IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. AIRSERVICES AUSTRALIA, Relators, v. THE HONORABLE J. DAN CONKLIN, CIRCUIT JUDGE, CIRCUIT COURT OF GREENE COUNTY, Respondent.	)	No. SC92405

REPLY BRIEF OF RELATOR AIRSERVICES AUSTRALIA

J. Kent Lowry #26564
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
Matthew J. Reh #49418
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, MO 63105
314-621-5070 FAX 314-621-5065

ATTORNEYS FOR RELATOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The brief filed by Lambert Leasing Inc. is a marvel. Lambert has filed the rare respondent's brief that fails entirely to respond to the issues and arguments advanced by its opponent.

In particular, Lambert refuses to address the plain statutory terms of the Foreign Sovereign Immunities Act, especially 28 U.S.C. § 1330(b), which is the purported basis of Lambert's claim of personal jurisdiction. Indeed, in addition to failing to address the terms of the statute, ***Lambert never cites section 1330 at all***. Section 1330 is not even listed in Lambert's seven-page table of authorities. Lambert's Brief at iv-x.

As Relator Airservices Australia has explained, section 1330 provides a rule of personal jurisdiction to be used in federal district courts and does not purport to provide any rule for use in state courts. Lambert does not even attempt to provide a statutory argument to the contrary. Lambert cites no authorities addressing this issue.

Lambert also ignores the provisions of the Missouri long-arm statute that apply to any out-of-state entity sought to be sued in Missouri. Lambert does not dispute that ASA has no contacts with Missouri (apart from defending against Lambert's improper efforts to drag ASA into the underlying case). Under this Court's cases, the circuit court lacks personal jurisdiction over ASA.

This Court and the other courts of this state have the power and the duty to apply Missouri's rules of personal jurisdiction. The FSIA contains no rule to the contrary, and Lambert cites no other authority to the contrary. Accordingly, the Court should direct Respondent to dismiss the third-party petition as to ASA for lack of personal jurisdiction.

It is settled that, when a defendant raises the issue of personal jurisdiction in a motion to dismiss, the plaintiff has the burden to show that the circuit court's exercise of jurisdiction is proper. *Capitol Indem. Corp. v. Citizens Nat'l Bank,* 8 S.W.3d 893, 899 (Mo. App. 2000). To subject a non-resident defendant to the long arm jurisdiction of this state, the plaintiff must plead and prove that the suit arose from any of the activities enumerated in the long arm statute, section 506.500, RSMo. *Id.* The evidence is unrefuted that ASA has never had any contacts of any kind with Missouri at any time. Lambert notes that the underlying action arises from an airplane crash in Australia in which all decedents were Australian nationals and residents. No plaintiff or defendant in this case is a resident of Missouri. Having failed to bring its claim within the scope of Missouri's limitations on personal jurisdiction, Lambert's arguments should be rejected.

The Court may note Lambert's strenuous flip-flop on the propriety of Missouri as a venue for the underlying action. According to Lambert's motion to dismiss on the theory of forum non conveniens, the entire United States "has no meaningful connection" to the Australian airline crash at issue. Exhibit K at 7. As a result, according to Lambert, Missouri has no interest in the adjudication of claims arising from the crash. Exhibit K at 14. Lambert insisted that a Missouri court in particular was not the proper jurisdiction for the case: "With no Missouri defendant, no Missouri plaintiff, or even a U.S. resident plaintiff, Missouri is clearly an inappropriate and inconvenient forum to litigate this dispute." Exhibit K at 9. Lambert noted that "all of the critical evidence is located in Australia, not in the United States, and certainly not in Missouri." Exhibit K at 10. Lambert's arguments have changed, but the facts have not.

I. Congress cannot tell Missouri courts how to exercise personal jurisdiction.

Congress lacks the constitutional authority to dictate to Missouri how to exercise personal jurisdiction in its own courts. The principle that the federal government is one of enumerated powers and that it may only exercise the powers granted to it is so fundamental to our form of government that it is "universally admitted." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Under Article I of the Constitution, Congress has the power to "constitute tribunals inferior to the Supreme Court." Under Article III, Congress can "ordain and establish inferior Courts." By their terms, these enumerated powers refer to the federal court system, not state courts.

