

No. 01-36146

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. MOORE,

Plaintiff-Appellant,

v.

THE UNITED KINGDOM, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING AFFIRMANCE

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
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The complaint in this case alleges that a British soldier, "acting within the course and scope of his employment," Excerpts of Record ("ER") 17 ¶ 1.2 (Compl.), injured plaintiff Robert E. Moore in an altercation in Washington State. The Department of Justice files this brief on behalf of the United States of America as amicus curiae pursuant to Fed. R. App. P. 29 and 28 U.S.C. § 517, in support of the district court's conclusion that the North Atlantic Treaty Organization Status of

Forces Agreement ("NATO-SOFA") precludes jurisdiction over the claims asserted in plaintiff's complaint.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Article VIII, ¶ 5 of the North Atlantic Treaty Organization Status of Forces Agreement deprives the district court of jurisdiction over plaintiff's claims against the United Kingdom, a British soldier, and ten unidentified members of the British military, based on the conduct of the soldiers in U.S. territory, acting within the scope of their employment.

2. Whether attorney's fees are available against the United States as amicus.

INTEREST OF THE UNITED STATES

The United States has a significant interest in the proper construction of the NATO-SOFA, a multi-lateral treaty that, inter alia, established the jurisdictional regime governing criminal and civil claims against foreign servicemen stationed overseas. NATO-SOFA provides a method for addressing tort claims that arise, primarily, from the presence and training of U.S. troops in the territories of our NATO partners.¹ Civilian injuries caused by U.S. servicemen acting in the course

¹Lt. Col. David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and International Agreement Claims Act*, 37 AIR FORCE L. REV. 191, 200 (1994).

and scope of their duties, such as the 1998 Marine Corps aircraft collision with an Italian ski gondola, are handled in accordance with NATO-SOFA.²

The Department of Justice, through the Office of Foreign Litigation, is responsible for handling claims in foreign courts against the United States. One consequence of NATO-SOFA is that the United States is rarely sued directly for injuries caused by our servicemen acting in the course and scope of their duties in the territory of a NATO state, because claimants know that any such action must be brought against their home state, not the United States. Our reciprocal obligation under NATO-SOFA is to ensure that our NATO partners are afforded like treatment for claims in American courts arising out of the conduct of their own servicemen on training exercises in this country. Brown v. Ministry of Def. of the United Kingdom of Great Britain, 683 F. Supp. 1035, 1036 (E.D. Va. 1988) (cautioning that "[t]o misconstrue or misapply the treaty could have far reaching effects insofar as misapplication could alter application of the NATO-SOFA to hundreds of thousands of American servicepeople in Europe and elsewhere").

²Sean D. Murphy, *Compensation for Collision with Italian Ski Gondola*, 94 AM. J. INT'L L. 541, 541 (2000) (discussing Italian gondola accident, which was resolved in settlement agreement between Italian government and victims' families, with compensation apportioned between host country and the United States pursuant to NATO-SOFA).

Dismissal of plaintiff's complaint was proper because plaintiff cannot sue the United Kingdom for injuries arising out of his fight with British soldiers in Tacoma, Washington. To the extent that the British soldiers at issue were acting within the scope of their employment, that is exactly the context in which NATO-SOFA was intended to apply, with suit to proceed against the host country alone and any judgment apportioned between the two countries involved. To the extent that the soldiers were acting in their individual capacity, plaintiff cannot sue the United Kingdom, as their employer, for conduct outside the scope of employment.

STATEMENT OF THE CASE

A. The North Atlantic Treaty Organization Status of Forces Agreement.

The United States and the United Kingdom are signatories to the North Atlantic Treaty Organization Status of Forces Agreement, a multilateral treaty that provides, in relevant part:

Claims * * * arising out of acts or omissions of members of a force³ or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting

³NATO-SOFA, Art. I, ¶ 1.a defines a "force" as "the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties[.]" 4 U.S.T. 1792, 1794 (June 19, 1951) (largely codified at 10 U.S.C. §§ 2734a, 2734b).

