No. 12-15178

IN THE UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

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

v.

INDIAN INSTITUTE OF TECHNOLOGY, KHARAGPUR AND
TECHNOLOGY INCUBATION & ENTREPRENEURSHIP TRAINING SOCIETY
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Case No. 5:08-cv-02658-RMW, The Honorable Ronald M. Whyte

OPENING BRIEF OF APPELLANTS

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INTRODUCTION

This appeal concerns the circumstances under which a foreign state may be sued in a U.S. court. Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611, the authority of U.S. courts to hear suits against foreign government entities is limited. Principles of comity help explain why this is so.

Imagine that an entrepreneur based in India approaches a U.S. government agency—say, the Federal Aviation Administration. This entrepreneur has dreams of applying a new technology to improve the U.S. air traffic control system. The entrepreneur proposes to work with experts at the FAA to develop the technology and, if all goes according to plan, eventually sell it to the agency. The FAA agrees to discuss the project, but the project goes nowhere. Now suppose that the entrepreneur files a lawsuit against the FAA raising breach of contract and other claims—and she sues across the world, in India.

The U.S. government would take a dim view of such a lawsuit. A federal agency that enters into dealings in the United States for domestic purposes does not expect to be haled into a foreign court simply because the dealings happen to involve a foreign national. Were an Indian court to assert jurisdiction over the case, the U.S. government would almost certainly see it as an affront to its sovereignty.

The reverse is equally true: Foreign governments do not appreciate being haled into U.S. courts to defend themselves against lawsuits involving activities that occur principally on their home soil. Recognizing this, Congress extended the courtesy of immunity to foreign states with the expectation that it would be reciprocated—that foreign courts will more likely respect our sovereignty if we respect theirs.

The allegations in this case are essentially the same as the FAA scenario, but with the nationalities flipped. Defendants-Appellants—the Indian Institute of Technology, Kharagpur (IIT) and the Technology Incubation and Entrepreneurship Training Society (Society or TIETS)—are agencies of the government of India. A California-based entrepreneur, Plaintiff-Appellee Mandana Farhang, approached them with a proposal: Her company, Plaintiff-Appellee M.A. Mobile, owned certain mobile computing technology. She suggested that Defendants team up with her to develop and sell an application of the technology to Indian Railways. The parties pursued this possibility for a time but ultimately nothing came of it. Plaintiffs then sued IIT and the Society in a U.S. court, raising several contract and commercial tort claims. Defendants moved to dismiss Plaintiffs' suit on the basis of sovereign immunity. The district court rejected their motions. The court held that this case fell within an exception to the FSIA for claims deriving from commercial activities of a foreign state that have a "direct effect in the United

States." According to the court, Defendants' conduct had the requisite "direct effect in the United States" because Plaintiffs allegedly were to receive any profits from the parties' joint venture in California.

The district court was wrong. As Plaintiffs themselves have acknowledged, a foreign state's commercial activities do not have a "direct effect in the United States" simply because a U.S.-based party claims to have been harmed. Instead, a domestic effect is "direct" within the meaning of the FSIA only if the effect follows as an "immediate consequence" of the foreign state's acts, which means that something "legally significant" must occur in the United States. For example, if a foreign state is contractually required to make payments domestically and fails to do so, that failure has been held to have a direct effect in the United States. Here, while Plaintiffs alleged that they had a right to receive profits from the parties' Indian joint venture in the United States, they offered no evidentiary support for that bare allegation. Moreover, even taking Plaintiffs' allegation as true, the only immediate consequence of Defendants' conduct was that Plaintiffs missed out on a possible business opportunity *in India*. Plaintiffs simply cannot claim a "direct effect in the United States" based on an Indian joint venture's yet-to-be earned profits on the sale of yet-to-be-refined technology to a yet-to-be-enlisted Indian customer.

The district court also suggested (but did not formally hold) that Defendant IIT waived its immunity from suit when it signed a non-disclosure agreement with Plaintiff M.A. Mobile in which the parties consented to the jurisdiction of the U.S. courts. This, too, was incorrect. Sovereign immunity waivers are narrowly construed. No waiver can occur unless a defendant unequivocally intends to relinquish its immunity with respect to the specific claims and parties at issue. By consenting to the jurisdiction of the U.S. courts for claims relating to a non-disclosure agreement with Plaintiff M.A. Mobile, IIT did not waive its immunity with respect to claims relating to a later alleged joint venture agreement or to commercial tort claims; nor did IIT waive its immunity with respect to claims brought by Plaintiff Farhang.

Because the exercise of jurisdiction over a foreign state inevitably has foreign policy implications, courts must tread carefully. Plaintiffs allege that they were thwarted in their efforts to do business *in India* by the acts and omissions of government entities *in India*. If this case is to be heard anywhere, it should be *in India*, not in the United States. The district court's denial of immunity should be reversed.

JURISDICTIONAL STATEMENT

This appeal is about the district court's subject-matter jurisdiction. Plaintiffs dispute this Court's appellate jurisdiction in part.

The district court purported to exercise jurisdiction under 28 U.S.C. § 1330(a), which provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in [28 U.S.C. § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity … under [28 U.S.C. §§ 1605-1607]." If, as Defendants contend, they are immune under the FSIA, then the district court "lack[ed] subject matter jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its order denying Defendant Society's motion to dismiss on the basis of immunity on January 12, 2012. The court had previously denied Defendant IIT's parallel immunity motion on January 26, 2010. The district court has not entered final judgment, but "denial of a motion to dismiss for foreign sovereign immunity is a collateral order which is immediately appealable." *Compania Mexicana de Aviacion, S.A. v. U.S. District Court*, 859 F.2d 1354, 1356 (9th Cir. 1988). Defendants filed a notice of appeal on January 25, 2012—within 30 days of the district court's January 12 order. *See* Fed. R. App. P. 4(a). Because Plaintiffs have previously contended that this notice of appeal was untimely as to Defendant IIT, Defendants explain below that this Court does, in fact, have authority to review the immunity status of both Defendants. *See infra* Point III.

ISSUES ON APPEAL

1. Did the district court err in holding that Defendants are not immune from suit on the ground that their alleged conduct had a "direct effect on the United States" within the meaning of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2)?

2. Did the district court err when it suggested that Defendant IIT waived its immunity with respect to both Plaintiffs and all of their claims simply by consenting to jurisdiction with respect to one contract and one Plaintiff?

3. Does this Court have the authority to consider the immunity status of both Defendants as part of this collateral-order appeal?

STATEMENT OF THE CASE

This action commenced when Plaintiff Farhang filed a complaint against IIT, the Society, and a number of other defendants on May 27, 2008. Amended complaints were filed on July 9, 2009, February 25, 2010, and June 21, 2010. The Second Amended Complaint added M.A. Mobile Ltd. as a Plaintiff.

On January 26, 2010, the district court issued an order denying Defendant IIT's motion to dismiss for lack of subject-matter jurisdiction pursuant to the FSIA. On January 12, 2012, the district court issued an order denying Defendant Society's similar motion to dismiss. IIT and the Society timely filed a notice of appeal on January 25, 2012.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Defendants Are Foreign Sovereign Entities

Plaintiffs acknowledge that Defendants IIT and the Society qualify as "foreign states" under the Foreign Sovereign Immunities Act (the relevant portions of which are appended to this brief). *See* ER 71; 28 U.S.C. § 1603(a) (defining "foreign state" to "include[] … an agency or instrumentality of a foreign state"). Defendant IIT is an educational and research institution run by the government of India. Its primary purpose is to educate and train undergraduate, graduate, and doctoral students in technology, engineering, and related fields. ER 194.

Defendant Society is affiliated with IIT but has a separate legal identity. Its governing body consists of a combination of IIT faculty and staff and volunteer members appointed from the local Indian technology community. The Society's purpose is to promote science, technology, and entrepreneurship, sometimes by serving as an incubator for start-up ventures. ER 37, 40, 84.

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[1] The facts that follow are drawn primarily from Plaintiffs' Third Amended Complaint (referred to in the text as "the complaint"). But the discussion also mentions evidence that the parties offered in the district court in connection with Defendants' immunity motions. The district court was required to consider this evidence in deciding whether the facts supported or precluded its exercise of jurisdiction. *See, e.g.*, *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1996) ("The district court should consider all evidence before it in resolving the immunity issue.").

Defendant Partha P. Chakrabarti, who is not formally a party to this appeal, is a citizen and resident of India. He serves as an IIT professor and as a member of the Society's governing body. ER 84. Plaintiffs describe him as an authorized agent of both institutions. *Id*.

