang in 2005, while the joint venture was ongoing, that the Incubation Society would act as a placeholder for IIT in the ongoing joint venture. ER 112.

After IIT accessed the Technology through execution of the NDA, and after the Incubation Society assumed the role of placeholder for IIT in the joint venture, it was repeatedly represented that they were developing the prototype applications as planned and on schedule. ER 96; *see also* SER 112-163. In the meanwhile, IIT and the Incubation Society misappropriated the Technology, admitting among other things to presenting the Technology to external third parties at a meeting of the Incubation Society in 2005. ER 104-105.

In the Indian complaint IIT filed against Ms. Farhang one year after the U.S. action, IIT admits that it “*developed the technology provided initially by the Defendant No.1* [emphasis added] (which was originally very primitive and rudimentary, incomplete and not working) to an advanced level and developed many interesting applications, especially for Indian scenarios like railways.” SER

324. Ms. Farhang's Technology, which IIT admits to "developing" and using, was in fact not "primitive" or "rudimentary." In fact, the Technology was novel and is the subject of a U.S. patent that enjoys a priority date back to 2000 (predating the date of disclosure to IIT). ER 86.

In the aforementioned Indian Complaint, it is significant to note that IIT did not and has not named M.A. Mobile as a defendant but has instead named Ms. Farhang *individually* as a defendant in a *private* civil action. SER 312-314. Despite arising from the same factual nexus, the Indian civil suit does not name M.A. Mobile in any capacity whatsoever. *Id.* Mr. Chakrabarti, as an officer of IIT and the Incubation Society, is repeatedly mentioned as the principal actor in the Indian suit. SER 315-323.

By June of 2006, after exploiting Ms. Farhang's Technology to develop numerous mobile applications, IIT and the Incubation Society abandoned the ongoing joint venture. ER 86-125, 129-130. In May of 2008, Ms. Farhang filed suit in the Northern District, where all Defendants have answered, counterclaimed, and engaged in extensive motion practice unrelated to issues of jurisdiction. ER 309-358. The Incubation Society is and has always been represented by the same law firm which represents IIT and Mr. Chakrabarti. ER 310, 312.

SUMMARY OF ARGUMENT

First, the Incubation Society, which took IIT's place in the joint venture, engaged in activities outside the United States that breached the joint venture and the NDA, and misappropriated Ms. Farhang and M.A. Mobile's Technology. These activities had a direct effect that was immediate on the intellectual property assets of M.A. Mobile and Ms. Farhang and also on the profits that would have been paid to M.A. Mobile and Ms. Farhang. The Incubation Society's actions here thus fall squarely within the commercial activity exceptions of the FSIA.

Second, because of Appellant counsel's erroneous statements regarding the activities of the Society's agents inside the United States in connection with the underlying claims, the District Court failed to recognize that other FSIA exceptions also applied to the facts at hand. In fact, representatives of the Incubation Society committed numerous acts *within the United States* that were inextricably linked to the alleged breaches but denied the existence of these actions to the District Court.

Third, the Incubation Society was bound by the terms of an NDA that contained an express U.S. consent-to-jurisdiction and choice of law clause, thereby implicitly waiving its rights of sovereign immunity. The scope of the implicit waiver extended to both Ms. Farhang, as a third party beneficiary, and M.A. Mobile.

In brief, Ms. Farhang and M.A. Mobile submit that this Court should affirm the District Court's 2012 ruling that the Incubation Society is not immune from suit under applicable FSIA exceptions.

ARGUMENT

I. STANDARD OF REVIEW

This Court should review the factual findings of the District Court for *clear error*, and should review legal determinations *de novo*. *See e.g. Filler v. Hanvit Bank*, 378 F.3d 213, 216 (2d Cir. 2004); *see also Rogers v. Petroleo Brasileiro* 673 F.3d 131 (2d Cir. 2012); *see also Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 (9th Cir. 1991). Review of the factual findings for clear error in this case is entirely appropriate; the District Court did not merely rely on the Complaint, but relied on evidence from a range of documents including sworn affidavits submitted by both parties, exhibits and documents authenticated by sworn affidavits, verbatim quotes and e-mails with dates referenced in the Third Amended Complaint, and in the case of the 2012 order on appeal here, all of the preceding documents and two years' worth of extensive docket submissions including additional sworn affidavits submitted by Plaintiffs. ER 21, 29-32, 36, 59, 193, 210, 266; *see also* SER 28, 41, 52, 99, 102, 112, 164, 219.

II. THE COMMERCIAL ACTIVITY EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT PROVIDES TWO DISTINCT GROUNDS FOR PLAINTIFFS' SUIT AGAINST THE INCUBATION SOCIETY

The FSIA embodies the “restrictive” theory of sovereign immunity and aligns the United States with numerous other developed countries that have abandoned the archaic views of absolute immunity originally adopted by U.S. Courts two hundred years ago but advanced by the Society in its present day brief. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-488 (1983); *see also* H.R. Rep 94-1487, reprinted in U.S.C.C.A.N. 6604, 6605 (Sep. 9, 1976). The FSIA assigned to the federal courts sole authority over immunity decisions, favoring a court’s statutory interpretation of the codified exceptions to sovereign immunity over the State Department’s interpretation of diplomatic and foreign policy considerations. *Dole Food v. Patickson*, 538 U.S. 468, 479 (2003) (where the court expressly rejected policy arguments in favor of statutory application of the FSIA to the facts at hand).

The commercial activity exception to the FSIA provides three prongs under which a foreign sovereign may be sued in a U.S. court: “based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of

the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2).

As set forth below, this brief first addresses the third prong or “direct effect” prong, as it is the exception fully analyzed by the District Court and upon which the District Court exclusively relied to justify its rulings. ER 14-16, 31-32.

A. Summary Of The Direct Effect Standard.

The Supreme Court has articulated a single overarching requirement for “direct effect” analysis, namely that “an effect is direct if it follows as an immediate consequence of the defendant’s . . . activity.” *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). It is thus not surprising that a “direct effect” may be established in a variety of contexts. The following is a brief catalogue of the various ways a direct effect in the United States has been established:

(1) A direct effect is established when a payment or contractual obligation to be fulfilled in the United States does not occur as a consequence of the sovereign’s extraterritorial act. *Weltover*, 504 U.S. at 611, 618-19 (direct effect requirement satisfied where unperformed payment required to be made to New York bank account); *see also Comm. Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d

Cir. 1994) (direct effect requirement satisfied even where U.S. payments are not paid directly to plaintiff).

(2) A direct effect is established even when the payment or contractual obligation is not required to be fulfilled in the United States but the contract or arrangement permits *selection* of the United States as the forum for performance of the payment or contractual obligation. *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 726-727 (9th Cir. 1996). Indeed, in *Adler*, the plaintiff initially had selected the Cayman Islands for fulfillment of the ultimate payment obligation but was permitted to select a new forum and ultimately selected New York. *Id.* at 727; *see also Hanil Bank v. PT Bank Negara Indonesia (Persero)*, 148 F.3d 127, 130, 132 (2d Cir. 1998) (direct effect requirement satisfied where a defaulting party agreed, pursuant to the terms of a letter of credit, to make payments "according to [a payee's] instruction," and the payee selected a New York bank).

