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WITHDRAWAL SHEET

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1. memo	from Colin Powell to Sec of State re: national security study directive and multilateral strategic export controls, with attachments (4pp)	1/30/87	P-1
2. memo	from Lou Pugliaresi and Alexander Platt thru Danzansky to F. Carlucci re: national security study directive on export controls, with attachments (4pp)	1/29/87	P-1
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United States Department of State

The Legal Adviser

Washington, D.C. 20520

January 28, 1987

*File
with
TABS
from
C.A. Hosi
package*

Mr. Stephen I. Danzansky
Special Assistant to the President
and Senior Director of International
Economic Affairs
Old Executive Office Building
Washington, D.C.

Dear Stephen:

Enclosed is the letter to the editor of the Wall Street Journal which I sent almost two weeks ago. It is cleared by the Secretary. They called me yesterday to say they have not printed the letter because they intended to run another piece today, which I have enclosed. They offered, however, to print my response to both the editorial and today's piece, which I will have prepared by tomorrow.

Also enclosed are some briefs and other materials we have filed in recent cases. All of our positions have been fully coordinated with the Department of Justice which made the submissions on behalf of the U.S. Government. I offered to meet with and try to assist Mr. Gregorian's attorney in response to his claims that we should help Americans, not the Soviet Union. He declined my offer, despite the fact that he had originally asked the Department for assistance in getting the Soviets to respond to his suit.

Weeks ago, when these issues began to arise, I raised with the Secretary the strong governmental interests that we have in ensuring the proper interpretation and implementation of the Foreign Sovereign Immunities Act and, at the same time, indicated the likelihood that we would be accused of "favoring" the Soviet Union if we presented our views. I told him I intended to do nothing for the Soviet Union that as Legal Adviser I would not do and have not done for other nations. At the same time, I told him that I would not be intimidated into doing any less for the Soviets than I feel is in our interests in this technical but sensitive area.

Sincerely yours,

Abraham D. Sofaer

Enclosures:
As stated



United States Department of State

Washington, D.C. 20520

January 21, 1987

Gerald L. Kroll, Esq.
Kroll & Linstrom
One Century Plaza
2029 Century Park East
Los Angeles, California 90067

Re: Gregorian et. al. v. Izvestia, et. al.
Civ. No. 85-0100-KN

Dear Mr. Kroll:

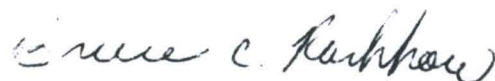
This is a response to your telegram of January 17, 1987, received in this office yesterday, and our conversation of last evening regarding the above-captioned matter. We regret that you decided not to take advantage of the opportunity to meet with the Legal Adviser regarding this case. The Office of the Legal Adviser provides counsel for parties to litigation in which the Department of State is considering making a submission an opportunity to present their views of the litigation and any role they may wish the United States Government to take in that litigation.

In our conversations last week, I conveyed to you the Legal Adviser's willingness personally to meet with you this week to discuss ways the Department might be helpful in resolving this matter short of further litigation. As I noted during our conversation, pursuant to the schedule established by the court, the Department was required to submit views relating to the January 28, 1987 hearing by January 20, 1987, or to inform the court at that time if we intended to submit such views. For that reason, I informed you that the Department was considering whether to submit additional views for that hearing, referring specifically in my conversation with your associate to the issue of libel, and asked that you let me know by yesterday afternoon whether you wished to meet with the Legal Adviser. Instead, both in our conversations and your telegram, you objected to the Department's "political" interference in the case and requested withdrawal of the United States Statement of Interest of December 4, 1986.

The decision of the United States Government to submit its views in this litigation is based upon legal and policy, not political, considerations. The United States has an independent interest in the administration of the Foreign Sovereign Immunities Act. As stated in its original submission, the United States Government considers that both the interests of justice and the foreign policy interests of the United States are served by permitting the defendants in this case the opportunity to present their arguments so that the court may rule on the merits of the issues presented in the litigation. In addition, as stated in the submission mailed late yesterday, the United States Government has an independent interest in an issue to be addressed at the next hearing -- whether a libel action may be brought against a foreign sovereign under the Foreign Sovereign Immunities Act. This is an issue of general application under the Foreign Sovereign Immunities Act upon which the United States Government has not previously commented.

As you are aware, the Department has already provided Mr. Gregorian assistance in regard to the proceedings instituted against him in the Moscow City Court by delivering to that court a message prepared by you on his behalf. The Department is prepared to consider further assistance to Mr. Gregorian in this matter, consistent with its responsibilities and authorities. The Legal Adviser also remains willing to meet with you personally to discuss the California litigation should you change your mind and wish to meet with him.

Very truly yours,



Bruce C. Rashkow
Assistant Legal Adviser

- 3 -

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OFFICE OF THE LEGAL ADVISOR

US STATE DEPT RM 5420

WASHINGTON DC 20520

RE: GREGORIAN VRS IZBESTIA. ET AL

WE HAVE CONSIDERED YOUR REQUEST THAT WE ADVISE YOU OF THE STEPS WE WOULD LIKE THE STATE DEPARTMENT TO TAKE AT HIS VISIT.

WE STRONGLY OBJECT TO THE STATE DEPARTMENT'S POLITICAL INTERFERENCE IN THIS CASE AT THE ASKING OF THE SOVIET UNION. POLITICS HAVE NO PLACE IN PRIVATE LITIGATION- EVEN IF AGENCIES OF A FOREIGN STATE ARE PARTIES.

WE THEREFORE REQUEST THAT THE STATE DEPARTMENT WITHDRAW ITS STATEMENT OF INTEREST IN THE U.S. LITIGATION AND TAKE NO FURTHER ACTION ON THE SOVIETS BEHALF. WE WOULD APPRECIATE, HOWEVER, ANY ASSISTANCE YOU CAN PROVIDE IN PREVENTING THE SOVIETS FROM RETALIATING AGAINST MR GREGORIAN IN THE CASE PENDING IN THE MOSCOW CITY COURT.

VERY TRULY YOURS

GERALD L KROLL

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13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
15

16 RAPHAEL GREGORIAN and CALIFORNIA)
INTERNATIONAL TRADE CORPORATION,)

17 Plaintiffs,)

18 v.)