Plaintiff Farhang Seeks Defendants' Assistance In Pursuing A Technological Venture In India, And IIT Executes A Nondisclosure Agreement

In 2003, Plaintiff Mandana D. Farhang emailed Dr. Chakrabarti seeking IIT's help. She was interested in developing and marketing mobile computing technology. She claimed that the technology belonged to Plaintiff M.A. Mobile Ltd., a company chartered in the Commonwealth of Dominica and owned by Ms. Farhang. ER 81, 86-87, 302-08.

Ms. Farhang gave Dr. Chakrabarti an initial overview of the technology, but before sharing more details, she asked IIT to enter into a Mutual Nondisclosure Agreement (NDA) with M.A. Mobile. Dr. Chakrabarti received and executed the NDA on IIT's behalf in India in August 2003. ER 238-41. There is a dispute as to whether M.A. Mobile ever properly counter-executed the document, though Defendants assume it did solely for purposes of the appeal. The Society never executed the NDA.

The NDA obligates the signatories to maintain the confidentiality of each other's proprietary information and prohibits either party from making, using, or selling "any product or other item using, incorporating, or derived from any

Confidential Information of the other party." ER 238. "Upon termination of th[e] agreement or upon written demand," each party is required to "cease immediately all use of the other party's Confidential Information and return promptly to the other party all documents and other tangible materials relating to or containing the other party's Confidential Information and all copies thereof." *Id.*

The NDA includes a section addressing choice of law and forum. It provides: "This Agreement shall be governed in all respects by the laws of the United States of America and by the laws of the State of California without application of the principles of conflicts of law. Each of the parties irrevocably consents to the exclusive personal jurisdiction of the federal and state courts located in Santa Clara County, California, as applicable, for any matter arising out of or relating to this Agreement[.]" *Id.*

The Parties Discuss Forming An Indian Joint Venture But Ultimately Go Their Separate Ways

With the NDA in place, Plaintiffs sent additional information to India for Defendants to review, including source code, a prototype, and business plans. ER 88-93. The parties discussed the possibility of participating in a joint venture to commercialize the technology in India and even exchanged drafts of a possible deal. Plaintiffs' allegations about what happened next are opaque. At points Plaintiffs seem to say that the parties actually entered into an agreement to participate in a joint venture, although they acknowledge that they never executed any written agreement. At other points, they suggest that Defendants embarked on an elaborate scheme to misappropriate Plaintiffs' technology for their own benefit by "lull[ing] Plaintiffs into the belief that the parties were forming a Joint Venture" when in fact they were not. *See, e.g.*, ER 94-95.

Either way, Plaintiffs' basic story is as follows: The parties discussed forming an Indian-based, Indian-registered corporation to serve as their joint venture vehicle. That corporation would sell an application of Plaintiffs' mobile computing technology to Indian Railways—a state-run entity and India's largest employer. The application would enable ticket examiners to use a handheld device to issue tickets, access passenger information, and more. Plaintiffs hoped that IIT, as a government entity, could help them cut through red tape and avoid "the usual bidding or tender process required of … nongovernmental, third party vendors" seeking to do business with Indian Railways. ER 95.

Negotiations over the ownership and control of the joint venture vehicle were drawn out. At one point, Ms. Farhang sent Dr. Chakrabarti a draft Letter of Intent on M.A. Mobile letterhead. The letter, dated July 7, 2004, purported to "confirm the shared intention of" M.A. Mobile, Ms. Farhang, Dr. Chakrabarti, and IIT "to form an Indian joint venture for the purpose of developing and marketing certain patent-pending technology that is presently owned outright and exclusively by [M.A. Mobile]." ER 270. The letter indicated that M.A. Mobile would grant

IIT "a limited, royalty-free license to market and continue the development of the Technology in India until formation of the joint venture" through "an Indian joint venture vehicle to be called 'Cool e-mobile.'" *Id*.

Shortly thereafter, Plaintiffs allege, the parties agreed that IIT and Dr. Chakrabarti would receive 28% of the shares, and M.A. Mobile and Ms. Farhang would receive the rest. The complaint asserts that "[t]he Joint Venture agreement initially contemplated and required that 72% of the profits … would be paid to M.A. Mobile at its principal place of business in Marin County, California, and to Farhang, individually, at her residence in Marin County, California." ER 74-75. The parties, however, did not execute their draft letters or otherwise formalize a joint venture agreement. ER 100.

Although the parties had not settled on specific terms, they moved forward with efforts to refine and commercialize the technology. According to Plaintiffs, Defendants (with Plaintiffs' knowledge and consent) "continued … work and development of the Technology at their labs at India," and the parties continued to strategize about how to earn the business of Indian Railways. ER 75, 99-101. Dr. Chakrabarti, for example, informed Plaintiffs that he would try to discuss the technology during meetings with Indian Railways officials. ER 99.

At some point in 2005, Dr. Chakrabarti allegedly alerted Plaintiffs that, due to legal requirements, IIT itself could not formally participate in the joint venture.

Dr. Chakrabarti suggested that the Society could potentially take over for IIT, and the yet-to-be-formed Cool e-mobile could seek to enroll in the Society's start-up incubation program. ER 112, 120. Later, Dr. Chakrabarti allegedly reported that IIT engineers had made a presentation on behalf of Cool e-mobile at a Society meeting and that the Society was considering incubation options. ER 104-05.

Plaintiffs allege that they received word in early 2006 that the Society's governing body had provisionally accepted Cool e-mobile into the Society's incubation program, subject to final approval. ER 96-97, 158. Plaintiffs then allegedly sent the Society a copy of the Cool e-mobile business plan and other details of the joint venture. ER 106.

The parties' relationship then came to an end. According to Plaintiffs, they received a letter from Defendants' Indian legal counsel in June 2006 informing them that Defendants would not be participating in any further negotiations concerning the joint venture. *See id*. The complaint offers no further details about the breakdown of the parties' relationship, apart from suggesting that Plaintiffs were disappointed that more progress had not been made toward getting Indian Railways' business. *See, e.g.*, ER 117.

In March 2008, nearly two years after the parties parted ways, Indian Railways announced that it had embarked on a pilot project with IBM to tie its passenger reservation system to a mobile handheld device. ER 106-08. Plaintiffs allege that there is a "remarkable similarity" between their technology and the technology IBM deployed as part of the pilot project, although their pleadings offer no specifics. ER 109. That purported similarity, Plaintiffs contend, makes it "more than plausible" to infer that Defendants disclosed Plaintiffs' confidential information about Plaintiffs' technology to IBM or that Defendants worked behind the scenes with Indian Railways without Plaintiffs' participation. *Id*. Plaintiffs offer no specific account as to how or when these alleged activities occurred, except to speculate that a member of the Society's governing body who also happened to be a manager at IBM India might have learned about Plaintiffs' technology or business plans and then leaked that information to IBM colleagues.

Plaintiffs Sue, Raising Breach Of Contract And Commercial Tort Claims

In 2008, Ms. Farhang sued IIT, the Society, and Dr. Chakrabarti in the U.S. District Court for the Northern District of California. (Other named defendants have been dismissed.) She added M.A. Mobile as a second plaintiff in 2010.

The operative complaint asserts numerous claims, only three of which have survived motions to dismiss: breach of the NDA, breach of the unwritten joint venture agreement, and trade secret misappropriation.

First, Plaintiffs allege that Defendants breached the NDA (a) by disclosing information about Plaintiffs' technology to others, "including specifically the IBM representative sitting on the IITK Incubation Society and members of the Indian

Railways and possibly other third parties not yet identified"; and (b) by "failing to return Confidential Information in complete form as requested by Plaintiffs." ER 126-27.

Second, Plaintiffs allege that Defendants "breached the [unwritten] terms of the Joint Venture … by abandoning all efforts to further [the] Technology on behalf of the Joint Venture, and instead working to deliberately move forward their own plans of commercialization at the expense of the Joint Venture." ER 129.

Third, Plaintiffs allege that Defendants misappropriated trade secrets by either "disclos[ing] to IBM and ultimately to the Indian Railways and possibly other third parties or us[ing] the Technology and its enhancements without the express or implied consent of Plaintiffs." ER 140.[2]

Plaintiffs seek damages "greater than $30,000,000" and other relief. ER 144. That amount, Plaintiffs allege, "captures the value of the revenue and benefits Plaintiffs would [have] derive[d] had the Technology been licensed to Indian Railways." ER 129.

The District Court Denies IIT's Motion To Dismiss Based On Sovereign Immunity

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[2] The complaint also lists claims for breach of fiduciary duty and fraud. ER 131-37. The district court ordered these claims struck because, under California Civil Code § 3426.7(b), common-law claims "based on the same nucleus of facts as [a] misappropriation of trade secrets claim" are preempted. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 958 (2009) (internal quotation marks omitted). *See* ER 60, 185-86.