As to state courts, the limits of congressional power are clear. "Congress cannot confer jurisdiction upon the state courts; neither can it regulate or control their modes of procedure." *Ex parte Gounis*, 263 S.W. 988, 990 (Mo. banc 1924). There has been no surrender by the states of the right to establish their own courts and to define and limit their jurisdiction and functions. *Id.* It is clear that "Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts." *Houston v. Moore,* 18 U.S. 1, 27-28 (1820)

Lambert's interpretation of the FSIA is impossible. Congress may not legislate into existence a power not granted to it by the Constitution. Lambert incorrectly claims that section 1604 "establishes its application to all jurisdictional issues, subject matter and personal, in all courts in the United States and the states." Lambert's Brief at 9.

Notably, this is not what the statute says. And Lambert's interpretation has no Constitutional support and directly contradicts United States and Missouri Supreme Court precedent which simply and expressly holds that "Congress cannot confer jurisdiction on state courts." *Houston*, 18 U.S. at 27-28; *Gounis*, 263 S.W. at 988.

Lambert's argument also violates basic principles of federalism, which are based on a "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federalism dictates that Missouri retains control of personal jurisdiction in its courts.

II. Missouri confers personal jurisdiction in its own courts.

Missouri law, not the FSIA, controls personal jurisdiction in Missouri courts. The Missouri Constitution grants access to Missouri Courts. Mo. Const. art I, § 14. The General Assembly may restrict individuals' or classes of individuals' access to the court if such restriction is not arbitrary or unreasonable. *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000). While the courts of this state are open to every person and a remedy afforded for every injury, this provision means that persons will not be barred from Missouri courts in cases where there is proper venue and jurisdiction of the parties and subject matter. *See Collar v. Peninsular Gas Co.,* 295 S.W.2d 88, 93 (Mo. 1956). The Missouri Constitution does not require this state's courts to be open to claims against entities from every country in the world.

Missouri courts employ a two-step analysis when determining whether a defendant is subject to personal jurisdiction. *Byrant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010). First, a court determines whether a defendant's conduct falls within the scope of the Missouri long-arm statute. *Id*. If so, the court then evaluates whether the defendant has sufficient minimum contacts with the state. *Id*.

Even if the defendant satisfies the long-arm statute and minimum contacts analysis (and ASA surely does not), a Missouri court may exercise discretion when deciding whether to exercise personal jurisdiction. A court may also consider: 1) the burden on the defendant, 2) the interest of Missouri in providing a forum for cause of action, 3) the plaintiff's interest in obtaining relief, 4) the interstate judicial system's interest in obtaining the most efficient resolution to controversies, and 5) the shared interest of the several states in furthering fundamental substantive social policies. *Schilling v. Human Support Services*, 978 S.W.2d 368, 371 (Mo. App. 1998).

Thus, the entirety of Missouri's personal jurisdiction analysis is governed by the interests and laws of Missouri subject to compliance with the Due Process Clause of the United States Constitution. Lambert's erroneous interpretation of the FSIA would eviscerate Missouri's ability to determine access to its court, the reach of its courts' personal jurisdiction, and the allocation of its judicial resources.

Contrary to Lambert's attempt to shift the Court's focus, the issue in this case in not whether ASA is a "person" for the purposes of the Fifth Amendment, but whether ASA is entitled to the protections afforded to non-resident defendants by the settled Missouri personal jurisdiction analysis. The broader issue is whether Missouri may apply

its own law to govern access to and the personal jurisdiction of its courts. Precedent holds that it may. *Houston*, 18 U.S. at 27-28; *Gounis*, 263 S.W. at 98. Lambert is wrong in asserting that it may not.

Congress may, and indeed does in the FSIA, provide for a certain type of personal jurisdiction analysis in federal courts. However, in state court, Missouri personal jurisdiction analysis is solely relevant and entirely applicable. ASA, like any non-resident defendant, benefits from the protections Missouri law gives non-residents. Such protections include the requirement that a defendant's conduct satisfy the long-arm statute or the possibility that a Missouri court may exercise its discretion and decline to exercise personal jurisdiction due to the burden on the defendant or Missouri's lack of interest in providing a forum.