Parties, shall be dealt with by the receiving State in accordance with the following provisions:

a. Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

b. The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

c. Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

NATO-SOFA, Art. VIII, ¶ 5, 4 U.S.T. 1792, 1806 (June 19, 1951) (largely codified at 10 U.S.C. §§ 2734a, 2734b). In this case, the "sending State" ("the Contracting Party to which the force belongs," NATO-SOFA, Art. I, ¶ 1.d.) is the United Kingdom, while the "receiving State" ("the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit," *id.* Art. I, ¶ 1.e.) is the United States.

"A member of a force * * * shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties." *Id.* Art. VIII, ¶ 5.g. However, the courts of the receiving State retain jurisdiction over "[c]laims against members of a force * * * arising out of tortious acts or omissions in the receiving State not done in the performance of official duty * * * unless and until" the sending State has made

an ex gratia payment to the claimant "in full satisfaction of the claim." Id. Art. VIII, ¶ 6. If any dispute arises between the sending State and receiving State over whether a particular serviceman's action "was done in the performance of official duty," the question shall be submitted to an arbitrator "whose decision on this point shall be final and conclusive." Id. Art. VIII, ¶ 8.

B. Statement of Facts.

This suit arises out of a bar fight in Tacoma, Washington, between plaintiff and several members of the British military. Br. 3. Plaintiff alleges that Kenneth Southall and other British soldiers "on active duty * * * engaged in an altercation with Moore, repeatedly striking and kicking Moore in the head and body, causing grievous physical injuries" that left plaintiff permanently disabled. ER 20 ¶ 4.2, 4.3 (Compl.). Plaintiff alleges that the injuries rendered him unconscious and unable to identify the individuals who participated in the fight. ER 17 ¶ 1.4 (Compl.). According to plaintiff, the British military took formal action against the soldiers who participated in the fight. ER 19 ¶ 3.2 (Compl.); Br. 3-4.

Within two years of the incident, plaintiff presented an administrative claim to the U.S. Army Claims Service. ER 18 ¶ 2.3 (Compl.).⁴

⁴We note for the Court's information that the Army processed plaintiff's claim under NATO-SOFA; that the British Ministry of Defence determined that Southall
(continued...)

C. Proceedings Below.

1. On January 11, 2000, plaintiff brought a tort suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, against the United Kingdom and individuals Kenneth Southall and unknown John Does I-X, British officials and employees stationed in Washington and "acting within the scope of their office and employment." ER 18 ¶ 2.1 (Compl.). The complaint included (1) a Freedom of Information Act ("FOIA") claim against the British government to compel production of records and documents relating to the fight, ER 19 ¶ 3.2 (Compl.); and (2) a personal injury claim for, inter alia, medical expenses and lost wages against the individuals who participated in the fight and against the United Kingdom for negligent training and supervision, ER 20 ¶ 4.2 (Compl.). The defendants did not file an appearance in the district court. Plaintiff subsequently moved for entry of a default judgment, which the district court denied. R. 10 (Order).

⁴(...continued)

was not acting within the scope of his duties when he assaulted plaintiff; and that the United States agrees with that determination. This information was communicated to plaintiff's counsel in a letter from the Army Claims Service referencing a telephone message of December 21, 1998, and another letter from the Army referencing a telephone conversation of January 4, 1999. A separate letter to plaintiff's counsel from the British Defence Staff states that the Ministry of Defence will not be making an ex gratia payment to plaintiff. Although these materials were not made a part of the record in the district court, we can supplement the record on appeal with these materials if the Court so requests.

Appearing as amicus, the United States argued that NATO-SOFA, Article VIII, ¶ 5 precludes district court jurisdiction over FSIA claims against the United Kingdom and the individuals for the tortious conduct of British soldiers acting within the line of duty in U.S. territory. R. 20 (U.S. Mem.). Plaintiff moved for attorney's fees against the U.S., which the government opposed.