Case No. 85-0100-KN

19 IZVESTIA; MINISTRY OF FOREIGN)
20 TRADE OF THE UNION OF SOVIET)
SOCIALIST REPUBLICS; V/O)
21 MEDEXPORT, UNION OF SOVIET)
SOCIALIST REPUBLICS; V/O)
22 LICENSINTORG, UNION OF SOVIET)
SOCIALIST REPUBLICS; UNION OF)
23 SOVIET SOCIALIST REPUBLICS;)
MINE SAFETY APPLIANCES COMPANY;)
24 and CATALYST RESEARCH, a division)
of Mine Safety Appliances Company,)

25 Defendants.)
26

27 STATEMENT OF INTEREST OF THE UNITED STATES
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16 RAPHAEL GREGORIAN and CALIFORNIA)
INTERNATIONAL TRADE CORPORATION,)
17)
Plaintiffs,)

18 v.)

Case No. 85-0100-KN

19 IZVESTIA; MINISTRY OF FOREIGN)
20 TRADE OF THE UNION OF SOVIET)
SOCIALIST REPUBLICS; V/O)
21 MEDEXPORT, UNION OF SOVIET)
SOCIALIST REPUBLICS; V/O)
22 LICENSINTORG, UNION OF SOVIET)
SOCIALIST REPUBLICS; UNION OF)
23 SOVIET SOCIALIST REPUBLICS;)
MINE SAFETY APPLIANCES COMPANY;)
24 and CATALYST RESEARCH, a division)
of Mine Safety Appliances Company,)
25)
Defendants.)
26)

1 STATEMENT OF INTEREST OF THE UNITED STATES¹

2 INTRODUCTION AND SUMMARY

3 V/O Medexport and V/O Licensintorg, instrumentalities of
4 the Union of Soviet Socialist Republics, have recently
5 appeared and moved this Court to set aside the default
6 judgment entered against them, requested the Court to
7 consider their jurisdictional and other defenses, and sought
8 a stay of any further execution on the default judgment. The
9 United States supports these requests as well as those
10 seeking to expedite consideration of these matters.²

11 The United States is filing this Statement of Interest,
12 and the accompanying declaration of Thomas W. Simons, Jr.,
13 Deputy Assistant Secretary of State for European and Canadian
14 Affairs, because the United States' foreign policy interests
15 are best served by permitting these Soviet instrumentalities
16 to appear at this time and having this Court consider their
17 defenses to plaintiffs' claims. The United States
18 respectfully requests leave to appear through counsel and
19 participate at any hearing in this case.
20

21 _____
22 ¹ The United States files this Statement of Interest and
23 appears pursuant to 28 U.S.C. § 517, which authorizes the
24 Attorney General to attend to the interests of the United
25 States in any pending suit.

26 ² Medexport and Licensintorg have also moved to dismiss
27 the Complaint pursuant to Rule 12(b), Fed. R. Civ. P. The
28 United States takes no position on that Motion at this time.

1 The United States has had extensive discussions with
2 representatives of the Embassy of the Soviet Union in
3 Washington and Soviet government officials in Moscow about
4 this case. (Simons Declaration at ¶ 4). The United States
5 has expended considerable diplomatic efforts over the last
6 year and a half to persuade the Soviet government that it is
7 appropriate under international and United States' law for
8 the Soviet defendants to appear, and in the best interest of
9 bilateral relations between the Soviet Union and the United
10 States, that they appear and present their defenses to this
11 Court. (Id. at ¶¶ 4(A)-(C), 8).

12 The Soviets regard this litigation as a very serious
13 matter and it has become a significant issue in bilateral
14 United States-Soviet relations. (Id. at ¶ 7). Permitting
15 the Soviets to have their day in court will significantly
16 further United States' foreign policy interests; conversely,
17 denying them that day in court is likely to have a negative
18 impact on the United States' interests. (Id. at ¶ 8).

19 Federal Rules of Civil Procedure 55(c) and 60(b) vest
20 this Court with substantial discretion to set aside default
21 judgments for equitable reasons. There are strong bases for
22 setting aside the default judgment and considering the Soviet
23 instrumentalities' defenses: 1) the Soviet government and
24 Soviet organs' reliance on the absolute theory of immunity as
25 not requiring them to appear and their particular sensitivity
26 to the charge of libel in the present proceedings; 2) the

1 strong diplomatic efforts made by the United States with the
2 Soviet Union and the important United States' foreign policy
3 interests that will be served by permitting the Soviet
4 instrumentalities to present their views to the Court at this
5 time; 3) the general judicial presumption that resolution on
6 the merits is preferable to default; 4) their assertion that
7 they have well-founded defenses; and 5) the lack of
8 irreparable prejudice to plaintiffs if the default judgment
9 is set aside.

10 In addition, this Court should stay further actions to
11 enforce the judgment pending resolution of the case on the
12 merits. Should further steps in aid of execution of the
13 judgment be permitted,³ there would be additional serious
14 problems for United States' foreign policy. (Simons
15 Declaration at ¶ 7). For example, the Soviets could take
16 retaliatory action against the United States. (Id. at ¶ 8).
17 Moreover, a stay of further executions on the judgment is
18 warranted because there is a strong legal basis for setting

19 ³ Plaintiffs have executed on certain property pursuant
20 to this Court's judgment in attachment proceedings in the
21 United States District Court for the District of Maryland.
22 (Gregorian v. Izvestia, et al., Misc. No. 2805, D. Md.) On
23 November 13, 1986, the United States Marshal for the District
24 of Maryland executed on a writ of attachment and removed a
25 typewriter allegedly owned by Izvestia, another defendant in
26 this action. See Defendants' Memorandum In Support of Their
27 Motion to Vacate at 5.

28 Plaintiffs have also begun attachment proceedings on
certain accounts held by the Bank of America in New York.
Id.

1 aside the default judgment, and deferring such actions would
2 not irreparably injure the plaintiffs, while permitting those
3 actions to go forward may cause substantial injury to the
4 United States' foreign policy interests.