(3) *Weltover* does not require "'substantiality' or 'foreseeability,'" and thus a direct effect need not be substantial or foreseeable to qualify as "an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. at 618. Lower court decisions provide additional illustrative parameters to better define what kind of effects are more than "purely trivial." For example, financial loss *by itself* will not satisfy a direct effect. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992). Instead, courts may find a direct effect when "legally

significant acts giving rise to the claim” occurred in the United States. *United World Trade v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994); *see also Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (to establish direct effect, plaintiff may show "something legally significant actually happened in the U.S").

(4) A direct effect in the U.S. is also established where the sovereign entity engaged in extraterritorial acts that inflict injury on a non-U.S. corporation where the non-U.S. corporation is required to pay profits or dividends to a shareholder in the United States. In *Siderman de Blake*, this Circuit noted that that it could establish a direct effect with these precise circumstances: “As an owner and shareholder of INOSA [an Argentinian corporation owned by U.S. based plaintiffs], each of the Sidermans [the U.S. based plaintiffs] is entitled to a share of the profits earned by the corporation.” *Siderman de Blake*, 965 F.2d at 711.

B. Consistent With *Weltover*, The District Court Properly Concluded That The Incubation Society’s Breaches Caused A Direct Effect In The United States.

On January 12, 2012, the District Court applied the principles set forth above and properly denied the Incubation Society’s motion to dismiss, concluding that the Incubation Society had engaged in commercial activity in India (i.e. the joint venture) which had a direct effect in the United States. ER 32. Because the Incubation Society was acting as a placeholder for IIT in the joint venture, and

because the District Court had extensively analyzed the joint venture issues in its previous 2010 order, the District Court did not feel the need to restate the “direct effect” analysis it had already clearly articulated in its January 2010 order. ER 16, 31-32; *see also* ER 25-27 (setting forth the District Court’s careful analysis of the manner in which the Incubation Society assumed IIT’s place in the joint venture); *see also* SER 41-51, 100, 102-111.

However, because Appellant claims that the District Court ruled without basis, it is important for this Court to understand how the District Court’s overall analysis (the analysis contained in its 2010 order which sets the foundation for the appropriately abbreviated 2012 order) was correct and consistent with applicable case law. As properly noted by the District Court, consistent with Ms. Farhang’s sworn affidavit, the terms of the joint venture agreement provided that “the profits were to be paid to M.A. Mobile at its principal place of business in Marin County, and to Farhang, individually, at her residence in Marin County, California.” ER 16, 214, 216-217. Expressly and appropriately relying on *Weltover*, where a direct effect was established as a result of a breached payment obligation in the United States, the District Court concluded in 2010 that “because IIT acted fraudulently and misappropriated the Technology and its enhancements (in breach of the NDA, the joint venture agreement, and its fiduciary duty), profits that would have been paid to California were not forthcoming.” ER 16; *see also Weltover*, 504 U.S. at

611, 618-19. As evident from the preceding quote, the district court *causally* linked the breach of the NDA, the breach of the joint venture, and the misappropriation of technology to the ultimate failure to pay profits to M.A. Mobile and Ms. Farhang in the United States.² ER 16.

In 2012, the District Court applied the same logic to pierce the sovereign immunity of the Incubation Society. By that time, the court had reviewed reams of documentary evidence (in the form of sworn affidavits, and a Third Amended Complaint with specific dates, verbatim email quotes, and actual exhibits) that the Incubation Society had assumed the role of IIT in the joint venture and had participated in the same misappropriation which resulted in the failure to pay profits to M.A. Mobile and Ms. Farhang in the United States. SER 41-51, 100-111; *see also* ER 103-112, 158. In view of this, the District Court applied the same *Weltover* principles and concluded that the Incubation Society's joint venture activities had caused a direct effect in the United States consistent with 28 U.S.C. § 1605(a)(2). ER 32.

² The causal link between the breach of the NDA and other two claims is unequivocal. The NDA covered the Technology that was the subject matter of the joint venture, and moreover was expressly continued and operative during the joint venture. Thus, IIT could not misappropriate Technology or breach the joint venture without breaching the NDA. ER 91-93, 103-106, 214; *see also* SER 54, 272-273.

C. Plaintiffs Satisfied Their Evidentiary Burden in Establishing A Direct Effect In The United States.

Contrary to Appellant's assertions, Plaintiffs clearly satisfied their burden in producing evidence to rebut the presumption of immunity pursuant to § 1605 (a)(2), both in the 2009-2010 IIT proceedings and the subsequent 2011-2012 Incubation Society proceedings.³ While the Plaintiffs were required to show "some facts" to rebut a prima facie claim of sovereign immunity, the ultimate burden of persuasion remained with the Incubation Society. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989); *see also Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1021 (9th Cir. 1987) (holding that if a party "offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply").

Ms. Farhang submitted two sworn affidavits confirming that she had expressly informed Mr. Chakrabarti that she was entitled to receive in the United States 100% of any monies that M.A. Mobile might in the future obtain from or through the Technology. ER 217; *see also* SER 273. Moreover, the NDA, which

³ Once again, consistent with Plaintiffs' *Weltover* analysis, it is important to demonstrate that Plaintiffs' burden was established in *both* instances because the District Court understandably relies on its 2010 IIT analysis to support its 2012 Incubation Society analysis. ER 29-32.

was breached by its own terms and the breach of which enabled the misappropriation of the Technology and breach of joint venture, expressly disclosed that M.A. Mobile was in the United States and forbade disclosure of the Technology which included a pending U.S. patent application that was developed in the United States, acquired in the United States, and whose ownership remained in the United States. ER 86-89, 92-93, 210-243.

Conversely and significantly, in the 2010 IIT proceedings, IIT failed to meet the ultimate burden of persuasion of an alleged sovereign and did not present any relevant affirmative evidence rebutting Ms. Farhang's highly detailed affidavits regarding the nature of the joint venture, her location in the United States, or M.A. Mobile's location in the United States. In his July 23, 2009 declaration, Mr. Chakrabarti simply attached two draft letters of intent *that actually support the District Court's finding of an ongoing joint venture* confirmed by e-mail and oral agreements. ER 267-308. IIT also submitted preliminary e-mails *that in fact showed Mr. Chakrabarti interfacing with Ms. Farhang in the United States*, an irrelevant status report regarding the 2009 Indian action *that was filed one year after the 2008 U.S. action*, and an irrelevant copy of a 2007 certificate of incorporation for Cool e-mobile *which occurred long after IIT and the Incubation society breached the joint venture* in the summer of 2006. *Id.*

Mr. Chakrabarti's September 14, 2009 reply declaration was even more ineffective, failing to address Ms. Farhang's principal contention regarding the place of payment obligations in the United States (ER 214-217), attaching emails from 2002 that literally had nothing to do with the joint venture but related to an irrelevant investment fund, and once again attaching irrelevant information about the belatedly-filed Indian action. ER 193-209.