2. The district court found the factual scenario alleged by plaintiff to be covered by NATO-SOFA, Art. VIII, ¶ 5. The court noted that under NATO-SOFA and the case law construing the Agreement, "foreign servicemen are effectively considered members of the United States military for purposes of claims arising out of acts or omissions of the servicemen," and "the courts lack jurisdiction over tort claims based on the acts or omissions in the performance of official duty of members of the military forces of NATO countries while present in the United States." ER 66 (Op.). "Unanimous judicial opinion confirms that Moore's only claim giving rise to jurisdiction in this Court is a claim against the armed forces of the host nation itself." ER 66 (Op.). "Because Moore's claim is against the United Kingdom, rather than the United States, and directly implicates British forces while in the line of duty within the United States, this Court lacks subject matter jurisdiction." ER 66 (Op.). The court therefore ordered the case dismissed without prejudice, and denied plaintiff's motion for fees. ER 66-67 (Op.).

3. Plaintiff filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59, requesting that the court make specific findings on, inter alia, whether plaintiff perfected service on the defendants, whether plaintiff's claims against the John Does survive, and which law applies to plaintiff's claims. The district court treated the motion as one for reconsideration under Local Rule 7(e). "Although Plaintiff raises several grievances with the Court's failure to address certain issues during the course of this litigation, it fails to address the Court's determination that it lacked jurisdiction to hear the case." ER 74 (Order). The district court therefore denied the motion. Plaintiff appealed both orders.

SUMMARY OF ARGUMENT

This Foreign Sovereign Immunities Act tort suit arises out of a bar fight in Tacoma, Washington between plaintiff and several British soldiers, present in the United States for NATO training exercises. The complaint alleges that at the time of the assault, the British soldiers were acting in the course and scope of their employment. If we accept plaintiff's allegations as true, the North Atlantic Treaty Organization Status of Forces Agreement provides the exclusive remedy for plaintiff's claims in U.S. courts. NATO-SOFA is a multi-lateral treaty to which both the United States and the United Kingdom are signatories. Under NATO-SOFA, plaintiff's line-of-duty claims must be brought in accordance with U.S. laws governing analogous

claims arising from the tortious activities of American soldiers. Because plaintiff sued the wrong parties, dismissal was proper.

In addition, plaintiff has no basis for obtaining attorney's fees from the United States in its capacity as amicus. Even assuming, arguendo, that plaintiff were ultimately to prevail on his claims, the United States is not a party to this action, and plaintiff has not identified a waiver of sovereign immunity that would permit the award of attorney's fees under these circumstances.

ARGUMENT

REVIEWABILITY AND STANDARD OF REVIEW

The United States raised the issue of the district court's jurisdiction over plaintiff's claims in two memoranda filed on May 16, 2001: one in support of its application to appear as amicus curiae and one in support of its suggestion of lack of subject matter jurisdiction. R. 20 (Mem.). The district court ruled on this issue at ER 65-66 (Op.) and ER 74 (Order). The existence of subject matter jurisdiction under the FSIA is a question of law reviewed de novo, Lyon v. Augusta S.P.A., 252 F.3d 1078, 1082 (9th Cir. 2001), cert. denied, 122 S. Ct. 809 (2002); factual determinations relevant to the district court's determination of subject matter jurisdiction are reviewed for clear error, United States v. Peninsula Communications, Inc., 287 F.3d 832, 836 (9th Cir. 2002). "It is the burden of plaintiffs to persuade the federal courts

that subject matter jurisdiction does exist." Hexom v. Oregon Dep't of Transp., 177 F.3d 1134, 1135 (9th Cir. 1999).

This Court interprets the NATO-SOFA de novo, Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996), while according respect to the reasonable views of the Executive Branch concerning the treaty's meaning. El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999); United States v. Lombera-Camorlinga, 206 F.3d 882, 887 (9th Cir.), cert. denied, 531 U.S. 991 (2000). This Court reviews for abuse of discretion a district court's refusal to enter a default judgment. Paul v. Yosemite Park & Curry Co., 928 F.2d 880, 885 (9th Cir. 1991). The district court's decision not to award attorney's fees is reviewed for an abuse of discretion, Pierce v. Underwood, 487 U.S. 552, 571 (1988), but questions of law under a fee statute are reviewed de novo, United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996).