5 STATEMENT

6 As defendants Medexport and Licensintorg's Memorandum of
7 Points and Authorities in support of their Motion to Vacate
8 the Default Judgment sets forth in some detail, the
9 underlying causes of action, filed on January 7, 1985,
10 involve alleged breaches of contract and libel.⁴ The Soviet
11 defendants did not appear in this Court to respond to the
12 action. The Soviet government maintained that the Soviet
13 defendants were immune from suit and were not required to
14 respond in courts of the United States. (Simons Declaration
15 at ¶¶ 4(B), 5). This Court subsequently entered a default
16 judgment against Medexport, Licensintorg and other defendants
17 on June 27, 1986, awarding plaintiffs almost half a million
18 dollars in damages. On October 14, 1986, the Court entered
19 an Order pursuant to the Foreign Sovereign Immunities Act
20 ("FSIA"), 28 U.S.C. § 1610(c), giving plaintiffs the right to
21 attach in aid of execution on the judgment and to execute
22 against property of the Soviet Union in the United States.⁵

23
24 ⁴ The action was originally filed on January 7, 1985.
On April 9, 1985, plaintiffs filed an Amended Complaint.

25 ⁵ Jurisdiction over the Soviet defendants is predicated
26 on the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, et
27 seq.

1 Since that time, plaintiffs have taken a variety of steps in
2 aid of execution. (See Defendants' Memorandum in Support of
3 their Motion to Vacate at 5).

4 From early 1985, when plaintiffs' counsel first
5 contacted the State Department seeking assistance in
6 connection with this litigation, the United States has had
7 on-going contacts with the Soviet Union regarding the matter.
8 (Simons Declaration at ¶ 4). During the pendency of these
9 proceedings, officials of the State Department have sought to
10 explain the requirements of United States' law to the Soviet
11 Union. (Id. at ¶¶ 4(A)-(C)). It was explained that the
12 Executive Branch had no authority to make determinations with
13 respect to a foreign State's claims of immunity or other
14 defenses. In particular, the Department of State attempted
15 to persuade the Soviets that the appropriate way to present
16 their views with respect to sovereign immunity or other
17 defenses is to communicate directly with the Court through
18 counsel, not through diplomatic channels. United States'
19 officials urged the Soviets to seek the advice of private
20 counsel regarding the manner in which their interests could
21 be best protected. (Id. at ¶¶ 4(A) and (C)).

22 On each of these occasions, the Soviet Union reiterated
23 its long-held views that it and its organs are entitled to
24 absolute immunity from the jurisdiction of foreign courts.
25 (Id. at ¶¶ 4(B) and 5). This includes the belief that it
26 need not even appear in foreign courts to invoke that

1 immunity. (Id. at ¶ 5). As underscored in defendants'
2 Memorandum in Support of Their Motion to Vacate, the Soviet
3 Union has steadfastly adhered to that position in this case.
4 (Defendants' Memorandum at 5-7).

5 Defendants Medexport and Licensintorg, however, have now
6 responded to plaintiffs' contentions in this Court. (Notice
7 of Appearance of Counsel, filed November 21, 1986; Motion to
8 Vacate Default Judgment, filed November 26, 1986). As set
9 forth in the Declaration of Thomas W. Simons, Jr., Deputy
10 Assistant Secretary of State for the Bureau of European and
11 Canadian Affairs, who is responsible for eastern Europe and
12 the Soviet Union, this represents a significant step in
13 removing a potentially serious irritant in Soviet-American
14 relations. (Simons Declaration at ¶ 7). Those relations are
15 of special importance to the United States in maintaining a
16 stable environment conducive to working bilaterally with the
17 Soviet Union on critical world issues such as arms control.
18 That this is a matter of high priority in United States'
19 foreign policy is reflected by the frequent meetings of
20 senior United States' and Soviet officials including, most
21 recently, those this fall between President Reagan and
22 Premier Gorbachev in Reykjavik and Secretary of State Shultz
23 and Foreign Minister Shevardnaze in Vienna and New York.
24 (Id. at ¶ 3).

25 The litigation at bar has been a matter of extreme
26 concern to the Soviet Union as demonstrated by the frequency
27
28

1 and tenor of Soviet diplomatic communications with the
2 Department of State regarding it. (Id. at ¶ 7). In light of
3 the seriousness which the Soviet Union attaches to this
4 litigation, it has become a significant issue in bilateral
5 American-Soviet relations. (Id.). This is particularly true
6 of plaintiffs' recent efforts to enforce their judgment
7 through attachment proceedings. (Id.).⁶ Therefore, it is in
8 the interests of the United States' foreign policy to support
9 the Soviet instrumentalities' efforts to present their
10 defenses before this Court; failure to do so can be expected
11 to adversely affect relations and may result in "reciprocal
12 measures against United States' interests in the Soviet
13 Union." (Id. at ¶ 8). This Statement of Interest supports
14 the Soviet instrumentalities' request to vacate the default
15 judgment and have their defenses heard by the Court and to
16 have this Court stay further execution on the default
17 judgment pending disposition on the merits.

18 DISCUSSION

19 I. This Court Should Set Aside The Default
20 Judgment Pursuant To Rules 55(c) And 60(b),
21 Federal Rules Of Civil Procedure, And
22 Consider Medexport's And Licensintorg's
23 Legal And Factual Defenses

24 1. Under Federal Rules of Civil Procedure 55(c) and
25 60(b), a default judgment may be set aside for, inter alia,
26 mistake, inadvertence, or any other reason justifying relief

27 ⁶ Indeed, such efforts may cause retaliatory measures.
28 (Id. at ¶ 8).

1 from the judgment. The provisions of Rule 60(b) and, in
2 particular, the provisions of subsection 6, are equitable in
3 origin and vest the district courts with the discretion to
4 set aside default judgments whenever justice so requires.
5 Thus, the courts have consistently held that Rule 60(b) vests
6 in the district courts power "adequate to enable them to
7 vacate judgments whenever such action is appropriate to
8 accomplish justice." Klapprott v. United States, 335 U.S.
9 601, 609 (1949); Schwab v. Bullock's, Inc., 508 F.2d 353 (9th
10 Cir. 1975); see generally, 7 J. Moore's Federal Practice
11 § 60.18 (2d ed. 1982).

12 The decision to set aside a default judgment lies within
13 the sound discretion of the district court. Schwab, 508 F.2d
14 at 355. While the district court has the discretion to grant
15 or deny a motion to vacate a default judgment under Rule
16 60(b), Fed.R.Civ.P., the courts have repeatedly emphasized
17 that "Rule 60(b) is remedial in nature and therefore must be
18 liberally applied." Schwab, 508 F.2d at 355, citing Butner
19 v. Neustadter, 324 F.2d 783, 786 (9th Cir. 1963). Accord
20 Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th
21 Cir. 1985); Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984);
22 Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983); Patapoff v.
23 Vollstedt's, Inc., 267 F.2d 863 (9th Cir. 1959).