In connection with the Incubation Society's motion to dismiss on grounds of sovereign immunity, Appellant also failed to present any relevant evidence that would rebut Ms. Farhang's past or present affidavits. In fact, the Incubation Society's initial declaration attached to its 2011 motion to dismiss contained only one assertion (i.e. a declaration alleging that it had not physically signed any NDA) and made no statements that caused the District Court to reconsider its position or reject the overwhelming evidentiary submission by Plaintiffs that the Incubation Society was a placeholder for IIT in the ongoing joint venture—which meant that the previous commercial activity and direct effects analysis applicable to IIT would apply to the Incubation Society. SER 58-59; *see also* ER 25-29. Moreover, the initial declaration was made by an individual who had not materially appeared in the matter in any capacity prior to the submission of the declaration. SER 58-59. Most tellingly (and ironically, particularly in view of the numerous pages which Appellant spends wrongly claiming that Plaintiffs did not meet their evidentiary

burdens), the Incubation Society then ignored its ultimate burden as the alleged sovereign and failed to submit any more affidavits to rebut Ms. Farhang's subsequent sworn affidavit, Counselor Singh's subsequent sworn affidavit, or any of the pertinent affidavits that preceded it. SER 41-57; ER 348-349.

D. There Was Substantial Additional Evidence Supporting the District Court's Findings Of A Direct Effect In The United States.

The District Court had numerous additional specific facts upon which it could have concluded that the Incubation Society's breach of the NDA, breach of the joint venture agreement, and misappropriation of the Technology caused a direct effect in the United States. First, the facts in this case support jurisdiction under the third prong of the commercial activity exception more strongly than the facts in *Weltover* or the facts in *Adler*. In *Weltover*, although the creditor elected to receive the payments in New York, the payments could have been made in any of several international cities, including New York. *Weltover*, 504 U.S. at 609-610. Similarly, in *Adler*, the payments were not required to be made in the United States and in fact the plaintiff initially requested that the payment of the disputed funds would be paid to an account of a Mexican (non U.S.) corporation to an account in the Cayman Islands. *Adler*, 107 F.3d at 722-723.

In this matter, Ms. Farhang explicitly wished to maintain her equity interests in the United States through her own individual ownership and through M.A. Mobile, and both Ms. Farhang as an individual and M.A. Mobile as a corporation

were at all times headquartered in the United States. SER 270. Indeed, for this reason, all joint venture documents, e-mails and related documents (including cover letters sent by Mr. Chakrabarti to Ms. Farhang in California) expressly disclosed, acknowledged and/or recognized the location of Ms. Farhang and M.A. Mobile as stakeholders located in the United States. ER 214, 219, 232-233, 236-237, 241, 270, 274. Additionally, the intellectual property assignment agreement between Ms. Farhang and M.A. Mobile required payment of M.A. Mobile profits to Ms. Farhang, both of which were located in the United States. ER 212, 219. And all of this was institutional knowledge of the Incubation Society since the Incubation Society was set up for the joint venture, acted as a placeholder for IIT in the joint venture, and shared Mr. Chakrabarti as its founding officer, permanent board member, and Secretary. SER 41-51, 100, 100-111; *see also* ER 43, 48-50.

Second, the effects of the Incubation Society's breaches far exceed the "mere financial loss" and "legally significant" parameters set forth by *Siderman de Blake and Gregorian*. *Siderman de Blake*, 965 F.2d at 710; *Gregorian*, 871 F.2d at 1527. In fact, the misappropriation of the Technology (which was an express breach of the NDA and thus constituted an inherent and ultimately fatal breach of the joint venture) rendered at least **two other immediate and direct effects distinct and independent from any place-of-payment obligation:**

(i) *Immediate diminution in value of the U.S. based Technology asset:* Plaintiffs' Technology was based in the United States at all times during the joint venture; it was owned and controlled by both M.A. Mobile and Ms. Farhang; only *copies* of the Technology were transmitted to India. ER 92, 211-212. M.A. Mobile's core value as a U.S. based privately held corporation, and Ms. Farhang's interest in M.A. Mobile as its sole and controlling owner, was dependent upon the protection of the confidential and trade secrets aspects of the *original* Technology which remained in the United States. Indeed, immediately as a consequence of the breaches, neither M.A. Mobile nor Ms. Farhang could make any reasonable attempt to license or sell the Technology because they were immediately unable to make the necessary and required representations regarding the trade secret status or confidentiality of the Technology that would be required in any basic asset sale, license or joint venture agreement. ER 115, 125, 162.

(ii) *Failure to comply with U.S. specific return obligations of the NDA:* Clause 8 of the NDA required the Incubation Society to return the aforementioned copies of the Technology and any other related confidential information to M.A. Mobile which was located *in the United States*. ER 92-93, 232. Failure to do so was a textbook location-specific obligation, the breach of which caused a direct effect in the United States. *Weltover*, 504 U.S. at 611, 618-19.

E. The Incubation Society’s Alternative Direct Effects Analysis Must Fail.

The Incubation Society’s alternative “direct effects” analysis should be rejected out of hand.

1. India Is Not The Locus Of Contractual Obligations, And In This Case A Promise To Keep Secrets Impacted The Joint Venture And Related Assets And Obligations In The United States.

In connection with the NDA, the Incubation Society contends that India is “both the locus of contractual obligation’ [citation omitted] and where the legal wrong occurred” and thus conclude that there was no direct effect in the United States. The Society further contends that “a promise to keep secrets is not a promise to share profits, and it is certainly not a promise to pay anyone any money in a particular place.” Appellant’s Opening Brief (“AOB”) 26. This tunnel-visioned interpretation of the NDA and joint venture defies common sense and also does not demonstrate any clear error in the Court’s factual determination to the contrary.

First, there was ample evidence that the Incubation Society had agreed to the terms of the NDA; it was represented by its own officers to be the placeholder for IIT in the joint venture, it was shown the Technology, the NDA specifically required that anyone shown the Technology would agree to the terms of the NDA, and it subsequently breached the NDA by showing the Technology to IBM and

third party experts. SER 41-51, 100-111; *see also* ER 84 (¶14), ER 103 (lines 18-28), ER 104 (lines 20-26), ER 105 (lines 1-18), ER 106 (lines 5-14).

Second, the District Court, in its previous 2010 opinion upon which the 2012 order depended, expressly noted that misappropriation of the Technology constituted a breach of the NDA and also breach of the joint venture (obviously because it concerned the Technology which the NDA covered and which the joint venture sought to develop). ER 9-10. In other words, contrary to the Incubation Society's assertions, the "promise to keep secrets" was inextricably linked to the "promise to share profits."