I. THE NATO-SOFA DEPRIVES THE DISTRICT COURT OF JURISDICTION OVER PLAINTIFF'S CLAIMS ARISING OUT OF THE CONDUCT OF BRITISH SOLDIERS ACTING WITHIN THE SCOPE OF EMPLOYMENT IN U.S. TERRITORY.

A. Plaintiff bases his claims, and the district court accordingly ruled, on the assumption that the individual defendants were acting within the scope of their employment when plaintiff's injury occurred. Assuming, as plaintiff urges, Br. 15,

the facts as alleged in his complaint, plaintiff's claims are precluded by NATO-SOFA, Art. VIII, ¶ 5.

1. The Foreign Sovereign Immunities Act of 1976 is the sole basis for obtaining civil jurisdiction over a foreign state in United States courts. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 522 (9th Cir. 2001). The FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604, unless one of the exceptions in 28 U.S.C. § 1605 applies. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993). One such exception is for suits "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[.]" 28 U.S.C. § 1605(a)(5).⁵

2. However, the FSIA was enacted "[s]ubject to existing international agreements to which the United States is a party," 28 U.S.C. § 1604, including pre-

⁵Individuals like Southall and the John Does, who were sued in their official capacity, are treated as an "agency or instrumentality of a foreign state" and are considered immune under the FSIA to the same extent as the foreign state itself. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099-1103 (9th Cir. 1990).

existing Status of Forces Agreements. E.g., H.R. Rep. No. 94-1487, at 21, reprinted in 1976 U.S.C.C.A.N. 6604, 6620 (FSIA is subject to existing international agreements "including Status of Forces Agreements"). NATO-SOFA is one such agreement. Brown v. Ministry of Def. of the United Kingdom of Great Britain, 683 F. Supp. 1035, 1036 (E.D. Va. 1988).

NATO-SOFA, Art. VIII, ¶ 5 sets out the procedure applicable to claims involving torts committed in the line of duty by the armed forces of one NATO nation within the territorial boundaries of another NATO country. Under this provision, the foreign serviceman is "merged" or "assimilated" into the host country's military, Daberkow v. United States, 581 F.2d 785, 789 (9th Cir. 1978), so that the injured local citizen proceeds against his own government "exactly as he would if the injury had been caused by a member of his own government's armed forces," Lowry v. Commonwealth of Canada, 917 F. Supp. 290, 291 (D. Vt. 1996).

Courts have consistently recognized that the remedy provided by Art. VIII, ¶ 5 is exclusive and precludes district court jurisdiction over a suit against a foreign government under the FSIA. Eyskens v. United States, 140 F. Supp. 2d 553, 558 (E.D.N.C. 2000) (NATO-SOFA is exclusive remedy for families of civilians killed by Marine Corps aircraft in Italian gondola accident); Greenpeace, Inc. (U.S.A.) v. State of France, 946 F. Supp. 773, 788 (C.D. Cal. 1996) (NATO-SOFA precludes

jurisdiction over claims concerning French military's transport of plaintiffs via Los Angeles); Lowry, 917 F. Supp. at 292 (same for U.S. citizen's claim against Canada for damage to birds caused by illegally low overflight by Canadian military helicopter); Aaskov v. Aldridge, 695 F. Supp. 595, 596-98 (D.D.C. 1988) (same for claims by injured American and Danish citizens involving crash of U.S. Air Force bomber in Greenland); Brown, 683 F. Supp. at 1038 (same for claim against United Kingdom involving accident on British merchant ship docked at Norfolk Naval Base); see generally Shafter v. United States, 273 F. Supp. 152, 156 (S.D.N.Y. 1967) (no jurisdiction over Public Vessels Act claim against U.S. for collision in German waters involving U.S. vessel), aff'd, 400 F.2d 584 (2d Cir. 1968), cert. denied, 393 U.S. 1086 (1969). Such claims can be asserted, if at all, only against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-80, which provides a vehicle for claims arising out of torts committed by American servicemen acting within the scope of their employment in the United States.⁶

3. Instead of suing the United States under the FTCA, plaintiff sued the United Kingdom, Southall, and other British soldiers under the FSIA. Because plaintiff sued

⁶However, all FTCA exceptions and defenses, including the exception for intentional torts such as assault, necessarily apply.

the wrong defendant under NATO-SOFA, Art. VIII, ¶ 5, the district court correctly dismissed the suit for lack of subject matter jurisdiction.