In July 2009, IIT moved to dismiss, asserting that it is immune from suit under the FSIA, which provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless a statutory exception applies. 28 U.S.C. § 1604. The Society did not participate in IIT's motion because it had not yet been served.

Ms. Farhang opposed the motion, contending that IIT fell within the FSIA's "waiver" and "commercial activity" exceptions to immunity. Under those exceptions, "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States … in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication …; [or] (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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." *Id.* § 1605(a).

The district court denied IIT's motion. With respect to waiver, the court observed that IIT and M.A. Mobile had agreed in the NDA to the application of U.S. and California law and consented to the jurisdiction of the state and federal courts of Santa Clara County, California "for any matter arising out of or relating to th[e] Agreement." ER 8-9. These provisions, the court explained, amounted to an implicit waiver of immunity. According to the court, the implied waiver encompassed not only the claim for breach of the NDA, but also the claim for breach of the joint venture agreement and the commercial tort claims, which the court viewed as "closely factually related to … the alleged breach of the NDA." ER 9-10.

The court recognized, however, that Ms. Farhang—who was then the sole plaintiff—"was not a party to the NDA" and thus could not invoke IIT's waiver unless she was "able to 'stand in the shoes' of M.A. Mobile, either as an assignee or as a third party beneficiary to the contract." ER 10. The court rejected Ms. Farhang's reliance on "her alleged status as an assignee," observing that the NDA had an express non-assignment clause. ER 11. The court then noted that, while Ms. Farhang had not alleged in her then-operative complaint that she was an intended third-party beneficiary, she made that claim in her opposition to IIT's motion. Deeming it a "close call," the district court decided that Ms. Farhang's proffer was sufficient "to justify allowing her to amend her complaint to attempt to assert such status." ER 13. The court, in other words, did *not* hold that IIT had waived its immunity with respect to Ms. Farhang; it simply granted her leave to amend.

Having declined to rely on the waiver exception, the district court turned to the commercial activity exception. The court focused on the third prong of that exception, which provides that a foreign state is not immune when a plaintiff's action "is based … 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). The court explained that "entering into a joint venture for commercial purposes," or taking preliminary steps to do so, "constitutes 'commercial activity' under the FSIA." ER 15. Thus, the decisive question was whether IIT's conduct in connection with the proposed joint venture "had a 'direct effect' in the United States." ER 16.

The court's discussion of that critical issue was brief. "A 'direct effect' under the FSIA," the court stated, "is present when money that was to be paid to a location in the United States is not forthcoming as a consequence of the extraterritorial act." *Id*. The court then recited Ms. Farhang's allegations that, "[u]nder the terms of the contemplated joint venture agreement, 72% of the profits were to be paid to M.A. Mobile at its principal place of business in Marin County, California and to Farhang, individually, at her residence in Marin County, California," and that, because of IIT's actions, the "profits that would have been paid to California were not forthcoming." *Id*. This sufficed, the court held, to establish the requisite direct effect and to defeat IIT's assertion of sovereign immunity. The court made no mention of Ms. Farhang's failure to offer any documents in which the parties specified where proceeds of the joint venture would be paid.

The District Court Denies The Society's Motion To Dismiss Based On Sovereign Immunity

Once the Society was served, it filed a separate motion to dismiss on the basis of sovereign immunity. (By this point M.A. Mobile had been added as a second plaintiff.) Again, Plaintiffs responded by invoking the FSIA's waiver and commercial activity exceptions. And again, the court denied the immunity motion.

The court began by rejecting Plaintiffs' waiver argument. Plaintiffs, the court explained, "ha[d] not provided evidence" to corroborate their bare assertion that the Society had executed the NDA, and thus could not establish that the Society had consented to the application of that agreement's jurisdiction and choice-of-law provisions. ER 30.

The court held, however, that the Society, like IIT, fell within the third prong of the commercial activity exception. Drawing from its previous order, the court reiterated that entering into or preparing to enter into a joint venture "constitutes 'commercial activity' under the FSIA." ER 32. Plaintiffs, the court declared, "ha[d] adequately alleged that [the Society] negotiated for a role and participated in a joint venture." *Id*. The court then stated: "The court concludes that the present action is based '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.' The commercial activity exception thus provides a basis for finding that IIT [sic] is not immune from suit in this action." *Id.* (quoting 28 U.S.C. § 1605(a)(2)). That was the totality of the court's analysis.

SUMMARY OF ARGUMENT

I. Commercial Activity. The district court erred in holding that the "direct effect" prong of the FSIA's commercial activity exception defeats Defendants' assertion of sovereign immunity. While a plaintiff may be able to establish a direct effect where the defendant withheld payments that the plaintiff was legally entitled to receive in the United States, a "direct effect in the United States" does not occur merely because a plaintiff claims to have suffered domestic financial losses. Here, Plaintiffs have alleged that the parties' joint venture agreement entitled them to receive profits from the Indian joint venture in the United States. But bare allegations do not suffice. Plaintiffs must come forward with cognizable supporting evidence—something they have not done. The record contains no indication that the parties ever agreed that Plaintiffs would have a right to be paid in the United States. Even crediting Plaintiffs' allegations (as the district court erroneously did), Defendants' conduct cannot be said to have had a direct effect in the United States. This is not a case in which Defendants failed to make any required domestic payments to Plaintiffs. Instead, Defendants allegedly deprived

Plaintiffs of an opportunity to earn the business of a potential Indian customer in India. Any downstream effects of this conduct, such as a loss of potential future profits, are necessarily indirect and speculative.

II. Waiver. The district court also erred in suggesting that Defendant IIT waived its immunity with respect to all of Plaintiffs' claims and with respect to both M.A. Mobile and Ms. Farhang. The district court relied on a provision of the NDA in which IIT consented to the jurisdiction of the U.S. courts for claims arising out of or relating to the NDA. But immunity waivers—particularly implicit waivers—are very narrowly construed. A party's intent to waive its immunity with respect to particular claims and parties must be crystal clear. Here, there is no clear indication that, by agreeing to jurisdiction for NDA-related claims, IIT also intended to give up its immunity with respect to claims for breach of a later purported joint venture agreement or for commercial torts. Likewise, because the only parties to the NDA were IIT and M.A. Mobile, there is no indication—much less a clear one—that IIT intended to waive its immunity as to Ms. Farhang. Contrary to the district court's suggestion, even if Ms. Farhang could potentially qualify as a third-party beneficiary of the NDA (and she cannot), that would not suffice to show that IIT intended to allow Ms. Farhang to sue it in a U.S. court.

III. Appellate Jurisdiction. This Court is entitled to determine the immunity status of IIT in conjunction with the Society's unquestionably timely appeal. First, under the doctrine of pendent appellate jurisdiction, an otherwise non-appealable ruling may be reviewed together with an appealable ruling when the two rulings are inextricably intertwined. Here, the district court's application of the commercial activity exception to both Defendants was identical. Second, when this Court hears a collateral-order appeal, its review need not be restricted to the order that triggered the appeal. It also may review earlier related orders.

ARGUMENT

There is no dispute that Defendants are "agenc[ies] or instrumentalit[ies]" of the Republic of India and therefore qualify as "foreign states," under the FSIA. 28 U.S.C. § 1603(a), (b); *see* ER 71. As such, they are "presumptively immune from the jurisdiction of the United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The district court had no jurisdiction over claims against these foreign sovereign entities unless "one of the specified exceptions to sovereign immunity [set forth in the FSIA] applies." *Verlinden*, 461 U.S. at 489; *see also Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 522 (9th Cir. 2001) ("The FSIA provides the sole means by which courts of the United States can assert jurisdiction over foreign sovereigns.").

The district court held that the FSIA's commercial activity exception permitted it to exercise jurisdiction over IIT and the Society. The court also indicated, but did not hold, that IIT waived its immunity with respect to all of

Plaintiffs' claims and that Ms. Farhang might be entitled to invoke that waiver as a third-party beneficiary to the IIT-M.A. Mobile NDA. The district court's resolution of these immunity issues is reviewable *de novo*. *See Corzo*, 243 F.3d at 522.

We address each exception in turn. *See infra* Points I and II. Then, we address a question of appellate jurisdiction, which Plaintiffs have previously raised. *See infra* Point III.

I. THE "COMMERCIAL ACTIVITY" EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PROVIDE A JURISDICTIONAL BASIS FOR PLAINTIFFS' SUIT AGAINST DEFENDANTS

The FSIA does not authorize U.S. courts to exercise jurisdiction over a foreign state (or instrumentality) simply because the state engages in activities that could be considered "commercial." A foreign state's commercial activities overcome the presumption of immunity only where the activities are sufficiently connected both to the plaintiff's cause of action and to the United States. Specifically, the plaintiff's action must be "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).