Third, the locus of the contractual obligations was not India. The joint venture had stakeholders in various locations; M.A. Mobile and Ms. Farhang were in the United States, and thus they reasonably expected payment and fulfillment of all obligations in the United States as the District Court noted. ER 213-214, 216-217. Moreover, the NDA (and thus the resulting confidentiality obligations under the joint venture and the alleged misappropriation) concerned Technology located in the United States, subject to a pending U.S. patent application and which comprised the core asset of the U.S. based M.A. Mobile. ER 92-93, 211-212. At all times, the Technology remained in the U.S. and only *copies* were transmitted to India. ER 92-93. Moreover, Clause 8 of the NDA expressly required return of the

copies of the Technology to M.A. Mobile which was located in the United States. ER 232.

2. Appellant’s Arguments That “Nothing Legally Significant” Occurred In The United States Are Without Basis.

The Incubation Society also argues that “nothing legally significant happened in the U.S. and cites *Gregorian* in the course of their analysis. AOB 26. They additionally note that “any place of payment provision in the parties’ purported joint venture agreement simply had no bearing on a finding of immediate consequence.” AOB 26-27. These arguments are simply incorrect.

First, several legally significant events occurred in the United States. The joint venture was launched from the United States by a *U.S. based* entrepreneur and *U.S. headquartered* M.A. Mobile, both of whom remained as *active stakeholders operating from the United States*, with technology housed and owned from the U.S. that was transmitted and disclosed *in copy form only from the United States* to IIT and the Incubation Society in India under presumed protection of an *NDA subject to U.S. law and U.S. dispute resolution provisions*.⁴ ER 92-93, 211-217.

Second, as articulated above, the Incubation Society’s breach of the NDA, misappropriation, and breach of joint venture that occurred when the Technology

⁴ See **Section II(F)**, *infra* at 42, which also outlines the Incubation Society’s significant commercial activities in the United States which were directly related to the breach of the NDA, breach of joint venture, and technology misappropriation.

was shown to third parties without authorization or NDA protection, all constituted legally significant acts some of which occurred both in India and the United States but all of which produced “direct effects” in the United States. Indeed, as argued above in **Section II(D)**, *supra* at 30, the breaches caused immediate diminution in value of the core assets of the U.S. based entity who owns the Technology and included a failure to return copies of the Technology to the United States.

Third, it is instructive to recall that the *Gregorian* court expressly acknowledged that the incurring of a debt obligation in the United States or other such payment obligation to be executed in the United States would be sufficient by itself to establish jurisdiction. *Gregorian*, 871 F.2d at 1527-1528; *see also Weltover*, 504 U.S. at 610. This case has not one but two similar obligations, namely the obligation to pay M.A. Mobile and Ms. Farhang profits in the United States, and the obligation to return copies of the Technology to M.A. Mobile in the United States. ER 214, 216-217, 232.

3. *Australian Government Aircraft Factories v. Lynne Is Inapplicable To The Matter At Hand.*

Setting aside the fact that if there were a conflict between the two decisions, *Weltover* would overrule *Australian Government v. Lynne* 743 F.2d 672 (9th Cir. 1984), the *Australian Government* analysis is actually entirely consistent with a finding of direct effect in this matter. The particular facts of *Australian Government* (where the damaged plane and injured pilot physically remained in

Australia) are easily distinguished from the facts of this case where the property injured by the tort of misappropriation committed by the Incubation Society actually did not reside in India but in the United States and was intellectual property, not physical property or human life. *Australian Gov't*, 743 F.2d 672, 674-675; ER 86-93. Only *copies* of the Technology resided in India. ER 92-93. The Incubation Society inflicted grave injury on this intellectual property when it misappropriated the Technology by showing *copies* of it to third parties in India (and possibly elsewhere) without authorization and in violation of the NDA (including Clause 8 of the NDA requiring return of the copies to M.A. Mobile in the United States) and the joint venture. ER 92-93, 111-125, 232. The actual property in this matter, the “pilot” and “plane” of *Australian Government*, never left the United States; only *copies* of the Technology were transmitted to India. ER 92, 232.

4. The District Court Properly Weighed The Available Evidence On Direct Effect And Did Not Commit Clear Error.

Appellant’s counsel have incorrectly represented to this Court the actual record when it states that “the court relied on what Plaintiff alleged in their complaints—evidently assuming the allegations to be true—rather than assessing whether the evidence supports the allegations.” AOB 29. The verbatim description of the equity allocation and place-of-payment obligation, which the District Court refers to, is found expressly in Ms. Farhang’s August 31, 2009

sworn declaration and Ms. Farhang's July 6, 2009 declaration. ER 214; SER 273. The District Court undoubtedly reviewed and utilized Ms. Farhang's sworn affidavit because it cites to the affidavit and the primary documentation of the NDA attached to the affidavit in numerous places throughout its 2010 opinion. ER 11-14, 17-18.

And by the time the District Court denied the Incubation Society's motion to dismiss on grounds of sovereign immunity in 2012, the District Court was immersed in primary evidence, having already issued the 2010 opinion which involved the same facts and parties, and also having viewed numerous relevant declarations from Ms. Farhang and from Defendants, and also having presided over multiple pleading attacks by Defendants which required Plaintiffs to submit sworn declarations with evidentiary exhibits. *See* SER 41-86, 100-111, 164-174, 219-225.

In stark contrast, as already set forth under **Section II(C)**, *supra* at 25, in 2010 when the District Court issued its original decision regarding the sovereign immunity of IIT (upon which decision the District Court relied in part when it issued its 2012 Incubation Society order), IIT submitted two affidavits which did not meaningfully or specifically contradict the core assertions of Ms. Farhang's sworn affidavits. ER 267. The Incubation Society similarly failed to present specific or relevant evidence to rebut Ms. Farhang's later affidavits and evidence

presented during the 2011 and 2012 proceedings, and in fact failed to submit any affidavit at all to refute the contentions raised by Plaintiffs' opposition briefs, Ms. Farhang's opposing affidavit, and Counselor Singh's opposing affidavit which attached evidentiary exhibits. SER 58-80; *see also* ER 348-349.

5. Sworn Affidavits Showed That Ms. Farhang and M.A. Mobile Were Reasonably Entitled To Performance Of Payment And Other Obligations In The United States.

Appellant also attempts to argue that place-of-payment obligations never definitively arose in the joint venture, and allege that "plaintiffs do not say that the parties actually agreed that Plaintiffs would have a right to have profits paid to them in California." AOB 34. This is simply incorrect. First, Ms. Farhang's July 6, 2009 affidavit and August 31, 2009 affidavit, both of which the Court reviewed and analyzed to issue its 2010 opinion, clearly state that: "The essential terms of the joint venture agreement were that, if M.A. Mobile and I would allow IIT[K] to retain and further develop the Technology. . .and (c) those profits would be paid to M.A. Mobile at its business location in Marin County, California, and to me, individually at my residence in Marin County, California." ER 214; SER 273. The fact that the District Court also cited to the pleadings as well does not change the fact that Ms. Farhang submitted two sworn affidavits that evidence the essential terms. Moreover, Ms. Farhang's sworn affidavits were corroborated by dates, verbatim e-mail quotes, and statements contained in the Third Amended Complaint

confirming the establishment of the joint venture and allocation of the equity. ER 99-101. In sharp contrast, Appellant's affidavits, as set forth above under **Section II(C)**, *supra* at 25, did not present any specific statements regarding the joint venture to rebut the primary evidence presented by Ms. Farhang's affidavit and the pleadings, and instead offered exhibits that, where relevant, in fact supported Ms. Farhang's arguments.