24 A liberal construction of Rule 60(b) is further
25 supported by the courts' clear preference for resolutions on
26 the merits rather than default judgments. Schwab, 508 F.2d
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1 at 355, citing Patapoff, 267 F.2d at 865. Finally, as the
2 Schwab Court noted, quoting with approval from 7 J. Moore's
3 Federal Practice § 60.19 at 232-233,

4 [w]here timely relief is sought from a
5 default judgment and the movant has a
6 meritorious defense, doubt, if any,
7 should be resolved in favor of the motion
8 to set aside the judgment so that cases
9 may be decided on the merits.

10 Schwab, 508 F.2d at 355.⁷ Thus, in the exercise of their
11 discretion under Rule 60(b), courts should resolve doubts
12 with respect to granting a motion to set aside a default
13 judgment in favor of a judicial decision on the merits of a
14 case. Id.; Blois v. Friday, 612 F.2d 938, 940 (5th Cir.
15 1980).

16 These general presumptions against default judgments
17 are, if anything, stronger in cases involving foreign states.
18 The FSIA specifically provides that no default judgment may
19 be entered against a foreign state unless "the claimant
20 establishes his claim or right to relief by evidence
21 satisfactory to the court." 28 U.S.C. § 1608(e). This
22 requirement was drawn verbatim from Rule 55(c), Fed. R. Civ.
23 P., likewise limiting default judgments against the United
24 States. Section 1608(e) of the FSIA represents Congress'
25 determination that foreign states be treated with respect and
26 that liability be imposed only for valid claims. Indeed,

27 ⁷ In the instant case, the operative default judgment
28 was entered on October 14, 1986. Less than three months have
passed since the entry of that Order.

1 United States courts have been diligent in considering
2 defenses available to foreign sovereigns, even where those
3 foreign sovereigns have not formally appeared. See
4 International Ass'n of Machinists & Aerospace Workers v.
5 OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd, 649 F.2d 1354
6 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Hanoch
7 Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 550-551,
8 n.4 (D.D.C. 1981), aff'd, 726 F.2d 774 (D.C. Cir. 1984),
9 cert. denied, 105 S.Ct. 1354 (1985); Frolova v. U.S.S.R., 558
10 F. Supp. 358 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir.
11 1985).

12 In addition, and most relevant here, United States
13 courts have shown a willingness to reconsider relevant legal
14 defenses even if the foreign state did not initially appear.
15 In Jackson v. The People's Republic of China, 596 F. Supp.
16 386 (N.D. Ala.), aff'd, 794 F.2d 1490 (11th Cir. 1986), the
17 district court set aside its default judgment which was
18 entered after the foreign government failed to appear. The
19 court noted that the controversy raised serious
20 jurisdictional issues as well as implicating "far reaching
21 ramifications on Sino-American relations." 596 F. Supp. at
22 387. It therefore found that "justice and the public
23 interest dictated that the default judgment be set aside."
24 Id. The United States Court of Appeals for the Eleventh
25 Circuit specifically upheld the district court's exercise of
26 discretion in setting aside the default judgment. 794 F.2d
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1 at 1496. The appellate court concluded that it was entirely
2 appropriate for the district court to have considered "the
3 Secretary of State's assessment of the foreign policy
4 implications of the default judgment." Id.

5 Similarly, in Siderman de Blake, et al. v. The Republic
6 of Argentina, CV No. 82-1772-RMT (MCx) (C.D. Cal. March 7,
7 1985), this Court (Takasugi, J.) granted Argentina's Rule
8 60(b) motion to set aside a default judgment entered against
9 it for failure to appear. The United States supported the
10 motion to vacate the default judgment on grounds similar to
11 those advanced here and in the Jackson case. Accord Castro
12 v. Saudi Arabia, 510 F. Supp. 309, 313 (W.D. Tex. 1980)
13 (request by foreign sovereign to set aside a default judgment
14 granted).

15 2. In exercising its discretion within the liberal
16 principles for setting aside a default judgment against a
17 foreign State, the Court should consider three factors: "(1)
18 whether plaintiff will be prejudiced, (2) whether the
19 defendant has a meritorious defense, and (3) whether culpable
20 conduct of the defendant led to the default." Falk v. Allen,
21 739 F.2d at 463 (citations omitted). Accord Pena v. Seguros
22 La Comercial, S.A., 770 F.2d at 815.

23 With respect to the first factor, the present plaintiffs
24 will not be prejudiced. They will be free to continue to
25 assert their claims against the defendants in this Court.
26 They cannot legitimately contend that their ability to pursue
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1 their claim will be hindered by being required to respond to
2 substantial legal defenses available to the Soviet
3 defendants. Falk, 739 F.2d at 463, citing Gross v. Stereo
4 Component Systems, 700 F.2d 120, 123 (3rd Cir. 1983) ("The
5 standard is whether his ability to pursue his claim will be
6 hindered.") Since the defendants have raised a number of
7 potentially dispositive legal issues, the relatively short
8 period of time since entry of the default judgment and the
9 relatively short period of time that will be necessary to
10 resolve this case on the merits, plaintiffs will not be
11 prejudiced in the presentation of their claim. See, e.g.,
12 Horn v. Intelectron, 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968).
13 Indeed, permitting the Soviet defendants to present their
14 defenses in the litigation may well increase plaintiffs'
15 prospects for any recovery to which they may be entitled
16 given the difficulty of recovery without the participation of
17 the Soviets. (Simons Declaration at ¶ 8).

18 A substantial part of the Court's inquiry should focus
19 on whether Medexport and Licensintorg have meritorious
20 defenses to plaintiffs' claims. Schwab v. Bullock's Inc.,
21 508 F.2d at 355. It is not necessary, however, that a party
22 will actually prevail at trial; it is sufficient that a
23 stated defense, if established at trial, would defeat the
24 judgment creditor's claim. Horn v. Intelectron, 294 F. Supp.
25 at 1155-1156; Keegel v. Key West & Caribbean Trading Co., 627
26 F.2d 372 (D.C. Cir. 1980).