The district court correctly recognized that the first two prongs of the commercial activity exception are inapplicable here because Defendants did not "carr[y] on" any relevant "commercial activity" or "perform[]" any relevant "act," *in the United States*. Rather, Plaintiffs' complaint rests on Defendants' activities in connection with the joint venture discussions—all of which are alleged to have occurred *in India*. The district court focused on the third prong, which is inapplicable unless Defendants' overseas acts "cause[d] a *direct* effect in the United States." *Id*. (emphasis added).

The Supreme Court and this Court have articulated three axioms as to what sorts of injuries or losses amount to a "direct effect in the United States":

Axiom 1: A "mere financial loss by a person—individual or corporate—in the U.S. is not, in itself, sufficient to constitute a 'direct effect'" within the meaning of the FSIA's commercial activity exception. *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 726-27 (9th Cir. 1996); *see also Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) ("[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception.").

Axiom 2: What matters is where the *legal wrong* occurred, not where the ultimate impact was felt. "[T]o establish a 'direct effect' in the United

States resulting from an act occurring abroad, a plaintiff must establish that 'something *legally significant* actually happened in the U.S.'" *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (citation omitted; emphasis added); *see also Adler*, 107 F.3d at 727.

Axiom 3: An effect is not "direct" unless "it follows as an '*immediate* consequence' of the defendant's activity." *Adler*, 107 F.3d at 726 (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992)) (emphasis added).

The district court failed to apply these axioms when it concluded that it had jurisdiction over Plaintiffs' claims. The court's "direct effect" holding was based on one legal proposition and one factual assertion. The legal proposition was that "[a] 'direct effect' under the FSIA, is present when money that was to be paid to a location in the United States is not forthcoming as a consequence of the extraterritorial act." ER 16. The factual assertion was Ms. Farhang's allegation that, "[u]nder the terms of the contemplated joint venture agreement," the Defendants were expecting profits, but because of IIT's actions, the "profits that would have been paid to California were not forthcoming." *Id*. The district court's analysis relates only to one claim (violating the unwritten joint venture agreement), but has no bearing on the other two (violating the NDA and trade secret misappropriation). So, the district court erred as an initial matter in denying sovereign immunity as to those claims. The district court also erred in denying sovereign immunity as to the purported breach of the joint venture agreement.

A. The District Court Erred In Denying Immunity With Respect To The Alleged NDA Violation And The Commercial Tort

Because no claim against a foreign state may proceed absent a direct effect in the United States, the district court was required to assess how each claim measures up against the axioms enumerated above. *See, e.g.*, *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1172 (9th Cir. 2010) ("The fact that an exception to the FSIA permits [one plaintiff's] claims does not indicate that the exception applies to [a second plaintiff's] claims."). A sovereign immunity exception that applies to only one claim does not somehow defeat the foreign state's immunity as to other claims. Failing to heed that rule, the district court eliminated Defendants' immunity with respect to two claims without even addressing them.

We begin with the claim that Defendants breached the NDA. For contract claims, courts look to "the locus of contractual obligation [that was breached] when deciding whether a direct effect occurred in the United States under the FSIA." *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 240 (2d Cir. 2002). That is what it means (under Axiom 2) to inquire whether "'something *legally significant* actually happened in the U.S.'" *Gregorian*, 871 F.2d at 1527 (citation omitted). The accusation is that Defendants, who are based in India, broke their promise to keep a secret *in India*. So India is both "the locus of contractual obligation," *id.*, and where the legal wrong occurred. The commercial activity of exchanging information in India did not yield any direct effect in the United States. To be sure, Plaintiffs allege that they felt financial consequences in the United States. But, as Plaintiffs concede, "mere financial loss suffered by a person or corporation in the United States is not in itself sufficient to constitute a 'direct effect.'" ER 265.

The district court's "direct effect" analysis was simply inapplicable to Plaintiffs' NDA claim. 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. That Plaintiffs were expecting profits "[u]nder the terms of the contemplated joint venture agreement," ER 16, has no bearing on Defendants' immunity from suit for a claim for violating the NDA.

The same goes for the tort of trade secret misappropriation. The allegation here is that Defendants not only breached the NDA, but also used the information to their own advantage in India, depriving Plaintiffs of a hoped-for commercial opportunity there. Again, nothing "*legally significant* actually happened in the U.S.'" *Gregorian*, 871 F.2d at 1527 (citation omitted). And, again, any place-of-payment provision in the parties' purported joint venture agreement simply has no bearing on where the "immediate consequence" of the alleged misappropriation was felt.

This Court's decision in *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672 (9th Cir. 1984), illustrates the point as to both claims. The defendant in that case was an aircraft manufacturer owned by the Australian government. The defendant sold an aircraft, in Australia, to a California nonprofit corporation. The plane later crashed in Indonesia, killing its American pilot. The corporation and pilot's family brought a tort action in California. This Court rejected the district court's conclusion that "the death of the pilot and the damage to the plane overseas caused 'direct effects' to the pilot's survivors and the California corporation which owned the plane." *Id*. at 674. As the Court explained, the "direct effects of the plane crash"—"the loss of the pilot's life and the destruction of the aircraft"—occurred in Indonesia, not the United States. *Id*. The emotional and economic harm suffered by the pilot's family and the financial loss suffered by the corporation were "indirect consequences" that did not "support the assertion of subject matter jurisdiction under the direct effect exception to foreign sovereign immunity." *Id*. at 675.

So, too, here. Plaintiffs complain about alleged wrongs that occurred abroad. The alleged domestic consequences to their pocket books were "indirect consequences" of those overseas wrongs. *Id.*[3]

B. The District Court Erred In Denying Immunity With Respect To The Alleged Violation Of The Unwritten Joint Venture Agreement

The district court's analysis was wrong even as to the purported breach of the joint venture agreement.

We begin with some common ground. The parties and the district court agreed that a plaintiff cannot overcome the presumption of sovereign immunity without establishing—at an irreducible minimum—a *legal right* to receive payment *in the United States.* It is not enough to prove that a breach cost the plaintiff money (Axiom 1); the plaintiff must demonstrate (under Axiom 2) that "'something *legally significant* actually happened in the U.S.'" *Gregorian*, 871 F.2d at 1527.

Accordingly, the absence of an enforceable right to receive payments domestically is frequently the key distinction between cases in which a foreign

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[3] As previously noted, *supra* at 14 n.2, the district court dismissed various other claims on nonjurisdictional grounds. While Defendants agree with the district court's analysis of those claims, subject matter jurisdiction should technically be the first determination that a court makes. Thus, this Court should clarify that the commercial activity exception does not confer jurisdiction over *any* of these claims.

state's assertion of immunity was accepted and those in which it was not. *Compare, e.g., United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (no direct effect in the U.S. from Kazakh oil company's breach of contract, where contract provided that plaintiff was to receive payment in London, even though plaintiff intended to forward the funds to its U.S. bank account), *with Weltover*, 504 U.S. at 618 (direct effect found where foreign state breached contract explicitly conferring on plaintiffs a right to be paid in New York), *and Adler*, 107 F.3d at 727 (because "New York was the place of performance of Nigeria's ultimate contractual obligation, its failure to satisfy that obligation necessarily had a direct effect in the United States").

The district court gave a nod to these bedrock principles, but it misapplied them in two respects. First, the court relied on what Plaintiffs *alleged* in their *complaint*—evidently assuming the allegations to be true—rather than assessing whether the evidence supports the allegations. Second, even if taken as true, Plaintiffs' allegations fail on their own terms.

1. Plaintiffs have not satisfied their burden of producing evidence of a "direct effect in the United States"

This Court's precedents required the district court to apply a burden-shifting framework to assess immunity. As a first step, there is no dispute that Defendants satisfied the initial burden of establishing that they are "foreign states" within the meaning of the FSIA and are thus "presumptively immune" from suit. *Adler*, 107

F.3d at 728; *see also Export Group v. Reef Indus.*, 54 F.3d 1460, 1470 (9th Cir. 1995) (holding that a concession from the plaintiff that the defendant qualifies as a "foreign state" satisfies the initial burden). "[P]laintiff[s] then ha[d] the burden of going forward with the evidence by offering proof that an FSIA exception applies." *Adler*, 107 F.3d at 728; *see also Export Group*, 54 F.3d at 1470 ("the burden shifts to the plaintiff to establish an exception"). Had Plaintiffs satisfied that burden of production, the ultimate burden would have fallen on Defendants to "prove by a preponderance of the evidence that the asserted exception does not apply." *Adler*, 107 F.3d at 728; *see also Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987). Plaintiffs failed their burden of production, and even if they had properly crossed that threshold, the evidence was woefully insufficient to defeat Defendants' assertion of immunity.