6. The Loss Of Profits Payable To M.A. Mobile And Ms. Farhang In The United States Was An Immediate Consequence Of Appellant's Breaches.

The Incubation Society also attempts to argue that Plaintiffs' loss of income in the United States was not an "immediate consequence" of the Incubation Society's breaches. AOB 35. Simply put, the Incubation Society is asking this Court to endorse the self-fulfilling view that a defendant sovereign can escape liability simply by breaching a technology joint venture *before* the planned commercialization of the technology is completed by the same joint venture. This is precisely what occurred in this matter; the Incubation Society entered the joint venture, breached it, and misappropriated the Technology, thereby avoiding the obligation of ever having to pay profits to joint venture stakeholders in the United States as demonstrated by Ms. Farhang's sworn affidavit, a detailed Third Amended Complaint, and numerous other sworn affidavits submitted by Ms. Farhang. ER 99-101, 106-113, 211-216.

Indeed, the place-of-payment effect in this matter is more definitive than the place-of-payment effects in *Adler* or *Weltover*. *See Adler*, 107 F.3d at 722-723 (place of payment effect relied upon by the court to establish direct effect arose from unilateral instructions whereby the plaintiff changed payment instructions from a Cayman Islands receiving account to a New York receiving account); *see also Weltover*, 504 U.S. at 609-610 (location of payment obligation relied upon by court to establish direct effect was “at the election of the creditor”). In this matter, the location of Ms. Farhang and M.A. Mobile and the attending place-of-payment obligation in the United States was plainly evident to the Incubation Society, was not the subject of an election made later by Ms. Farhang, and was disclosed before the execution of the NDA and before the joint venture. ER 72-73, 213-214; SER 232.

7. The Incubation Society’s “Straight line” Causation Analysis Supports A Finding Of Direct Effect In This Matter.

In *Princz v. Federal Republic of Germany*, cited by Appellant, the court commented that a direct effect may be found where there is “straight line” causation. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). Such straight line causation was not present in *Princz* where the plaintiff, albeit egregiously injured by the defendant during the Holocaust, faced the formidable hurdle of trying to show that his enslavement by firms in Germany exerted a direct effect in the United States because those firms were part of a larger

national effort to support the German military that was fighting against the United States in different parts of the world. *Id.* at 1172-1773; *see also Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 237-238 (2d Cir. 2002) (where direct effect could not be established given the intervention of not one but two third parties (the press and investors) and also involved numerous intervening assumptions regarding potential damages). “Straight line” causation is however undeniably present in this matter.

The Incubation Society, as a placeholder for IIT in the joint venture, was bound by the terms of the NDA and the joint venture, used the *same* NDA to acquire access to the Technology, and then breached the joint venture and the NDA by showing the *same* Technology to third parties without appropriate confidentiality protections and without authorization. The direct effects (e.g. the loss of the payment obligations in the United States, the immediate loss of trade secret status and diminution of value of the Technology, and the breach of return provisions of the NDA requiring return of the Technology to M.A. Mobile in the United States) were caused directly by the Incubation Society’s actions without the intervening acts of any third parties. ER 92-93, 105-128; *see also* SER 42-51, 53, 99-111.

8. *United World Trade v. Mangyshlakneft Oil Prod. Ass'n* Is Inapplicable To The Matter At Hand.

United World Trade v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1236-1237 (10th Cir. 1994), also cited by the Appellant, typifies the kind of squiggled line, disjointed causation frowned upon by *Princz* and *Virtual Countries*. In *United World Trade*, there was no payment obligation in the United States; in fact, the operative contract expressly stated that payment could be made in Europe or the United States. *United World Trade*, 33 F.3d at 1236-1237. Indeed, the plaintiff had initially accepted past payments in the London Branch of the Sao Paolo bank and then only later transferred the payment to a New York branch for conversion to U.S. dollars. *Id.*

United World Trade bears no resemblance at all to the matter at hand. M.A. Mobile and Ms. Farhang were clearly disclosed and known to Appellant as U.S. based stakeholders in a joint venture involving parties in India and the United States. ER 72-73, 213-243. The parties in the United States, as stakeholders, were to receive their share of profits at their locations in the United States. *Id.* The Technology in question—located at all times in the United States—also suffered a direct effect because the breach of the NDA (including critical return obligations requiring return of copies to M.A. Mobile in the United States) immediately compromised its trade secret and confidential status and immediately diminished the Technology's value as the core asset of M.A. Mobile (and Ms. Farhang, who

owns and controls M.A. Mobile and is entitled to all of the profits of M.A. Mobile per express agreement.) ER 92-93, 103-124, 210-243.

F. Contrary To Appellant’s Repeated Erroneous Assertions, The Record Contains Significant Evidence That The Incubation Society Was Engaged in Commercial Activity In The United States.

Appellant repeatedly and erroneously misstated to the District Court key facts about their commercial presence in the United States in connection with the activities underlying this case; this Court therefore is empowered to review those facts *de novo* to evaluate whether jurisdiction may be asserted under different prongs of the FSIA. *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004) (where sovereign immunity raised on summary judgment reviewed by appellate court, appellate court “may affirm a grant of summary judgment on any ground supported by the record, even if not relied upon by the district court”).

In 2009, Plaintiffs presented evidence of Mr. Chakrabarti’s numerous business communications, e-mails, and physical meetings which took place in the United States. ER 88-93, 212-217; SER 271-273. The District Court, unexpectedly, concluded that Farhang had not shown how her claims against IIT were “based upon these emails, calls, and meetings in California.” ER 14. When the District Court analyzed the Incubation Society’s immunity claims in 2012, the

District Court did not consider the issue again as it was not essential to its ruling. ER 7-16; *see also* ER 31-32.

The reality is, however, that both IIT and the Incubation Society did in fact engage in commercial activity within the United States, and these facts were not known to the Court at the time it issued its 2010 ruling and were concealed by Appellant's counsel's misleading statements prior to its 2012 ruling. Indeed, they have made repeated false statements that all of the development work for the project was conducted in India. They made this statement in their first case management statement almost three years ago: "All allegations of wrongdoing are related to events that occurred in India." SER 306. Appellant's counsel repeated these statements throughout the life of the case thereafter, even as recently as 2012 during the hearing on the sovereign immunity issues for the Incubation Society:

COUNSELOR CHATTERJEE: "THEIR ENTIRE ALLEGATION RESTS ON A SET OF COMMUNICATIONS AND ACTIVITIES THAT OCCURRED ON AN INDIAN CAMPUS ALLEGEDLY TO AN INDIAN COMPANY WHICH WAS THEN SENT TO AN INDIAN ENTITY WHERE THE UNLAWFUL ACT THAT'S ACCUSED OCCURRED IN INDIA."