1 The Soviet instrumentalities have appeared in this
2 proceeding to assert a number of legal and factual defenses.
3 These include, inter alia, lack of sufficient contacts with
4 the United States to establish in personam jurisdiction and
5 lack of subject matter jurisdiction over the libel claim
6 under the FSIA. As a matter of comity and out of respect for
7 a foreign sovereign, these defenses should be considered by
8 the Court at this time.

9 The United States' support for the Soviet defendants'
10 efforts to set aside the default judgment, however, should
11 not be confused with government interference with the merits
12 of private party litigation against a foreign State. The
13 United States takes no position on the merits of the defenses
14 at this time. In making its determination on the merits the
15 Court must apply and is limited to the provisions under the
16 FSIA. The legislative history of the FSIA unequivocally
17 states that the FSIA sets forth the sole and exclusive
18 standards to be used by the courts in resolving questions of
19 foreign sovereign immunity raised by foreign states. See
20 1976 U.S. Code Cong. & Ad. News 6604, 6610. The United
21 States Court of Appeals for this Circuit held in McKeel v.
22 Islamic Republic of Iran, 722 F.2d 582, 586-87 (9th Cir.),
23 cert. denied, 105 S.Ct. 243 (1984), that jurisdiction over
24 foreign states and their instrumentalities can only be
25 obtained under the FSIA. Pursuant to 28 U.S.C. § 1604 of the
26 FSIA, which codifies as federal law the restrictive theory of
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1 sovereign immunity, a foreign state is immune from the
2 jurisdiction of the federal and state courts, except as
3 provided in sections 1605 and 1607. See Verlinden B.V. v.
4 Central Bank of Nigeria, 461 U.S. 480, 488, 497 (1983). If
5 one of the specified exceptions to sovereign immunity
6 applies, a federal district court may exercise subject matter
7 jurisdiction under 28 U.S.C. § 1330(a). However, if the
8 claim against the foreign State does not fall within one of
9 the exceptions, federal courts lack subject matter
10 jurisdiction as well as personal jurisdiction. Verlinden,
11 461 U.S. at 480.

12 For example, the FSIA, 28 U.S.C. § 1605(a)(5),
13 specifically provides that the exception to the immunity
14 otherwise accorded foreign States and their agencies and
15 instrumentalities does not apply to any claim arising out of
16 libel or slander. Here, where a significant portion of the
17 plaintiffs' claims sound in libel, the defendants' argument
18 that the Court lacks jurisdiction over those claims raises a
19 serious question which warrants judicial review.⁸ See also
20 Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849
21 (S.D. N.Y. 1978).

22 The third factor to be considered, whether culpable
23 conduct of the defendant led to the default, should be
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25 ⁸ This is not to suggest that other defenses raised by
26 the Soviet defendants do not also create issues which merit
27 consideration by the Court.

1 resolved in favor of setting aside the default. The Soviet
2 Union has repeatedly asserted that under international law
3 neither it nor its organs are subject to the jurisdiction of
4 a foreign court without its consent.⁹ The absolute principle
5 of immunity is still adhered to by a number of foreign
6 states. While the United States now adheres to the
7 restrictive principle of immunity, the codification of that
8 practice and removal of the Executive's authority to
9 recognize a foreign state's immunity in a particular case is
10 relatively recent. See generally, Jackson v. People's
11 Republic of China, 794 F.2d at 1492-1494. As a matter of
12 comity and because of the Soviet government's reliance on its
13 interpretation of international law, this Court should permit
14 the Soviet defendants an opportunity to advance their
15 defenses despite their initial failure to appear. Id. at
16 1496. As the Jackson Court found:

17 Here much more is involved than mistake,
18 inadvertence, surprise, or excusable neglect.
19 The concerns extend to the misconception by an
20 ancient and proud sovereign of its responsibi-
21 lity to reply to the demands of a United
22 States court whose authority it does not
23 recognize as a matter of international law, at
24 a time when concepts of United States law and
25 international law are changing.

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⁹ Private counsel has appeared in a limited number of commercial and tort cases brought jointly against the Soviet government and its instrumentalities. These cases have not included claims of libel where the Soviet Union itself was among the defendants. (Simons' Declaration at ¶ 5).

1 Id. But see Meadows v. The Dominican Republic, 628 F.Supp.
2 599, 608 (N.D. Ca. 1986) (interpreting F.R.Civ.P. 60(b)(1)).

3
4 Moreover, because this case involves the foreign
5 relations of the United States, this Court should give great
6 weight to the Deputy Assistant Secretary of State's judgment
7 that setting aside the default judgment and permitting the
8 Soviet defendants to have their day in court would serve the
9 foreign policy interests of the United States. (Simons
10 Declaration at ¶ 8). See e.g., Dames & Moore v. Regan, 453
11 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942);
12 Ex Parte Republic of Peru, 318 U.S. 578, 587 (1943); United
13 States v. Curtiss-Wright Export Corp., 229 U.S. 304, 319-322
14 (1936).

15 II. This Court Should Stay Execution
16 On The Default Judgment Pending
Resolution Of The Case On The Merits

17 As set forth in greater detail in the Soviet defendants'
18 Memorandum in Support of their Motion to Vacate the Default
19 Judgment, at 4-5, the plaintiffs have taken certain steps to
20 execute on the default judgment. These include seizure of
21 property and attempted attachment of bank accounts. (Id.)
22 These actions have further exacerbated the strain on
23 American-Soviet relations. (Simons Declaration at ¶ 7).
24 And, unless the execution efforts are stayed pending
25 resolution on the merits, there may be additional
26 repercussions. (Id. at ¶ 8).

1 The United States therefore urges this Court to stay
2 further execution proceedings pending resolution of the case
3 on the merits. This Court has the inherent power to control
4 the disposition of the causes on its docket with economy of
5 time and effort for itself, for counsel, and for the
6 litigants. Landis v. North American Co., 299 U.S. 248, 254
7 (1936); Will v. Calvert Fire Insurance Co., 437 U.S. 655, 665
8 (1978) (Rehnquist, J.). The Court's power includes the
9 discretion not to decide certain issues pending further
10 judicial proceedings on related, but not necessarily
11 identical questions. Leyva v. Certified Grocers, 593 F.2d
12 857, 863-864 (9th Cir.), cert. denied, 444 U.S. 827 (1979).