Plaintiffs' effort to show a "direct effect in the United States" revolves entirely around their allegation that the parties contemplated that a portion of the profits that might eventually be earned by their joint venture "would be paid [to them] … in Marin County, California." ER 75. The district court erred in taking this contested allegation at face value. The question under the FSIA is not whether Plaintiffs' *allegations*, if true, would defeat immunity; it is whether Defendants are, *in fact*, immune from suit—i.e., whether Plaintiffs' allegations *are* true. Under the burden-shifting framework, the district court should have looked beyond bounds of the complaint and "considered all evidence before it." *Adler*, 107 F.3d at 728; *see also Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 38 (D.C. Cir. 2000) ("Because Angola's motion to dismiss raised a factual challenge to the court's subject matter jurisdiction under the FSIA, the district court erred in accepting as true the jurisdictional facts alleged by the plaintiff."). Were it otherwise, a plaintiff could proceed against a foreign sovereign simply by pleading whatever was necessary to overcome immunity—a result wholly at odds with the principles of comity that underlie the doctrine.

Had the district court peered beyond the complaint, it would have recognized that Plaintiffs had not met their burden of production. Consistent with this Court's "direct effect" precedents, the onus was on Plaintiffs to demonstrate that Defendants made a *legally enforceable* commitment to pay the Plaintiffs *in the United States*. *See supra* at 23-24, 28-29. An unexpressed, subjective *expectation* of receiving payment in the United States would not suffice.

Plaintiffs produced not a shred of competent evidence indicating that the parties even discussed, much less agreed upon, the place where proceeds from their alleged joint venture would be paid. The closest Plaintiffs came was to offer a declaration from Ms. Farhang that simply parrots the complaint: "M.A. Mobile and I entered into what we had been led by IITK to believe was a joint venture agreement with IITK. The essential terms … were that, if M.A. Mobile and I would allow IITK to retain and further develop the Technology … M.A. Mobile and I, individually, would together receive 72% of any profits that were generated through the further development and marketing of the Technology; and … those profits would be paid to M.A. Mobile … and to me … in Marin County, California." ER 214.

As an initial matter, this submission—which addresses only *IIT*—says nothing about any contractual undertaking by the *Society*. The Society is a separate sovereign entity. Without proof that the Society made the relevant contractual commitment, Plaintiffs cannot overcome its immunity.

Nor does the declaration overcome IIT's presumptive immunity. Plaintiffs attached no supporting documentary proof—not even so much as an email—capturing this purported contractual commitment. The declaration offers no details about how this unwritten agreement came about or its scope: Who brought it up? How was it worded? Who among Defendants' representatives agreed? How did they indicate their assent? What exactly did it mean to "be paid in … Marin County," anyway? By whom? By what mechanism? In what currency?

This Court has frequently observed that such a "'conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence' is insufficient to create a genuine issue of material fact.'" *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012) (quoting *FTC v. Publ'g Clearing*

House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997)); *cf. Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by *competent proof*." (emphasis added)); *Virtual Countries*, 300 F.3d at 241 ("Despite an opportunity to come forward with evidence to meet its burden of production in order to prevail on the jurisdiction issue, [plaintiff] failed to provide sufficient evidence for [its] contentions.").

Even if the unsupported Farhang declaration could somehow meet Plaintiffs' burden of production, Defendants have unquestionably satisfied their burden of proof. *Cf. Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir. 1995) (noting that party asserting immunity does not bear the burden of proof until "a plaintiff offers evidence that an [FSIA] exception applies"). Defendants produced multiple draft Letters of Intent that refer to the parties' ownership stakes in the joint venture but make no mention of a requirement that Plaintiffs' share of joint venture profits be paid in California or any other particular location. *See, e.g.*, ER 270-71, 274-79. Likewise, the record contains email correspondence in which the parties discuss ownership interests and the structure of the joint venture vehicle, but say nothing at all about place of payment. *See, e.g.*, ER 147. To the contrary, these written materials plainly contemplate that the parties would see profits (if at all) in the form of an increase in the value of their shares of an Indian company. They did not, in other words, have a right to be "paid" by anyone. Instead, they would presumably sell or cash out their shares in India in whatever ways the corporate by-laws and Indian law prescribed.

The only reasonable inference to draw from the record is that there was never any agreement that Plaintiffs would have a right to receive joint venture proceeds in California. Had the joint venture succeeded, perhaps Plaintiffs ultimately might have chosen, of their own volition, to cash out and transfer their share of the India-earned profits to California, but Defendants certainly had no contractual obligation to assure that Plaintiffs received payments there. The "locus of [Plaintiffs'] injury" was India, and any losses Plaintiffs may have suffered in this country were indirect. *Siderman de Blake v. Republic of Argentina*, 965 F.2d at 699, 711 n.11 (1992). Accordingly, the commercial activity exception does not defeat Defendants' assertion of immunity.

2. Plaintiffs' allegation about the location of joint venture payments fails on its own terms to satisfy the direct effect requirement

Even if Plaintiffs' allegation about place of payment is accepted as true, it still would not show a "direct effect in the United States." For starters, the language of Plaintiffs' complaint is equivocal. Plaintiffs do not say that the parties actually agreed that Plaintiffs would have a right to have profits paid to them in California. They say "[t]he Joint Venture agreement *initially* contemplated and required that 72% of the profits earned through the development and marketing of the Technology and its enhancements would be paid to M.A. Mobile … and to Farhang … in Marin County, California." ER 74-75 (emphasis added). This artful phrasing is a tacit concession that the parties never *ultimately* agreed to any such thing—a concession reinforced by Plaintiffs' acknowledgement that the parties never executed a final, written document memorializing the terms of their supposed arrangement. *See, e.g.*, ER 100. This fact alone distinguishes this case from the cases the district court cited—*Weltover* and *Adler*—where the plaintiffs had a clear contractual entitlement to be paid in the United States and, as a direct result of the defendants' acts, never received payment. *See, e.g.*, *Adler*, 107 F.3d at 729 ("Nigeria was contractually obligated to make payment in New York.").

More importantly, Plaintiffs' allegations fail Axiom 3: The effect Plaintiffs complain of (loss of income in the United States) was not "an '*immediate* consequence' of the defendant's activity." *Adler*, 107 F.3d at 726 (quoting *Weltover*, 504 U.S. at 618) (emphasis added). Plaintiffs do not allege that *Defendants* ever would have had any obligation to pay them anything. They contend that, as a result of Defendants' conduct, they lost out on a share of future profits they might have earned from customers of their Indian joint venture. Their claim presupposes that, but for Defendants' conduct, the parties would have succeeded in optimizing the technology, then succeeded in winning Indian

Railways as a customer, then succeeded in extracting enough money from Indian Railways to turn a profit, then been allowed to sell their shares in the joint venture company, and then received their money in California. If a "'direct effect' … 'is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption,'" *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (citation omitted), then this course of contingent future events falls far short. *See also Virtual Countries*, 300 F.3d at 237 (refusing to "defin[e] 'direct effect' to permit jurisdiction when a foreign state's actions precipitate reactions by third parties, which reactions then have an impact on a plaintiff").

Courts have rejected assertions of a "direct effect" where the connection between the defendant's acts and the alleged harm was much more direct than the connection Plaintiffs' allege here. The Tenth Circuit supplied an excellent example in *United World Trade*, which this Court has cited with approval. *See, e.g.*, *Adler*, 107 F.3d at 727. The plaintiff there, a Colorado corporation, had contracted to serve as the intermediary in transactions between a state-owned Kazakh oil company and an Italian refiner. Under the parties' agreements, the refiner was required to pay for the oil in U.S. dollars at a London bank, and the plaintiff was entitled to keep 3% of the proceeds. The plaintiff's plan was to transfer its share of the proceeds to its account in Denver. After the Kazakh company allegedly breached the contract, the plaintiff sued in a U.S. court, asserting that the commercial activity exception applied because it had "suffered financial loss in the United States in the form of lost profits as a result of defendants' actions." *United World Trade*, 33 F.3d at 1237.

The Tenth Circuit rejected this argument, holding that any domestic effect was indirect. "The immediate consequence of the [Kazakh company's] alleged breach of contract and fraud was that [plaintiff] did not receive funds from [the refiner] … in London." *Id*. at 1238. According to the Court, "[t]he fact that [the plaintiff], had it received additional funds in London pursuant to the contract, would have then transferred those funds to the United States does not allow us to conclude that the loss suffered by appellant was sufficiently 'in the United States' to warrant jurisdiction under § 1605(a)(2)." *Id*. at 1239. Congress, the court concluded, "did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *Id*. at 1238; *see also Corzo*, 243 F.3d at 525 (finding no direct effect where plaintiff alleged that foreign defendant's cutoff of financial assistance led plaintiff to breach contracts with companies in the United States).