SER 11. At that time, the confusion created by these erroneous statements proved immaterial to the Court's otherwise correct conclusion that the Incubation Society had indeed engaged in extraterritorial commercial activity which had a direct effect in the United States. ER 31-32. The confusion is however material and relevant to

this appeal where the Incubation Society attempts its own belated end run around the court's prior rulings.

The long-concealed truth is that IIT, and the Incubation Society who acted as a placeholder for IIT, had *key agents working and physically located in the United States throughout the joint venture*. Former Defendant Gurashish S. Brar, who was dismissed because Plaintiffs' former counsel failed to serve him in the United States, was one of the two lead engineers coordinating the entire project. SER 28-40. He was a senior engineer, and along with another engineer, Mr. Rakesh Gupta, directed the activities of the more junior engineers, namely Subrat Panda and Pravanjan Choudhury. *Id.* By his own admission, prior to the District Court's 2012 order on appeal here, Ex-Defendant Brar has stated unequivocally that *during the entire time period of his involvement with the joint venture, which would include the period during which the Incubation Society acted as a placeholder for IIT, he was physically located in the United States*. SER 220. Thus, the act of accessing the technology under the NDA, exploiting the technology under the NDA, and ultimately following the directives of his superiors to breach the joint venture, all took place in the United States and were all executed as an agent of the Incubation Society (which assumed IIT's role in the joint venture). SER 28-40, 220; ER 103-124; *see also* SER 42-51.

Similarly, it was determined after the Court's 2010 collateral order, ER 5, prior to the filing of this Appeal, that IIT's other lead engineer, former Defendant Rakesh Gupta, was also substantially performing his duties under the joint venture from the United States during a significant portion of the joint venture. SER 28-40, 220.

Appellant's incorrect presentation of the evidence prevented the District Court from engaging in a meaningful analysis of the second prong commercial activities exception. 28 U.S.C. § 1605(a)(2). In view of the recent factual revelations, Plaintiffs set forth here the analysis which the District Court should have applied in 2010 had it been properly informed of IIT's (and the Incubation Society's) conduct in the United States.⁵ Brar and Gupta's source code development, administrative and coordinating duties in the joint venture were undoubtedly "commercial activity," ER 15-16, as required by 28 U.S.C. § 1605(a)(2). It was clearly part of a for-profit venture, was clearly not "peculiarly within the realm of governments," and was not "one that only a sovereign state could perform." *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1392 (5th Cir. 1985); *see also Park v. Shin*, 313 F.3d 1138, 1145 (9th Cir. 2002).

⁵ Since the District Court's ruling on Appellant's other commercial activities strongly suggests how the District Court would have ruled had it known these facts, this Court can exercise its discretion to rule now in the interests of judicial efficiency. *In re B. Del C.S.B.* 559 F.3d 999, 1008 n.13 (9th Cir.2009); *see also Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir.2001).

Moreover, the commercial activity was closely related to all of Plaintiffs' core claims and thus more than satisfies the Supreme Court's requirement that commercial conduct in the United States must have sufficient nexus with the claims. *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). For example, Brar and Gupta's source code development work inside the U.S. involved the Incubation Society's access to the Technology under the NDA, its exploitation of the Technology during the joint venture including dissemination to third parties at the Incubation Society meeting, and its ultimate abandonment and breach of the joint venture. ER 103-124. Indeed, at the precise time that the Incubation Society was breaching the joint venture, one of its lead engineers exploiting the Technology was in the United States and had been as such for the entire duration of the joint venture. SER 28-40, 220; *see also* ER 103-124.

III. THE "WAIVER" EXCEPTION PROVIDES A THIRD BASIS BY WHICH THE DISTRICT COURT MAY EXERT JURISDICTION OVER THE INCUBATION SOCIETY

The District Court should have concluded that the Incubation Society waived immunity pursuant to 28 U.S.C. §1605(a)(1). As set forth above, the Incubation Society was a placeholder for IIT in the joint venture and thus had to agree to the terms of the NDA which included an express U.S. consent-to-jurisdiction clause. ER 116, 118-119, 121, 232. Its own officer, Mr. Chakrabarti,

had represented to Ms. Farhang that anyone who accessed the Technology would execute the NDA. SER 54. Moreover, the NDA itself expressly required that IIT would ensure that anyone accessing the Technology would agree to the terms of the NDA. ER 232.

Despite all of these facts, the District Court ruled that “[w]hile Farhang could benefit from the terms of the NDA, a party that never agreed to be bound by the NDA cannot be limited by its terms.” ER 31. Though it was not material at the time, the District Court erred both in its finding of law and its assessment of the facts.

A. The District Court Should Have Ruled That The Incubation Society Waived Its Immunity Under The FSIA By Agreeing To The Terms Of The NDA.

It is true that implied waivers under the FSIA are ordinarily found where: “(i) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising a defense of sovereign immunity.” *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985).

However, the case law does not require that the waiver must occur in writing. As the oft cited, express language of *Frolova* suggests, it instead requires that there is clear evidence of *agreement* (“has agreed”). *Frolova*, 761 F.2d at 377.

Indeed, as the District Court's own case law and other case law illustrates, there are significant instances in which a sovereign agrees to terms that effect an implied waiver of immunity without having approved express written terms memorializing the waiver.

For example, in *Joseph*, cited by the District Court, the sovereign executed a simple lease agreement which contained the following clause:

In the event that any action shall be commenced by either party hereto arising out of, or concerning this lease or any right or obligation derived therefrom, then in addition to all other relief at law or equity, the prevailing party shall be entitled to recover attorney's fees as fixed by the court.

Joseph, 830 F.2d at 1022. The court ruled that it could infer from this language that a waiver of immunity had occurred: "In light of the wholly local nature of the transaction, it is virtually inconceivable that the Consulate contemplated that adjudication of disputes would occur in a court outside of the United States." *Id* at 1023.

Similarly, in *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986), the court found an implied waiver even where the sovereign had neither signed nor executed any written document which contained a U.S. choice of law provision, U.S. jurisdictional consent, or other such U.S. specific clause. In fact, the underlying contract only contained an arbitration clause specifying resolution of disputes under the International Center

for Settlement of Investment Disputes (“ICSID”), which required the court to then analyze the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "Convention"), to which the ICSID referred. *Id.* Therein, with reasonable inferences, the court concluded that Liberia impliedly waived its immunity against the backdrop of the arbitration judgment having been issued *ex parte*, and against the backdrop of a plaintiff and sovereign with no other connection, except for the treaty, to the United States. *Id.*

In view of *Joseph* and *Liberia*, it is thus clear that courts can and will find implied waiver even where there is no execution of a document containing a U.S. choice of law, jurisdiction, or venue clause. Unlike in *Joseph*, where the sovereign had only agreed to a lease contract but had not otherwise agreed to any terms remotely resembling a jurisdictional waiver, the Incubation Society was the placeholder for IIT in a joint venture that was inextricably governed by the terms of an NDA which contained an express U.S. choice of law, U.S. jurisdiction, and U.S. venue clause. ER 232; *see also* ER 116, 118-119, 121. Moreover, in order to be the placeholder of IIT in the joint venture, the Incubation Society would have had to have agreed to its terms; this proposition is far more compelling than the “virtually inconceivable” scenario that a lease agreement would not contemplate resolution in the United States, as put forth by the court in *Joseph*. *Joseph*, 830 F.2d at 1022. Finally, the NDA, on its face, requires that anyone accessing the

Technology was required to agree with its terms; the Incubation Society was not merely accessing the Technology, but had become the placeholder for IIT in the joint venture. ER 232; *see also* ER 116, 118-119, 121.