13 "The factors relevant to wise administration * * * are
14 equitable in nature." Kerotest Manufacturing Co. v. C-O-Two
15 Fire Equipment Co., 342 U.S. 180, 183 (1952); CMAX, Inc. v.
16 Hall, 300 F.2d 265, 268 (9th Cir. 1962). Thus, in
17 determining whether to stay peripheral proceedings pending a
18 decision on the Fed. R. Civ. P. 60(b) motion to set aside the
19 default judgment, the Court should consider (a) whether
20 deferring decision will fulfill the judicial objective of
21 simplifying the issues (CMAX, Inc. v. Hall, 300 F.2d at 268);
22 (b) where the public interest lies (see generally, Beverly v.
23 United States, 468 F.2d 732 (5th Cir. 1972)); and (c) the
24 competing interests of the respective parties (CMAX, Inc. v.
25 Hall, 300 F.2d at 268).

1 a. For the reasons stated in Part I, supra, the Soviet
2 defendants are likely to prevail on their Motion to Vacate
3 the Default Judgment. Many of the defenses raised go to the
4 validity of the default judgment. Because the execution
5 proceedings are based upon that judgment, if it is set aside,
6 all the efforts incident to its enforcement will be halted or
7 subject to additional challenge. Thus in the interest of
8 judicial economy, those peripheral actions should be stayed
9 pending disposition on the merits.

10 b. Continued attempts to execute on the default
11 judgment will exacerbate the foreign policy problems that
12 have already resulted from this case. (Simons Declaration
13 at ¶ 7). Where judicial proceedings involving a request for
14 a stay affects United States' foreign policy, "a court is
15 'quite wrong in routinely applying * * * the traditional
16 standards governing more orthodox "stays"'" Adams v. Vance,
17 570 F.2d 950, 954 (D.C. Cir. 1978), quoting Sampson v.
18 Murray, 415 U.S. 61, 83-84 (1974). That is, "[c]ourts must
19 beware of 'ignoring the delicacies of diplomatic negotiation,
20 the inevitable bargaining for the best solution of an
21 international conflict, and the scope which in foreign
22 affairs must be allowed to the President.'" Adams, 570 F.2d
23 at 954, quoting Mitchell v. Laird, 488 F.2d 611, 616 (D.C.
24 Cir. 1973). Thus, a stay to accommodate legitimate foreign
25 policy concerns of the Executive is permissible. American

1 International Group, Inc. v. Islamic Republic of Iran, 657
2 F.2d 430, 448 (D.C. Cir. 1981).

3 c. The Soviet Union will suffer substantial injury if
4 its property is executed upon and the Court subsequently
5 determines that the default judgment was void or should have
6 been set aside. On the other hand, if plaintiffs ultimately
7 prevail, they still have the same execution and attachment
8 proceedings available to them to collect on the judgment.
9 Accordingly, a stay would not prejudice plaintiffs.

10 CONCLUSION

11 For the foregoing reasons the United States respectfully
12 requests that defendants Medexport and Licensintorg's Motions
13 to Vacate the Default Judgment and to Stay Execution
14 Proceedings pending disposition of the case on the merits
15 should be granted.

16 Respectfully submitted,

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CERTIFICATE OF SERVICE

- I hereby certify that on this 4th day of December, 1986,-
a copy of the Statement of Interest of the United States, was
mailed by Federal Express to the following:

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20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 RAPHAEL GREGORIAN and CALIFORNIA)
22 INTERNATIONAL TRADE CORPORATION,)
23)
24 Plaintiffs,)

25 v.)

Case No. 85-0100-KN

26 IZVESTIA; MINISTRY OF FOREIGN)
27 TRADE OF THE UNION OF SOVIET)
28 SOCIALIST REPUBLICS; V/O)
29 MEDEXPORT, UNION OF SOVIET)
30 SOCIALIST REPUBLICS; V/O)
31 LICENSINTORG, UNION OF SOVIET)
32 SOCIALIST REPUBLICS; UNION OF)
33 SOVIET SOCIALIST REPUBLICS;)
34 MINE SAFETY APPLIANCES COMPANY;)
35 and CATALYST RESEARCH, a division)
36 of Mine Safety Appliances Company,)
37 Defendants.)

SUPPLEMENTAL STATEMENT
OF INTEREST OF THE
UNITED STATES

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INTERNATIONAL TRADE CORPORATION,)
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Plaintiffs,)
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IZVESTIA; MINISTRY OF FOREIGN)
19 TRADE OF THE UNION OF SOVIET)
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of Mine Safety Appliances Company,)
24)
Defendants.)
25)
26)

Case No. 85-0100-KN

1 SUPPLEMENTAL STATEMENT OF INTEREST
2 OF THE UNITED STATES

3 STATEMENT

4 In this contract and libel action against the Soviet
5 Union and several of its instrumentalities, the United States
6 submitted a Statement of Interest urging that the default
7 judgment previously entered be set aside and that the
8 defendants who have now appeared be permitted to present
9 their defenses. It is very much in the foreign policy
10 interests of the United States that foreign governments and
11 their instrumentalities be encouraged to come into United
12 States courts to present their immunity and other defenses as
13 Congress contemplated under the Foreign Sovereign Immunities
14 Act, 28 U.S.C. § 1602, et seq. ("FSIA"). Plaintiffs oppose
15 the vacation of the default judgment, but without vigor or
16 case authority. This Court should, therefore, vacate the
17 judgment and consider the defenses raised by the Soviet
18 defendants under the Act.

19 Among the defenses asserted is the bar to libel actions
20 set forth in the FSIA. The United States has not previously
21 addressed any merits issue in this lawsuit. However, the
22 construction of the FSIA, and its specific provision with
23 respect to libel suits against foreign states, is a matter of
24 importance to the United States and one on which it wishes to
25
26

1 express its views. See 28 U.S.C. § 517.¹ In the view of the
2 United States, the Act precludes libel suits against foreign
3 sovereigns in a manner analogous to the Federal Tort Claims
4 Act, 28 U.S.C. § 2671, et seq. ("FTCA"), which bars such
5 actions against the United States. Such a conclusion is in
6 keeping with the language and intent of the FSIA and is in
7 the interest of United States' foreign policy.