If the "ripples caused by [those] overseas transactions" were "simply too attenuated from the defendants' actions to be considered a 'direct effect,'" then Plaintiffs cannot possibly satisfy the "direct effect" requirement here. At least the plaintiff in *United World Trade* had a clear contractual entitlement to be paid, albeit overseas. In this case, the only even arguable "immediate consequence" of Defendants' conduct is that Plaintiffs lost out on the chance to win a prospective Indian customer in an Indian market. Any alleged downstream effects in the United States "were at best secondary or incidental results" of Defendants' actions and thus do not suffice to establish jurisdiction under the commercial activity exception. *Corzo*, 243 F.3d at 525.

In contrast, in each of the cases the district court invoked, the contracts did not just provide that the defendant would eventually receive money in the United States from some source or another. They provided that the *defendant* would pay the plaintiff money in the United States, as part of the defendant's obligation to perform the contract. There was, in other words, a direct, unbroken connection between the defendants' acts and plaintiffs' domestic losses.

For example, in *Weltover*, the plaintiffs held Argentine bonds that explicitly "provide[d] for payment of interest and principal in United States dollars … through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor." 504 U.S. at 610. The bondholders exercised their right to be paid in New York. Argentina defaulted. Rejecting Argentina's assertion of immunity, the Supreme Court held that, because New York was "the place of performance for Argentina's ultimate contractual obligations," "the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to be delivered to a New York bank for deposit was not forthcoming." *Id*. at 619. The "immediate consequence" of Argentina's decision to reschedule its bonds was that the country breached a legal duty to make a payment *in the United States*. *Id*. at 618; *see also Rogers v. Petroleo Brasileiro*, 673 F.3d 131, 139 (2d Cir. 2012) ("In cases involving the default by a foreign state or its instrumentality on its commercial obligations, an act has a direct effect in the United States if the defaulting party is contractually obligated to pay in this country."); *Adler*, 107 F.3d at 727 ("As in *Weltover*, since New York was the place of performance of Nigeria's ultimate contractual obligations, its failure to satisfy that obligation necessarily had a direct effect in the United States.").

II. THE DISTRICT COURT ERRED IN SUGGESTING THAT THE FSIA'S "WAIVER" EXCEPTION MIGHT PROVIDE AN ALTERNATIVE BASIS FOR JURISDICTION OVER IIT

The district court correctly held that the Society did not waive its immunity. *See* ER 29-31. The court suggested, however, that waiver might provide an alternative basis for the exercise of jurisdiction over IIT. *See* ER 7-13. Because the district court never formally relied on waiver as a basis for denying IIT's assertion of immunity, this Court need not address waiver. If the Court rules in Defendants' favor on the commercial activity exception, it could simply remand to allow the district court to resolve the waiver issue in the first instance. But since the district court did signal how it is likely to rule, this Court may choose to review the district court's analysis in the interest of judicial efficiency. *See, e.g.*, *In re B. Del C.S.B.*, 559 F.3d 999, 1008 n.13 (9th Cir. 2009) (exercising discretion, for the sake of efficiency, to resolve an issue where the district court "strongly suggested" what it would have done had it been "required to decide the issue"); *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1164 (9th Cir. 2000) ("Although we need not reach this issue, it may arise on remand …. Therefore, we address it now in the interest of judicial economy.").

The district court's waiver discussion is flawed in two key respects. First, the court erred when it indicated that IIT had implicitly waived its immunity with respect to *all* of Plaintiffs' claims, not just their claim for breach of the NDA. Second, the court further erred when it suggested that Ms. Farhang might be able to maintain an action against IIT as a third-party beneficiary of the nondisclosure agreement between IIT and M.A. Mobile.

A. The NDA's Jurisdictional Provision Does Not Waive IIT's Immunity With Respect To Plaintiffs' Joint Venture And Misappropriation Claims

IIT has never explicitly waived its immunity from suit. IIT and M.A. Mobile did, however, agree in the NDA to consent to the personal jurisdiction of the state and federal courts located in Santa Clara County, California "for any matter arising out of or relating to this Agreement." ER 238. The district court expressed the view that this language implicitly waived IIT's immunity, and that it did so with respect to *all* of Plaintiffs' claims, not just their claim for breach of the NDA. As the district court saw it, Plaintiffs' claims for breach of the joint venture and misappropriation of trade secrets (as well as for fraud and breach of fiduciary duty) all could be said to "aris[e] out of or relat[e] to" the NDA simply because "all concern further dealings between M.A. Mobile and IIT regarding use of the Technology and confidential information covered by the NDA." ER 9. It thus automatically followed, the district court believed, that "all of [Plaintiffs'] claims fall within the scope of IIT's implicit waiver of sovereign immunity." ER 10.

The district court failed to heed the established rule that the FSIA's waiver exception must be "narrowly construed." *Corzo*, 243 F.3d at 523; *Joseph*, 830 F.3d at 1022. It is not enough that language in an agreement *might* support a finding of waiver. Instead, there must be unmistakable evidence that a foreign state intended to waive its immunity with respect to the specific claims brought against it.

A case from the D.C. Circuit involving closely analogous facts illustrates the proper application of the narrow construction requirement and the error of the district court's approach. *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154 (D.C. Cir. 2002). The plaintiff in that case entered into a series of contracts with the government of Kazakhstan in an effort to facilitate the production and export of Kazakh uranium. The parties' first contract, the Management Agreement, gave the plaintiff the right to manage and control the assets of TGK, a state-run holding company that operated a uranium mining complex. The Management Agreement included language similar to that found in the NDA, except instead of merely consenting to personal jurisdiction, the Management Agreement expressly waived immunity: "In respect of any arbitration or legal action or proceedings *arising out of or in connection with this Agreement*, … [the Kazakhstan State Committee] hereby irrevocably agrees not to claim and hereby irrevocably waives … immunity for itself and the assets of the Republic of Kazakhstan to the full extent permitted by the laws of such jurisdiction." *Id*. at 1162 n.12 (alterations in original; emphasis added).

The parties later entered into two other agreements—one in which the plaintiff agreed to lend TGK $3.5 million to upgrade the uranium complex, and one in which the plaintiff agreed to form a joint venture with a government-owned corporation to develop and mine other uranium sources while the corporation agreed to assist the plaintiff in obtaining uranium export licenses. Neither of those agreements contained any express or implied waiver language. Finally, the parties entered into a fourth contract, the Pledge Agreement, in which the plaintiff received a security interest in the assets of TGK as collateral for its earlier loan. The Pledge Agreement included a broadly worded express immunity waiver: "The

Grantor [defined as Kazakhstan and TGK] hereby irrevocably agrees not to claim and hereby irrevocably waives … immunity … to the full extent permitted by the laws of such jurisdiction with the intent inter alia that the foregoing waiver of immunity shall have irrevocable effect for the purposes of the [FSIA] *in any legal action or proceedings to which such Act applies*." *Id*. (alterations in original; emphasis added).

The parties' relationship soured, and the plaintiff brought suit, asserting claims for breach of the each of the four contracts, as well as fraudulent inducement, tortious interference, and more. *See id*. at 1159. The district court held that Kazakhstan's express waiver of immunity authorized the exercise of jurisdiction over all of the plaintiff's claims. The D.C. Circuit reversed.

The D.C. Circuit began by noting that, "[i]n general, explicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires.'" *Id*. at 1162 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986)); *see also id*. at 1161 n.11 (noting the "'virtually unanimous'" view that implied waiver provisions are likewise construed narrowly). The court found it clear that Kazakhstan had intended to waive its immunity with respect to the plaintiff's claims for breach of the Management Agreement and Pledge Agreement. *Id*. at 1162. But the court observed that neither waiver provision specified "the kind of claims" for which immunity would be waived, "[a]nd there is nothing 'clear and unambiguous' about either waiver other than that each extends to claims for breach of the agreement in which it is contained." *Id*. at 1162-63. The "real ambiguity as to Kazakhstan's intent," the court observed, was amplified by "the fact that only two of the four agreements contain[ed] waivers." *Id*. at 1163. It "*could* be argued," the court recognized, that the parties saw no need for repetition, but it was equally plausible that "Kazakhstan did *not* contemplate" that it was relinquishing immunity as to those agreements. *Id*. (emphasis added). The court also saw no "evidence that, by waiving immunity for claims for breach of the Management and Pledge agreements, Kazakhstan unambiguously intended to expose itself to the miscellany of tort and tort-like claims with which [the plaintiff] has charged it. Unlike the claims for breach of those two contracts, which arise out of consensual agreements containing waivers of immunity, the tort claims arise out of exogenous law." *Id*.