Application of *Liberia* leads to a similar conclusion. Indeed, more compellingly than *Liberia* where the court relies on reasonable inferences applied to non-U.S. parties and treaty ratifications, the District Court in this matter was offered the clearly enforceable terms of the NDA with express U.S. choice of law and jurisdictional provisions to which the Incubation Society clearly agreed, as set forth above. *Liberia*, 650 F. Supp. at 76.

B. The Incubation Society Has No Other Grounds to Oppose Application Of The Waiver Exception.

While the Incubation Society has not expressly argued on the issue of waiver in this appeal, it is likely that the Incubation Society's counsel will repackage IIT's arguments on behalf of the Incubation Society. AOB 40. Plaintiffs respond preemptively and appropriately.

1. The NDA's Jurisdictional And Choice Of Law Provisions Decisively Waive The Incubation Society's Claims of Immunity.

Plaintiffs agree that the FSIA's waiver exception should be "narrowly construed." *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519 (9th Cir. 2001); *see also Joseph*, 830 F.2d at 1023 (9th Cir. 1987). The waiver of immunity contained in the NDA easily satisfies this standard.

In *Corzo*, cited by the Incubation Society, the plaintiff claimed that the sovereign's submission to the jurisdiction of the courts of *another* non-U.S. foreign state should operate as an implied waiver of immunity from suit in the United States. *Corzo*, 243 F.3d at 523. It is not surprising that the court gave short shrift to this argument. *Id.* Obviously, a waiver of immunity in Peru does not translate to a sovereign entity waiving its immunity in the United States. *Id.*

Application of *Corzo* to this case should find an implied waiver of immunity by the Incubation Society. In this matter, the NDA enabled access to the core Technology, and, as set forth above, remained an integral part of the joint venture governing confidentiality obligations during the joint venture's course including the obligations of the Incubation Society. ER 91-93, 103-124. When the Incubation Society disclosed the Technology to third parties without authorization, they were simultaneously breaching the NDA, breaching the joint venture and misappropriating technology. ER 103-124. In brief, the breach of the NDA, the breach of the joint venture, and the misappropriation of technology were inextricably linked. Even a narrowly construed waiver may encompass multiple breaches by the same party. (Application of *Joseph*, also cited by the Incubation Society's counsel, leads to similar results. *Supra* at 48-49.)

Finally, contrary to Appellant's counsel's arguments, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154 (D.C. Cir. 2002) is strikingly

factually distinguishable from the matter at hand. In *World Wide Minerals*, plaintiff entered into a series of separate and independent contracts with the government of Kazakhstan: (1) the first between plaintiff and the Kazakhstan State Committee (“KSC”) for operation of a state holding company operating a uranium mine; (2) the second between plaintiff, the holding company, and the KSC which focused only on a loan; (3) the third between plaintiff and a completely different state owned entity called Kazatomprom, agreeing to a joint venture to develop *other* uranium sources; and (4) a separate fourth pledge agreement between plaintiff and the holding company which it loaned funds pursuant to the second contract described above. *World Wide Minerals, Ltd.*, 296 F.3d at 1157-1160.

Obviously, this multi-party, multi-transactional world with multiple agreements that did not bear upon the conduct of the others bears no resemblance to the narrowly circumscribed sphere of this case. In *World Wide Minerals*, the plaintiff sued the *entire* Republic of Kazakhstan and attempted to then utilize the waiver from certain contracts with certain Khazak agencies to apply to numerous other independent state owned agencies, different subject matters, and independent corporations within Kazakhstan. *World Wide Minerals, Ltd*, 296 F.3d at 1159.

In this matter, the original NDA was executed with IIT and concerned the Technology. ER 91-93. The NDA with IIT became an integral part of the ongoing joint venture with the Incubation Society and enabled the joint venture with IIT

and the Incubation Society to proceed because it governed the confidentiality requirements of the same, single joint venture. *Id.*; *see also* ER 103-124. Plaintiffs sued IIT's Incubation Society on breaches relating to a single joint venture, not the entire Republic of India based on multiple agreements with independent agencies engaged in multiple projects on unrelated matters.

2. The Incubation Society Waived Its Immunity With Respect To Plaintiff Farhang.

Like IIT, the Incubation Society will likely rely principally on *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993) and *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) to conclude that the District Court applied the wrong standard—namely, third party beneficiary analysis—in its review of whether the scope of the implied waiver contained in the NDA executed by IIT and M.A. Mobile includes Ms. Farhang. AOB 46-47. However, neither *Cargill* nor *Frolova* nor other case law supports the Incubation Society's position.

For example, the *Cargill* court expressly found that the district court erred by *not* applying third party beneficiary analysis. *Cargill*, 991 F.2d at 1019. In this matter, the District Court did not err in its methodical application of the third party beneficiary analysis to the pleadings and affidavits before it, and appropriately gave Plaintiff Farhang the opportunity to amend her complaint accordingly. ER 12-13; *see also Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1439 (1992). Upon amending the complaint, as well as in relevant sworn affidavits, Ms. Farhang

has offered significant evidence that not only was she a third party beneficiary, but her sole and controlling beneficial ownership of M.A. Mobile was specifically known and disclosed to Mr. Chakrabarti (an officer of the Incubation Society) in connection with the NDA, the joint venture and the Technology: (1) Ms. Farhang disclosed her ownership of M.A. Mobile's Technology in an e-mail dated April 27, 2003; ER 72-73; (2) As set forth in her sworn affidavits, Ms. Farhang explicitly told Mr. Chakrabarti that she was entitled to receive 100% of any profits or payments to M.A. Mobile in connection with development of the Technology; ER 72, 216-217; (3) Both of the draft letters of intent in the record specifically name Ms. Farhang as a separate party participating in the joint venture; ER 270, 274; and (4) Counsel preparing the joint venture documents wrote to Mr. Chakrabarti (an officer of the Incubation Society) and referred to his client as Ms. Farhang, not M.A. Mobile. ER 73.