8 DISCUSSION

9 I. The Default Judgment Should Be 10 Vacated

11 Plaintiffs' sole ground for opposing the Motion to
12 Vacate is that the Soviet Union has been involved in other
13 litigation and had sufficient notice to respond to this
14 litigation. (Plaintiffs' Memorandum in Opposition to Motion
15 to Vacate at 3-9.) Even assuming the truth of plaintiffs'
16 assertions, they would not be dispositive of the Motion to
17 Vacate. Indeed, plaintiffs never address the applicable
18 standard for vacating a judgment or how their assertions
19 would satisfy that standard.

20 Plaintiffs do concede that under Rule 60(b),
21 Fed.R.Civ.P., courts have the power to vacate judgments
22 whenever appropriate to accomplish justice. (Pl. Memo. at
23 3.) In Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1985), the
24 Court of Appeals instructed that three factors should be

25 ¹ The United States expresses no views on the merits of
26 the contract claim other than its assertion that this Court
should consider the Soviet defendants' defenses to the
contract claim.

1 considered: "(1) whether plaintiff will be prejudiced,
2 (2) whether the defendant has a meritorious defense, and
3 (3) whether culpable conduct of the defendant led to the
4 default." (citations omitted.) Accord Pena v. Seguros La
5 Comercial, S.A., 770 F.2d 811, 815 (9th Cir. 1985). In their
6 Opposition, plaintiffs have identified no prejudice should
7 the judgment be vacated. Similarly, they do not assert that
8 the Soviets' defenses are without merit. In fact, plaintiffs
9 spend the majority of their 31 page Opposition attempting to
10 respond to those defenses. As to the third factor, culpable
11 conduct of the defendant, plaintiffs do not take issue with
12 the Soviets defendants' contention that the Soviet Union
13 continues to adhere to its view that under international law
14 it is absolutely immune from suits in foreign courts,
15 including those of the United States. A view contrary to
16 plaintiffs', or even the United States, of international law
17 regarding sovereign immunity cannot be characterized as
18 "culpable conduct."

19 Plaintiffs also fail to take issue with the judgment of
20 Deputy Assistant Secretary of State Thomas W. Simons, Jr.,
21 that United States' foreign policy will be adversely affected
22 if the Soviet defendants are denied an opportunity to have
23 their defenses considered. While plaintiffs would like to
24 dispense with this judgment by labelling it as "politics"
25 (Pl. Memo. in Opp. at 2), they clearly are not competent to
26 make or question such a foreign policy judgment. That

1 determination may be made only by the Executive and should be
2 accorded great weight, see, e.g., Dames & Moore v. Regan, 453
3 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942);
4 Ex Parte Republic of Peru, 318 U.S. 578, 587 (1943); United
5 States v. Curtiss-Wright Export Corp., 229 U.S. 304, 319-322
6 (1936), particularly in the context of a Rule 60(b)(6)
7 motion, Jackson v. People's Republic of China, 794 F.2d 1490,
8 1496 (11th Cir. 1986).

9 Plaintiffs have failed to demonstrate why the Motion to
10 Vacate should not be granted. Accordingly, this Court should
11 now consider the defenses advanced by the Soviet defendants
12 under the Foreign Sovereign Immunities Act.

13 II. The Libel Claim Is Barred By The
14 Foreign Sovereign Immunities Act

15 Plaintiffs contend that the defendants caused the
16 publication of a libelous article about them in Izvestia,
17 also a named defendant in this action. (Amended Complaint,
18 Tenth Claim for Relief.) The Soviet defendants argue in
19 their Motion to Dismiss that libel actions are barred by the
20 Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5)(B).
21 (Defendants' Memorandum of Points and Authorities in Support
22 of Motion to Vacate Judgment at 16-20.) The United States
23 agrees that such actions are barred by the FSIA. In the
24 FSIA, Congress specifically provided immunity from the tort
25 of libel for foreign sovereigns. Congress thereby intended
26 to afford foreign sovereigns an immunity with respect to
libel actions analogous to that granted the United States

1 under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)
2 ("FTCA"). Under the FTCA, the United States is immune from
3 any libel action. Such immunity should thus also be accorded
4 foreign sovereigns under the FSIA. The failure to recognize
5 immunity from libel suits for foreign sovereigns would not
6 only be a misconstruction of the FSIA, but would pose serious
7 diplomatic problems for the United States in foreign courts.

8 A. Congress Intended To Bar Libel
9 Actions Under The FSIA

10 The FSIA provides for jurisdiction against foreign
11 sovereigns for actions based upon commercial activity.
12 28 U.S.C. § 1602. It also recognizes jurisdiction for
13 actions not otherwise encompassed by the "commercial
14 activity" provisions, in which money damages are sought for
15 personal injury, death or damage or loss of property
16 occurring in the United States and caused by a tortious act
17 of a foreign state or its employees in the course of their
18 official conduct. 28 U.S.C. § 1605(a)(5). However, the FSIA
19 specifically bars such claims as arise out of "malicious
20 prosecution, abuse of process, libel, slander,
21 misrepresentation, deceit, or interference with contract
22 rights." 28 U.S.C. § 1605(a)(5)(B) (emphasis added).

23 The legislative history of this section of the FSIA
24 reveals that Congress intended to carve out immunity from
25 libel actions for foreign sovereigns similar to that accorded
26 to the United States in the Federal Tort Claims Act.
Congress specifically noted that

1 The exceptions provided in subparagraphs
2 (A) and (B) of section 1605(a)(5)
3 correspond to many of the claims with
4 respect to which the U.S. Government
5 retains immunity under the Federal Tort
6 Claims Act, 28 U.S.C. 2680(a) and (h).

7 H.R. Rep. No. 1487, 94th Cong., 2d Sess. reprinted in 1976
8 U.S. Code Cong. & Admin. News, 6604, 6620.

9 Section 2680(h) of the Federal Tort Claims Act, referred
10 to above, provides for immunity from suits against the United
11 States for

12 any claim arising out of assault,
13 battery, false imprisonment, abuse of
14 process, libel, slander,
15 misrepresentation, deceit, or
16 interference with contract rights
17 (emphasis added.)