Contrary to the assertions of plaintiff, Br. 7-8, the court properly addressed jurisdiction first, before making any of the myriad factual and legal findings requested by plaintiff. Phaneuf v. Republic of Indonesia, 106 F.3d 302, 305 (9th Cir. 1997) ("[s]ubject matter jurisdiction under the FSIA * * * must be decided before the suit can proceed" on the merits). Nor does this Court need to make such findings at this stage. The issue of whether defendants were properly served (Br. 7-8) would be relevant only if plaintiff files a new suit against Southall and the other Does in their individual capacities. And the status of plaintiff's claims against the Does (Br. 5, 12-13), which likewise involve conduct allegedly in the line of duty, is self-evident: Those claims are likewise precluded by NATO-SOFA.

The absence of jurisdiction also moots the issue of whether plaintiff can obtain files from the United Kingdom under pre-trial discovery rules and the FOIA, 5 U.S.C. § 552. Plaintiff's assertion that his document request does not implicate NATO-SOFA (Br. 2, 5, 8-10) is incorrect. Article VIII, ¶ 5 of NATO-SOFA applies to all claims "arising out of acts * * * causing damage in the territory of the receiving State to third parties." Plaintiff seeks an order compelling the release of the United Kingdom's files and records "in relation to the tort committed by Southall" and the

Does "while acting within the course and scope of his employment against Moore on or about January 17, 1997," in order to "evaluate and prepare" plaintiff's tort claim. ER 18 ¶ 3.2 (Compl.). Because this document request "aris[es] out of" the same tortious acts giving rise to plaintiff's personal injury claim, it is likewise covered by NATO-SOFA.

Plaintiff's suggestion that his document request implicates "commercial activity" on the part of the United Kingdom, which is excepted from immunity under the FSIA, 28 U.S.C. § 1605(a)(2) (Br. 8-9), is meritless. The "commercial activity" exception "applies only where the sovereign acts 'in the market in the manner of a private player,'" and does not encompass the employment of military personnel. Holden v. Canadian Consulate, 92 F.3d 918, 920-21 (9th Cir. 1996), cert. denied, 519 U.S. 1091 (1997) (citation omitted). In any event, the FSIA exception for commercial activity, like the exception for tortious activity, does not trump application of the NATO-SOFA.⁷

⁷Plaintiff remains free to reurge his document request in a proper FTCA action or a state suit against the soldiers in their individual capacity. However, FOIA authorizes persons to receive certain records upon request from an "agency," 5 U.S.C. § 552(a)(3), which FOIA defines as organs of the executive branch of the United States government, 5 U.S.C. §§ 551(1), 552(f). Foreign governments do not fall within this definition.

4. Plaintiff argues that NATO-SOFA does not apply where, as here, the servicemen at issue were not engaged in military operations at the time of their tortious conduct. Br. 6, 16-17. Neither the text of NATO-SOFA nor the case law construing the Agreement supports this argument.

The test for when NATO-SOFA applies is geographical, not purposive. Aaskov, 695 F. Supp. at 597. NATO-SOFA applies to the act and omissions of "members of a force," with "force" broadly defined to include not only servicemen who are carrying out official duties, but those who are present in the receiving State "in connection with their official duties." NATO-SOFA, Art. I, ¶ 1.a ("force" is "personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties"). The fact that NATO-SOFA contemplates that members of a force may wear civilian dress under certain circumstances, id. Art. V, ¶ 1, and must carry certain documents to be presented on demand, id. Art. III, ¶ 2, further undercuts the notion that "force" status extends only to those directly engaged in military operations.