Similarly, *Frolova* makes no mention of an "unmistakable intention" standard argued by Appellant, AOB 47, and instead asks district courts to look for "strong evidence" of implied waiver. *Frolova*, 761 F.2d at 377. In this matter, as set forth in the preceding paragraph, there is indeed "strong evidence" that Ms. Farhang, on repeated occasions, disclosed facts to Incubation Society affiliates and representatives making it clear that she would be a third party beneficiary to the

NDA (and the sole beneficial owner of M.A. Mobile). ER 72-73, 216-217, 236-237, 241, 270, 274.

It is important to note that there is no general rule, contrary to the implication of Appellant's loose description of the law, that third party plaintiffs may not benefit from an implied waiver of immunity. As the District Court correctly noted in its 2010 order, in the cases where such a rule is applied, the third party plaintiff was **not** alleging third party beneficiary status. ER 10; *see also Keller v. Transportes Aereos, Militares Ecuatorianos*, 601 F. Supp. 787, 789 (D.D.C. 1985); *see also Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981).

The Incubation Society is also incorrect when it implies that the District Court could not apply contract law to answer substantive questions of law (e.g. whether Ms. Farhang was a third party beneficiary) until they had otherwise exerted jurisdiction over the Incubation Society. AOB 48-49. This so called problem of the "substantive cart before the jurisdictional horse" is not applicable to the matter at hand and is a questionable principal in the first place. In *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the "substantive cart" was the statutory construction of COBRA (specifically COBRA's definition of employer), and the "jurisdictional horse" was the FSIA. *Gates*, 54 F.3d at 1464. The court's unwillingness to use COBRA statutory interpretation to establish jurisdiction under

the FSIA was premised on the fact that the COBRA definition of “employer” was at odds with the presumption under federal and FSIA jurisprudence of “separate juridical entities” unless there is: (i) a showing of “extensive control” or (ii) the presumption of separate form would work “fraud or injustice.” *Id.* See also *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627, 629 (1983).

Moreover, third party beneficiary analysis has been clearly sanctioned by federal courts in the analysis of implied waivers. *Cargill*, 991 F.2d at 1019. Additionally, it is undisputed that courts have the *jurisdiction to review jurisdiction* and may conduct reasonable factual assessments, including third party beneficiary analysis. *Id.* at 1019; see also *Gould v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) (“[T]he district court has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction”).

Even if one were to accept Appellant’s incorrect argument that third party beneficiary law should not be applied, the “federal” requirements which Appellant wishes to apply (evidence of the sovereign’s intent that the waiver would extend to the third party) is more than satisfied in this case as set forth above in connection with the repeated specific disclosures to Mr. Chakrabarti of Ms. Farhang’s status as the sole beneficial owner of M.A. Mobile and the Technology. ER 72-73, 216-217, 236-237, 241, 270, 274.

It is thus clear that the District Court appropriately found sufficient basis to conclude that Ms. Farhang was a third party beneficiary of the agreement. ER 13. The presence of the assignment clause in the NDA is a question of fact, and the District Court's view on it one way or the other does not constitute clear error. Moreover, there is other significant evidence including a sworn affidavit that IIT not only should have contemplated that Ms. Farhang could personally enforce the NDA, but was expressly told about her status as a beneficial owner of M.A. Mobile (and thus the Technology) on repeated occasions. ER 72-73, 216-217, 236-237, 241, 270, 274. In addition, if the Incubation Society insists on pointing to language of the NDA as evidence of what the parties knew or understood about the circumstances attending the execution of the NDA, the Society should consider the opening clause which specifically defines "M.A. MOBILE" as "M.A. MOBILE LTD., and its corporate affiliates." ER 232. Under California statute, an "affiliate" of a corporation is defined as "any person or persons controlling, controlled by, or under common control with, other specified persons." Cal. Corp. Code § 28032. Ms. Farhang, as the sole owner of M.A. Mobile, obviously is an affiliate of M.A. Mobile. ER 211, 219.

The Incubation Society's likely final argument will be that the implied waiver did not contemplate Ms. Farhang because she was a mere shareholder of M.A. Mobile. AOB 50-51. Specifically, like IIT, the Incubation Society will likely

argue that “foundational corporate law principles” preclude Ms. Farhang from suing on the purportedly “corporate contract” in her individual capacity. *Id.* The reality is that there is no general rule that individual shareholders cannot sue on corporate contracts. Indeed, under basic principles of corporate law, an individual who is not a party to a contract can sue in connection with a contract where they are a third party beneficiary. *Alling*, 5 Cal. App. 4th at 1439-1440.

The fact patterns underlying the other cases cited by Appellant on this issue are easily distinguished. For example, like IIT, the Incubation Society may also try to rely on *Jones v. Niagara Frontier Transportation Authority* where the court held that the shareholder plaintiff “did not have standing as an individual because the claims asserted all involved injuries to the Corporation, stemming from its failure to obtain the construction contracts at issue. *There were no allegations that defendants had taken any actions against Jones in his individual capacity.*” *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 736 (2d Cir. 1987) (emphasis added). In the matter at hand, the facts are mirror opposite. Ms. Farhang’s individual profit rights were defined by an intellectual property assignment, not by her role as a mere shareholder. ER 212, 219. Moreover, she had separate and distinct individual rights as a stakeholder in the joint venture, where the joint venture was enabled by and incorporated the confidentiality provisions of the NDA. ER 72-73; *see also* ER 270.

For this reason, any reliance on *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979) is similarly without basis. Unlike the facts set forth above, the plaintiff in *Sherman* lacked standing as a third party beneficiary and there was no allegation, except as a corporate shareholder, that he had sustained injuries as a result of the alleged breaches. *Sherman*, 601 F.2d at 440 n. 13; *see also Petroleum N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1983) (where court notes that a shareholder can sue in connection with wrong to a corporation where the shareholder suffered direct and independent injury); *see also Amesco Exports, Inc. v. Ass'd Aircraft Mfg. & Sales, Inc.*, 977 F. Supp. 1014, 1016 *vacated on other grounds by* 87 F. Supp. 2d 1013 (C.D. Cal. 1997) (where the court plainly recognizes that “where the action is based on a contract to which he is a party, or a right belonging severally to him, or on a fraud affecting him directly, *it is an individual action* [emphasis added].”

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court’s January 12, 2012 findings that the Incubation Society engaged in commercial activity outside the United States which had a direct effect in the United States and commercial activity within the United States that had ample nexus with the underlying causes of action. In addition, to the extent it is dispositive to its

decision, the Court should also conclude that the Incubation Society impliedly waive its sovereign immunity by agreeing to be the placeholder for IIT in an ongoing joint venture governed by an NDA with express U.S. choice of law and consent-to-jurisdiction provisions.

Respectfully submitted,

Dated: June 15, 2012

SANJIV N. SINGH, A PROF. LAW CORP.

/s/ Sanjiv N. Singh

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STATEMENT OF NO RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs are not aware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,920 words.

Dated: June 15, 2012

Respectfully submitted,

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LAW CORPORATION

By /s/ Sanjiv N. Singh
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 15, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 15, 2012

Respectfully submitted,

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