18 Thus, Congress, by tracking the language of section 2680(h)
19 of the FTCA in section 1605(a)(5)(B) of the FSIA, intended
20 immunity of the sovereign from libel actions.²

21 The exclusion from liability for libel actions against
22 the United States has been present in the FTCA since its
23 inception. 2 L. Jayson, Handling Federal Tort Claims
24 § 260.01, n.1.1 at 13-36 (1986). The purpose of the
25 exclusion was

26 that government officials should not be
hampered in their writing and speaking by

23 ² Under the FTCA, the immunity with respect to libel
24 extends to agencies and instrumentalities of the United
25 States, 28 U.S.C. §§ 2671, 2679(a), including "corporations
26 primarily acting as instrumentalities or agencies of the
United States." Id. at § 2671. Similarly, immunity under
the FSIA should extend to the instrumentalities of foreign
governments.

1 the possibility that their actions would
2 give rise to government liability.

3 Quinones v. United States, 492 F.2d 1269, 1280 (3rd Cir.
4 1974). Inquiry into the merits of a libel claim against a
5 foreign sovereign under the FSIA would impose the same
6 burdens on that sovereign as would inquiry into the merits of
7 a libel claim against the United States under the FTCA.
8 Congress expressly provided for immunity from those burdens
9 both in the FTCA and the FSIA.

10 Moreover, the United States and its agencies and
11 instrumentalities publish and distribute hundreds of
12 different documents abroad, many of which are published or
13 distributed on a regular basis. Some of those publications
14 are free, others are sold. The United States is not aware of
15 any instance where it or its agencies has been sued in a
16 foreign court for libel. It would consider any assertion of
17 such jurisdiction to be inappropriate. In the interest of
18 comity as well as the language of the FSIA, the United States
19 can expect no less for a foreign sovereign.

20 B. Plaintiffs Misread The FSIA

21 Plaintiffs argue that, despite the explicit bar against
22 libel actions, the FSIA permits suit for a libel which arises
23 in connection with "commercial activity." (Pl. Memo. in Opp.
24 at 9-14.) Neither the FSIA itself nor the legislative
25 history recognizes any such distinction, nor does plaintiff
26

1 cite to any.³ Indeed, to recognize such a distinction would
2 render the libel exception meaningless for it would take only
3 creative counsel to label a claim as a "commercial" or
4 "trade" libel to avoid the bar.⁴ As the United States
5 District Court for the Northern District of California stated
6 in an analogous situation under the FTCA

7
8 ³ Plaintiffs rely primarily (Pl. Memo. at 9-12) on an
9 earlier ruling by this Court that it had general jurisdiction
10 over the action under section 1605(a)(2) of the FSIA. Order
11 of July 17, 1985. However, the Court made no specific ruling
12 upon the libel claim and apparently was not apprised of the
13 libel exception to the FSIA. The Court's preliminary finding
14 was, of course, made without benefit of pleadings from the
15 Soviet defendants.

16 ⁴ Plaintiffs attempt to find some support for their
17 theory in Yessenin-Volpin v. Novosti, 443 F. Supp. 849, 855
18 (S.D. N.Y. 1978), where the court suggests in dicta that the
19 libel exception may not be a complete bar under the FSIA.
20 However, the court concluded that publication in a state
21 organ, Novosti, of official commentary of the Soviet
22 government is not a "commercial activity" which would confer
23 jurisdiction under the FSIA. Rather, the court found it to
24 be "an activity whose essential nature is public or
25 governmental" and thus excluded under the FSIA. Id. at 855.
26 Here, plaintiffs have admitted that Izvestia is "an agency or
instrumentality of the government of the Soviet Union."
(First Amended Complaint, para. 5). Along with Novosti,
Izvestia is one of the entities through which the official
views and policies of the Soviet Union are made public.
Where such is the case, the Novosti court held that

to reach around the various organs of the
Soviet government which actually
published the alleged libels and subject
to this Court's jurisdiction a news
agency whose ownership by and
identification with the Soviet state has
been demonstrated . . . or admitted . . .
would contravene the spirit of sovereign
immunity as well as the letter of the
Immunities Act.

Id. at 856.

1 The label which a plaintiff applies to a
2 pleading does not determine the nature of
3 the cause of action which he states and a
4 litigant cannot circumvent the [FTCA] by
5 the simple expedient of drafting in terms
6 of negligence a complaint that in reality
7 is a claim as to which the United States
8 remains immune.

9
10 Hoesl v. United States, 451 F. Supp. 1170, 1171 (N.D. Cal.
11 1978), affirmed on the basis of the opinion below, 629 F.2d
12 586 (9th Cir. 1980) (citations omitted). The district court
13 went on to hold that

14 Congress did not intend to make the
15 United States liable for any conduct
16 which fits the traditional and commonly
17 understood legal definition of the tort
18 of defamation . . . and this legislative
19 intent cannot be frustrated by calling
20 plaintiff's cause of action something
21 other than defamation.

22 451 F. Supp. at 1175 (citations omitted).

23 More recently, in Art-Metal, Inc. v. United States, 753
24 F.2d 1151, 1156 (D.C. Cir. 1985), plaintiff attempted to
25 avoid the libel and slander bar under the FTCA by including a
26 different label, "injurious falsehood," on its cause of
action. The court, citing the Supreme Court in Kosak v.
United States, 104 S.Ct. 1519 (1984), stated that

the fairest interpretation of [section
2680(h)] is the one that first springs to
mind . . .: claims for injurious
falsehood, disparagement of property,
slander of goods, or trade libel are
claims arising out of . . . libel or
slander.

753 F.2d at 1156 (emphasis added). The court dismissed the
plaintiff's claim as barred by the libel and slander

1 exception to the FTCA.⁵ Plaintiff's attempts here to embrace
2 the same type of conduct within the FSIA should be rejected.

3 Conclusion


4 For the foregoing reasons, the Motion to Vacate the
5 Default Judgment should be granted and the plaintiffs' claims
6 for libel dismissed.

7 Respectfully submitted,

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23 ⁵ Reference to the analogous FTCA exceptions in
24 interpreting the FSIA was expressly approved by the Ninth
25 Circuit in Olsen By Sheldon v. Government of Mexico, 729 F.2d
26 641, 646-647 (9th Cir. 1984) ("To determine the scope of the
discretionary function exception of the FSIA, we therefore
turn to the interpretation given the similar FTCA provision."
(footnote omitted)).

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