The case law supports this broad interpretation of "force." Lowry, 917 F. Supp. at 291 (rejecting argument that NATO-SOFA did not apply unless tort occurred on NATO mission); Aaskov, 695 F. Supp. at 597 (same). And while NATO countries

can jointly agree to exclude particular individuals, units, or formations from the definition of "force," *id.* Art. I, ¶ 1.a., that did not occur in this case.

Plaintiff protests that NATO-SOFA does not automatically apply "solely" because the individual defendants are in the British military. Br. 14. Plaintiff misses the point. Plaintiff's claims against the individual defendants are covered by NATO-SOFA because plaintiff alleges that the soldiers assaulted him while in the course and scope of employment. Indeed, active-duty soldiers present in foreign territory for NATO training exercises are the very population whose actions the drafters of NATO-SOFA intended to cover.

Plaintiff argues at some length that Washington law of respondeat superior, not NATO-SOFA, applies to his claims. Br. 2, 13-15, 17-19. Plaintiff is only partly correct. Under 28 U.S.C. § 1346(b)(1), Washington law will apply in any FTCA action that plaintiff brings against the U.S., arising out of the Tacoma bar fight.⁸ But

⁸Contrary to plaintiff's representations, Br. 18-20, it is not at all clear that the United States would be considered responsible under state law for a bar fight between plaintiff and the individual defendants. Langness v. Kentonen, 255 P.2d 551, 555 (Wash. 1953) (en banc) ("when an employee steps aside from his employer's business and, in order to effect some purpose of his own, commits an assault, such act is committed outside the scope of employment, and the employer is not liable"); Linck v. Matheson, 116 P. 282, 284 (Wash. 1911) (no respondeat superior liability where servant's "attack was induced by ill will, hatred, or other ill feeling * * * towards respondent, irrespective of his duties as an employee").

that fact does not make the United Kingdom likewise amenable to suit under state law.⁹

B. Notwithstanding the allegations in plaintiff's complaint, which were properly accepted as true by the district court for purposes of considering dismissal of the action, we note for the Court's information that the American and British governments have concluded that Southall was not acting within the line of duty when the assault occurred. See supra note 4. This information, which was not before the district court, does not affect the validity of the district court's judgment of dismissal for lack of subject matter jurisdiction under NATO-SOFA, which this Court should affirm. Rather, it simply clarifies why, in our view, an FTCA action against the United States for actions within the scope of employment would not ultimately bring plaintiff any relief.

⁹Although plaintiff cites cases for the proposition that state law governs for FSIA purposes (Br. 18), these cases are wholly inapposite where, as here, the FSIA expressly does not apply. See Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 173 (5th Cir. 1994) (stating state law governs scope determination); Eckert Int'l Inc. v. Government of the Sovereign Democratic Republic of Fiji, 32 F.3d 77, 79-80 (4th Cir. 1994) (applying the particular state law to which the parties contractually agreed); Berdakin v. Consulado de la Republica de El Salvador, 912 F. Supp. 458, 461 (C.D. Cal. 1995) (discussing waiver of sovereign immunity by lease and commercial activity exception). The law review note cited by plaintiff, which addresses whether a tort claimant's release of an employer also releases the employee from liability, is likewise irrelevant. Note, *'Respondeat Inferior': The Rule of Vanderpool v. Grange Ins. Ass'n*, 110 Wash.2d 483, 756 P.2d 111 (1988)? 64 WASH. L. REV. 419, 422-24 (1989).

However, under NATO-SOFA, Art. VIII, ¶ 6, courts of the receiving State retain jurisdiction over claims against individual servicemen acting outside their official capacity. Thus, in our view, plaintiff remains free to attempt to sue the individual defendants, Southall and the Does, assuming that plaintiff can establish personal jurisdiction over them. Of course, such a suit cannot proceed under the FSIA, which applies to tortious acts of foreign nationals only "while acting within the scope of [their] office or employment." 28 U.S.C. § 1605(a)(5). See generally Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105-06 (9th Cir. 1990). Plaintiff's assertion that default judgment should therefore issue against Southall (Br. 2, 5, 11-12) is thus incorrect.