The D.C. Circuit's reasoning is equally applicable here, and principles of comity counsel strongly in favor of assuring that foreign sovereigns are treated consistently across the circuits. As in *World Wide Minerals*, nothing in the language of the NDA *unambiguously* demonstrates that IIT intended to waive its immunity with respect to Plaintiffs' claims for breach of the joint venture and misappropriation. Perhaps it "*could* be argued" that those claims are "related to" the NDA in some colloquial sense, but that is surely not a necessary reading. That is particularly so given that, as in *World Wide Minerals*, the parties later allegedly entered into a joint venture agreement that did not include any waiver or jurisdictional provisions.

If anything, IIT has a stronger argument than the defendant in *World Wide Minerals* because the NDA does not contain an express waiver of immunity, only an implied waiver in the form of a consent to personal jurisdiction. Courts generally have been even more cautious about extending implied waivers than express ones because implied waivers necessarily leave at least some residual doubt about whether the sovereign actually intended to waive immunity at all. *See, e.g.*, *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993). A broad construction of an implied waiver thus stacks uncertainty upon uncertainty. There is, at a minimum, "real uncertainty" about whether IIT intended, by consenting to the personal jurisdiction of the California courts for claims "arising out of or relating to the NDA," to waive its immunity with respect to contract claims involving an alleged separately negotiated Indian joint venture and tort claims involving alleged misdeeds in India during the course of that joint venture. Accordingly, this Court should clarify that any implied waiver by IIT encompasses, at most, Plaintiffs' claim for breach of the NDA.

B. IIT Did Not Waive Its Immunity With Respect To Plaintiff Farhang

The NDA's choice-of-forum provision states that "the parties" to the NDA consent to the jurisdiction of the federal and state courts of Santa Clara County, California. Those parties are M.A. Mobile and IIT. The NDA does not even mention Ms. Farhang. Nevertheless, Ms. Farhang has insisted that the district court is entitled to exercise jurisdiction over her claims against IIT because she qualifies as a third-party beneficiary of the NDA. Contrary to the district court's suggestion, Ms. Farhang is not entitled to invoke the NDA based on a third-party beneficiary theory.

In line with the rule of narrow construction, courts are reluctant to hold that an immunity waiver in an agreement between two parties extends to third parties, and are "even more hesitant" where, as here, "the case involves an implied waiver." *Cargill*, 991 F.2d at 1017. At a minimum, a third party seeking to invoke such a waiver must come forward with "strong evidence" that the foreign state intended to waive its immunity with respect to that party. *See, e.g.*, *Cargill*, 991 F.2d at 1017 ("[S]uch a waiver will not be implied absent strong evidence of the sovereign's intent."); *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985) (per curiam) ("[C]ourts rarely find that a nation has waived its sovereign immunity, particularly with respect to suits brought by third parties, without strong evidence that this is what the foreign state intended.").

The district court gave short shrift to these narrow construction and strong evidence requirements. Rather than focusing on whether IIT conveyed an unmistakable intention to waive its immunity with respect to Ms. Farhang, the district court looked to California third-party beneficiary law. That law, the court noted, does *not* require "that the intent to benefit the third party be manifested by the promisor." ER 12 (quoting *Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1439 (1992)). Applying California law, the court indicated that Ms. Farhang might be able to show (based on the assertions in her opposition papers) that she qualified as a third-party beneficiary of the NDA. Specifically, Ms. Farhang asserted that "(1) pursuant to a contractual arrangement with M.A. Mobile, she was entitled to receive 100% of any money that M.A. Mobile might obtain from or through the Technology covered by the NDA, and (2) prior to the execution of the NDA, she had informed IIT about this contractual arrangement between her and M.A. Mobile." ER 12. The court described the adequacy of these allegations as a "close call." ER 13.

The district court's chief error was to rely exclusively on California third-party beneficiary law. The dispositive question is not whether California law would treat Ms. Farhang as a third-party beneficiary of the NDA; it is whether IIT intended to consent to be sued by Ms. Farhang in an individual capacity. The questions are distinct. To the extent California confers third-party beneficiary status without regard to the intent of the party being sued, that status does not suffice to allow the beneficiary to invoke the FSIA's narrowly construed waiver exception.

In an analogous context, this Court held that a district court erred in applying a federal statutory definition of "employer" to determine whether claims against a corporation run by a foreign government fell within the commercial activity exception. According to the Court, "[b]y referring to COBRA's definition of employer to determine whether the court had jurisdiction under the [FSIA], the district court placed the substantive cart before the jurisdictional horse. A court can apply the substantive portions of a statute only after it has *independently* determined that it has jurisdiction." *Gates*, 54 F.3d at 1464. The Court explained that the district court instead should have applied the FSIA-specific "presum[ption] that separate juridical entities are normally to be treated as independent from one another"—a presumption "rooted in principles of international law: comity, sovereignty, and the equality of sovereigns." *Id*. Likewise, the touchstone of the district court's inquiry here should have been IIT's intent, not Farhang's third-party beneficiary status under California law.

Focusing on intent, it is plain that there is *no* evidence, much less "strong evidence," that IIT meant to allow Ms. Farhang to bring suit in California in her individual capacity. According to Ms. Farhang, IIT understood that she was the sole owner of M.A. Mobile and thus would be entitled to any proceeds M.A. Mobile received from the development of its technology. *See* ER 211-12, 216-17. Ms. Farhang offered no evidence that she explained her relationship with M.A. Mobile to IIT. But even accepting her allegations as true, they do not demonstrate that IIT meant to allow Ms. Farhang personally to invoke the agreement's jurisdictional provision. To the contrary, IIT could have drawn only one reasonable inference from the fact that Ms. Farhang, who represented M.A. Mobile during the parties' discussion of the NDA, declined to make herself a party to the agreement—namely, that the agreement would be enforceable only by M.A. Mobile.

Two additional considerations confirm this conclusion. First, the NDA includes an unequivocal nonassignment provision: "This Agreement may not be assigned or otherwise transferred by either party, in whole or in part, without the prior written consent of the other party, and any such attempted transfer or assignment without consent shall be null and void." ER 238. Considering that the parties took the trouble to preclude such transfers, it is farfetched to think that IIT nevertheless meant to give Farhang some unexpressed right to enforce the NDA's jurisdictional provision. This is particularly so given that the NDA further states: "This Agreement represents the entire understanding and agreement of the parties and supersedes all prior communications, agreements, and understandings relating to the subject matter hereof." *Id*.

Second, Ms. Farhang's effort to invoke the NDA's jurisdictional provision is at odds with the foundational corporate law principle that corporations and their shareholders have separate identities and that a shareholder—even the sole shareholder—generally may not sue or be sued on a corporate contract in her individual capacity. *See, e.g.*, *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 736 (2d Cir. 1987) ("A shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation."); *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1983) ("Generally, a shareholder does not have standing to redress an injury to the corporation."). Consistent with this principle, IIT necessarily and correctly understood that M.A. Mobile would be the only party entitled to bring suit in relation to the NDA and thus to invoke the NDA's jurisdictional provision. Ms. Farhang is a sophisticated businesswoman. Having chosen to conduct business through a corporate entity (presumably at least in part to shield herself from the possibility of personal liability), she cannot now invoke that entity's agreement in her individual capacity. *Cf. Amesco Exports, Inc. v. Associated Aircraft Mfg. & Sales, Inc.*, 977 F. Supp. 1014, 1016, *vacated on other grounds by* 87 F. Supp. 2d 1013 (C.D. Cal. 1997) ("[W]hen one creates a corporation as the sole shareholder and uses the corporation to sign contracts, the person is using the corporation as a shield from individual liability. To allow that individual to sue on a contract signed only by the corporation would be to allow that person the benefits of a corporation without the limitations. If one wishes to preserve the right to sue as an individual in this situation, one may sign the contract as an individual.").[4]

In short, the FSIA's waiver exception simply provides no jurisdictional basis for Ms. Farhang's claims against IIT.

III. IIT'S APPEAL IS PROPERLY BEFORE THIS COURT

Plaintiffs have previously asserted, before both the district court and a motions panel of this Court, that this Court lacks jurisdiction over IIT's appeal. Plaintiffs contend that IIT's appeal is untimely because the district court rejected IIT's assertion of immunity in 2010, and IIT did not appeal until 2012. Because Plaintiffs will presumably raise this argument again, and because this Court has an independent responsibility to confirm its jurisdiction, we address this Court's authority to decide IIT's immunity status.

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[4] The principle of corporate separateness does more than show that IIT did not intend to waive immunity as to Ms. Farhang. To the extent this matters, the principle also defeats Ms. Farhang's assertion that she qualifies as an intended third-party beneficiary under state law. As this Court has recognized, the owner of a corporation who stands to earn profits or incur losses as a result of a corporate contract is no more than "an incidental beneficiary" of that contract and thus "lack[s] standing as a third-party beneficiary" and "ha[s] no rights under [the] contract." *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979).