However, any suit against the United Kingdom for specific military officers' negligent supervision of the individuals' conduct would be barred by NATO-SOFA, because the officers are likewise members of a "force" under NATO-SOFA, Art. I, ¶ 1.a. Even if the FSIA were otherwise applicable, suit against the United Kingdom for its policies or procedures for supervising off-duty servicemen would be barred by the discretionary function exception to the FSIA, 28 U.S.C. § 1605(a)(5)(A).¹⁰

¹⁰Contrary to plaintiff's contention, Br. 13-14 n.3, the United States cannot compel the United Kingdom to award an ex gratia payment. Such a payment is, by definition, discretionary with the sending State. BLACK'S LAW DICTIONARY 594 (7th ed. 1999) (defining ex gratia payment as "[a] payment not legally required").

II. ATTORNEY'S FEES ARE NOT AVAILABLE AGAINST THE UNITED STATES AS AMICUS.

A. Finally, plaintiff argues that the district court should have awarded attorney's fees against the United States as amicus because its participation prevented the entry of a default judgment to which plaintiff was entitled. Br. 3, 6, 23-25. This Court need not consider this issue because plaintiff has not prevailed on his claims, a prerequisite for an award of fees on any statutory basis. Nome Eskimo Cmty. v. Babbitt, 67 F.3d 813, 816 (9th Cir. 1995) (plaintiffs cannot obtain fees under 28 U.S.C. § 2412(b) "because they have lost the case"). See also Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 602-03 (2001) (noting that numerous federal fee-shifting statutes impose a "prevailing party" requirement).

B. But even if this Court were to reverse the district court dismissal, an award of fees would still be inappropriate. Sovereign immunity bars the award of attorney's fees against the United States unless expressly authorized by statute, and any such waiver must be strictly construed in favor of the sovereign. Ardestani v. INS, 502 U.S. 129, 137 (1991); Anderson v. United States, 127 F.3d 1190, 1191 (9th Cir. 1997), cert. denied, 523 U.S. 1072 (1998). Plaintiff has failed to identify any waiver of sovereign immunity that would permit the award of fees against the United States

in this case. For instance, the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), limits fee recovery to suits brought by or against the United States, which would plainly exclude the present suit.¹¹

Plaintiff's reliance on the district court's equitable discretion under Federal Rule of Civil Procedure 60(b) (Br. 24) is misplaced. Rule 60(b), which permits a court to condition the setting aside of a default judgment on the payment of fees by the defaulting defendant to the plaintiff, Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538,1546 (9th Cir. 1988),¹² is plainly inapposite where, as here, the United States has not sought relief from a default judgment against it. Schmidt v. Schubert, 79 F.R.D. 128 (E.D. Wisc. 1978), on which plaintiff relies (Br. 25), is not to the contrary. The district court in Schmidt awarded fees as a sanction where the defendant moved for relief from judgment as a substitute for appeal, on the basis of a Supreme Court case that issued before final judgment;

¹¹Moreover, reversal of the judgment of dismissal would not, in any event, make plaintiff a prevailing party, since this Court would not actually enter judgment for plaintiff on the merits, but would simply remand the case for further proceedings. See, e.g., Hewitt v. Helms, 482 U.S. 755, 759-63 (1987); Hanrahan v. Hampton, 446 U.S. 754, 756-59 (1980) (*per curiam*).

¹²But see Adduono v. World Hockey Ass'n, 824 F.2d 617, 620 (8th Cir. 1987) (district court "did not have the authority" under Rule 60(b) to award attorney's fees).

Schmidt does not purport to hold that such sanctions can be awarded against non-parties that raise issues prior to the entry of judgment.

And contrary to plaintiff's representation (Br. 24), it is far from "certain" that default judgment would have been entered against the defendants had the government not participated. The district court had an affirmative duty to look into subject matter jurisdiction before entering default judgment. In re Tuli, 172 F.3d 707, 712 (9th Cir. 1999); Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1264 (9th Cir. 1992). And this Court has made clear that "judgment by default is an extreme measure and a case should, 'whenever possible, be decided on the merits.'" Cnty. Dental Servs. v. Tani, 282 F.3d 1164, 1170 (9th Cir. 2002) (citation omitted).¹³

Plaintiff's appeal to general equitable principles (Br. 24) is likewise misplaced. The fundamental equitable principle is that equity follows the law, In re Shoreline Concrete Co., 831 F.2d 903, 905 (9th Cir. 1987), so that plaintiff cannot resort to equity to fashion a remedy that would violate sovereign immunity, INS v. Pangilinan, 486 U.S. 875, 883 (1988).

C. Significantly, plaintiff fails to identify a single case in which a court has held an amicus liable for attorney's fees. Traditionally, each party to a suit bears its

¹³This is consistent with the FSIA, 28 U.S.C. § 1608(e), which forbids the entry of default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

own legal expenses, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975), and fee-shifting statutes apply only to the parties to the lawsuit.

An amicus is, by definition, not a party to the lawsuit in which it appears. Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982); Morales v. Turman, 820 F.2d 728, 732 (5th Cir. 1987) (amicus are not entitled to fees under 42 U.S.C. § 1988 because they are not parties to the litigation). It is "merely a friend of the court whose sole function is to advise, or make suggestions to, the court." Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953) (citation and internal quotation marks omitted). A party cannot prevail against the amicus. E.g., Wilder v. Bernstein, 965 F.2d 1196, 1203 (2d Cir.) (amicus could not be awarded fees because they were not prevailing parties), cert. denied, 506 U.S. 954 (1992). Nor is the amicus bound by the judgment. Cory Corp. v. Sauber, 267 F.2d 802, 803 (7th Cir. 1959) ("[t]hose who seek to intervene in this court as amicus curiae are not bound by either the stipulation of the parties in this case or our opinion and judgment"), rev'd on other grounds, 363 U.S. 709 (1960).

Only if an amicus successfully petitions the court to intervene does the amicus become party to the suit, Miller-Wohl Co., 694 F.2d at 205, liable for both the judgment and fees (where, unlike here, the other party has actually prevailed). The Supreme Court has stated that liability on the merits and fee responsibility "go hand

in hand": Just because "a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a nonparty." Kentucky v. Graham, 473 U.S. 159, 168 (1985) (construing 42 U.S.C. § 1988).¹⁴

This Court's decision in League of Women Voters v. FCC, 798 F.2d 1255, 1260 (9th Cir. 1986), is not to the contrary. In that case, this Court presumed for the sake of argument that EAJA fees might be recoverable from the Senate, participating as amicus to defend the constitutionality of a federal statute when the Executive Branch had temporarily declined to do so, but the Court refused to award fees on the ground that the position taken by the Senate was substantially justified. This Court did not purport to hold that fees are generally available against amici.

¹⁴Cf. Charles v. Daley, 846 F.2d 1057, 1067 (7th Cir. 1988) (intervenors may "fairly be charged with the consequences of choosing to proceed as intervening defendants rather than as amici, a status that would have permitted them to present their legal arguments to the court while protecting them from any liability for fees"), cert. denied, 492 U.S. 905 (1989).

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.¹⁵

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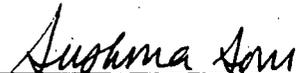
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¹⁵The Department gratefully acknowledges the assistance of Stephanie Cotilla, a student at Georgetown University Law Center, in the preparation of this brief.

CERTIFICATE OF SERVICE

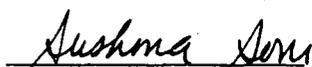
I hereby certify that on September 3, 2002, I served an original and fifteen final copies of the foregoing "BRIEF FOR THE UNITED STATES AS AMICUS CURIAE" by overnight mail, postage prepaid, on the Clerk for the U.S. Court of Appeals for the Ninth Circuit and two (2) copies of the brief by overnight mail on:

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e) and Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Corel Wordperfect 9 and complies with the type and volume limitations set forth in Rule 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Times New Roman, for text and footnotes, and the computerized word count for the foregoing brief (excluding exempt material) is 6051.



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STATEMENT OF RELATED CASES

Counsel is not aware of any related case in this Court.