To be clear, there is no dispute that the Society's appeal is properly before the Court. The district court denied the Society's immunity motion on January 12, 2012. That denial was immediately reviewable under the collateral order doctrine, and the Society filed its notice of appeal within 30 days. *See, e.g.*, *Compania Mexicana*, 859 F.2d at 1356 ("[D]enial of a motion to dismiss for foreign sovereign immunity is a collateral order which is immediately appealable.").

To assure that the immunity status of IIT and the Society will be resolved simultaneously and consistently, Defendants jointly appealed. At least two jurisdictional mechanisms authorize this approach. First, because the district court's denials of immunity to IIT and the Society are inextricably intertwined, this Court has the authority review them together under the doctrine of pendent appellate jurisdiction. Second, the timely appeal of one collateral order opens the door to review of prior collateral orders, at least when the orders are related.

A. The Doctrine Of Pendent Appellate Jurisdiction Authorizes Review Of IIT's Immunity Status

"Pendent appellate jurisdiction," this Court has explained, "refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on interlocutory appeal if raised in conjunction with other issues properly before the court." *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). To qualify under this doctrine, the otherwise non-appealable ruling must be either "'inextricably intertwined' with or 'necessary to ensure meaningful review of' decisions over which [the appellate court] ha[s] jurisdiction." *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995)). To illustrate, the doctrine is commonly used in actions brought under 42 U.S.C. § 1983 against both individual and municipal defendants. Denial of qualified immunity to individual defendants is immediately appealable; denial of summary judgment to municipal defendants is not. But the dispositive legal question is often the same (*e.g.*, did the plaintiff suffer a constitutional deprivation?), and, when it is, appellate courts exercise pendent jurisdiction over the municipality's claim. *See, e.g.*, *Ganwich v. Knapp*, 319 F.3d 1115, 1119 n.6 (9th Cir. 2003).

As the discussion in Part I confirms, the district court's decisions to deny immunity to IIT and the Society cannot be disentangled. The district court rejected the immunity assertions of both Defendants based solely on the third prong of the FSIA's commercial activity exception, which provides that foreign states are not immune from suit when a plaintiff's claims are based upon commercial activities of the sovereign that have a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). (While the district court suggested in its 2010 order that IIT also might have waived its immunity, it did not ultimately rely on that ground.) The dispositive analysis in the district court's 2010 and 2012 orders applied equally to both Defendants, and the relevant portions of the 2012 order are practically a carbon copy of the 2010 order. Plaintiffs, the court noted in the 2010 order, had alleged that, "after promising to participate in a joint venture agreement …, *defendants* 'in fact did not participate with [Plaintiffs] in a joint venture." ER 16 (emphasis added); *see also id*. (declaring that Defendants' conduct qualified as commercial even "if *defendants* had never intended to [and did not] form a joint venture" (emphasis added)). The court then held, using language encompassing both Defendants, that "these acts had a 'direct effect' in the United States" because "[u]nder the terms of the contemplated joint venture," Plaintiffs allegedly were to receive payments in California. *Id.*; *see also* ER 32 ("*[T]he present action* is based '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.'" (emphasis added)).

Given the nature of the district court's analysis, this Court's review of the 2012 order and the Society's immunity will necessarily have implications for the validity of the 2010 order and IIT's immunity, and vice versa. It would be bizarre for the Society to be held immune from suit now, but for IIT to be forced to proceed in the district court through final judgment before getting the chance to convince this Court that it is entitled to the same treatment. By that point, of course, much of the practical value of immunity will have been irretrievably lost.

B. The Society's Collateral-Order Appeal Opened An Appellate Window For IIT

Separate from the doctrine of pendent appellate jurisdiction, courts have held that the timely appeal of one collateral order (here, the district court's denial of immunity to the Society) can create an opportunity for appellate review of an earlier collateral order, at least when the orders are related. In the words of one leading treatise, although "[a] collateral order that is not timely appealed ordinarily must wait for review until after final judgment in the case, … it may be revived for review before that time if a timely appeal is taken from a later collateral order, at least if that later order is closely related to the first one." 19 *Moore's Federal Practice* § 202.07; *cf.* Fed. R. App. P. 4(a)(3) ("If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.").

This notion that a timely collateral-order appeal of one ruling can open the door to review of prior collateral rulings comports with Federal Rule of Appellate Procedure 4 and the prevailing practice for post-judgment appeals. While Rule 4(a)(1) generally requires a notice of appeal to be filed "within 30 days after the entry of the judgment or order appealed from," that rule does not limit the *scope* of review once an appeal has been timely noticed. It is well established, for instance, that an appellate court hearing a traditional post-judgment appeal is entitled to review not only the judgment itself but also any non-moot orders issued earlier in the litigation. *See, e.g.*, *Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994) ("When reviewing final judgments in civil proceedings we have jurisdiction to review any interlocutory orders or other rulings that may have affected the outcome below.").

Likewise, the jurisdiction of a court presented with a collateral-order appeal is not strictly limited to the order from which the appeal is taken. Instead, the court is entitled to use the occasion of the collateral-order appeal to review earlier orders. The Supreme Court expressly endorsed this jurisdictional understanding in *Eisen v. Carlisle*, 417 U.S. 156 (1974). In that case, the district court issued an order certifying a class action and setting forth the method for providing notice to class members. No one appealed from that order. A year later, the district court issued another order holding the defendants responsible for 90% of the cost of providing class notice. The defendants filed a notice of appeal from that latter order, and sought review not only of the cost-shifting ruling, but also of the class certification and notice rulings set forth in the court's earlier order. The Second Circuit proceeded to address all of these issues. *See id*. at 167-69. The Supreme Court held that this was a proper exercise of appellate jurisdiction. The order imposing notification costs on the defendants, the Court held, qualified as an immediately appealable collateral order and opened the door to review of the earlier order: "In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action." *Id*. at 172.

A recent Seventh Circuit decision further illustrates this principle in circumstances even more similar to this case. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011). The plaintiffs there sought to enforce a judgment against Iran by attaching three collections of Iranian-owned antiquities housed at U.S. museums. The museums objected, asserting that Iran was immune under the FSIA. The district court issued an order holding that the museums were not entitled to assert immunity on Iran's behalf. The museums did not appeal. Iran later entered an appearance in the litigation and claimed immunity for itself. The plaintiffs, in turn, sought discovery from Iran as part of their effort to oppose Iran's immunity motion. The district court granted the discovery motion. Iran then filed a timely collateral-order appeal of the discovery order and also sought review of the district court's earlier order.

The Seventh Circuit held that "Iran's timely appeal of [the discovery] order permit[ted] review of the earlier—and closely related—immunity decision," even though no appeal had been taken from the earlier order within 30 days. *Id*. at 791.

According to the court, "[t]he failure to timely appeal an immunity order under the collateral-order doctrine does not necessarily postpone review until the end of the case; it postpones review until another appealable order is entered." *Id*.; *see also id*. at 785 ("The court's earlier order … raises closely related questions about sovereign-property immunity and is revived for review by Iran's interlocutory appeal of the general-asset discovery order."). Simultaneous review of both rulings, the Seventh Circuit observed, was not just jurisdictionally proper; it "reflect[ed] sound appellate management": "Both orders raise important and closely related questions regarding the scope and operation of the FSIA. Questions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications…. Review of both orders now will clarify the rest of the litigation." *Id*. at 791-92.

The Seventh Circuit's reasoning applies with equal force here. The Society's collateral-order appeal is unquestionably timely. That appeal "revived for review" the district court's earlier and closely related rejection of IIT's assertion of immunity. Indeed, the immunity orders here are even more tightly connected than the discovery and immunity orders in *Rubin*, and the practical value of immediate review is at least as strong. Leaving IIT's appeal unresolved would not only be terribly inefficient; it might well be viewed in India as an affront to

IIT's sovereignty. In sum, this Court has jurisdiction to decide the immunity status of both Defendants, and there are strong prudential reasons for it to do so.

CONCLUSION

This Court should reverse the district court's immunity rulings and hold (1) that IIT and the Society are not subject to suit under the FSIA's commercial activity exception, and (2) that IIT has not waived its immunity (a) with respect to the breach of the joint venture and commercial tort claims, and (b) with respect to Ms. Farhang.

Respectfully submitted,

Dated: May 4, 2012

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STATEMENT OF NO RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants 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 opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,989 words.

Dated: May 4, 2012

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ I. Neel Chatterjee

I. Neel Chatterjee
Attorneys for Defendants-Appellants

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 May 4, 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.

/s/ I. Neel Chatterjee
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STATUTORY ADDENDUM

28 U.S.C. § 1603

§1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

<u>28 U.S.C. § 1604</u>

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.