III. Lambert's cited authority does not require the FSIA personal jurisdiction analysis to apply in Missouri state courts.

Lambert does not and cannot cite any authority that supports its contention that Missouri's personal jurisdiction analysis is "simply inapplicable." Lambert points to a host of irrelevant cases in an attempt to create a Congressional power not enumerated in the Constitution. Missouri's personal jurisdiction analysis controls the outcome of this case.

As Lambert's first cited case shows, even federal courts are required to have personal jurisdiction over a foreign sovereign (or in rem jurisdiction over its property) in order to provide any relief. *See Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic,* 582 F.3d 393, 398 (2d Cir. 2009). This Second Circuit case was

based on *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 619-620 (1992), in which the Supreme Court assumed, without deciding, "that a foreign state is a 'person' for purposes of the Due Process Clause" and determined that the country of Argentina possessed minimum contacts that would satisfy the constitutional test.

Lambert declares, without citation, that the FSIA "and not Missouri's long-arm statute controls the issues in ASA's motion." Lambert's Brief at 5. Lambert cites a host of federal cases, but none of them declare that a state court must forego any analysis of personal jurisdiction.

Lambert emphasizes that the Second Circuit and the D.C. Circuit have held that foreign states are not "persons." *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic,* 582 F.3d 393, 400 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 96 (D.C. Cir. 2002). Notably, Lambert does not suggest that any other circuit has adopted this holding. And Lambert does not point to any state court in general, or any Missouri case in particular, declaring that a state court is required to ignore personal jurisdiction in any case, including a case involving foreign entities.

Lambert argues that *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), is controlling precedent directly on point. It is not. First, the case originated in a federal district court, not state court. *Id.* at 610. Second, the Court held that Argentina satisfied the minimum contacts test for Due Process. *Id.* at 619. Third, and most significantly, the Court did not hold that the FSIA supplanted state personal jurisdiction analysis. *Id.* at 610-11. Rather, the Court held that the FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, ***may*** exercise jurisdiction

over a foreign state." *Id.* at 610 (emphasis added). The Court never addressed whether any state court ***must*** exercise personal jurisdiction. Neither *Weltover* nor any other federal case cited by Lambert holds that the FSIA confers personal jurisdiction in state courts.

Lambert makes a claim unsupported by any Missouri authority: "The relevant evaluation under the FSIA focuses on ASA's contact with the entire United States and not only the State of Missouri." Lambert's Brief at 18. Lambert's own cited cases make it clear that state courts consider the standard personal jurisdiction analysis in cases involving foreign sovereigns and their instrumentalities. *See Nigerian Air Force v. Van Hise,* 443 So.2d 273, 275 (Fla. App. 1983) ("It is plain from the legislative history of the Foreign Sovereign Immunity Act (FSIA) that due process notions of minimum contacts have been incorporated in the act."); *New Hampshire Ins. Co. v. Wellesley Capital Partners, Inc.,* 200 A.D.2d 143, 149 (N.Y. App. Div. 1994).

In the *New Hampshire* case, the court rejected a claim for lack of personal jurisdiction: "Even if this Court were to decide the question of subject matter jurisdiction under FSIA in favor of third-party plaintiff, the foreign defendants' contacts with the United States are insufficient to support the exercise of personal jurisdiction by our courts without offending traditional notions of fair play and substantial justice." *Id.* (citations and internal quotations omitted). In another New York case cited by Lambert, it was determined that personal jurisdiction was proper because the defendant had "offices and personnel in New York" and was "regularly carrying on business in New York." *Aboujdid v. Singapore Airlines, Ltd.,* 494 N.E.2d 1055, 1060 (N.Y. 1986).

IV. The FSIA does not confer personal jurisdiction in state courts.

Even if Congress had the power to confer personal jurisdiction in state courts, the plain language of the FSIA does not do so. Lambert does not argue otherwise, preferring to ignore the key statutory provisions and refrain from any statutory analysis.

Section 1330 of Chapter 85 of Title 28 of the United States Code is part of the FSIA and is simply titled "Actions against foreign states." The statute expressly deals with jurisdiction over foreign states. The first subsection provides: "***The district courts*** shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a) (emphasis added).

The second provision of section 1330 specifically addresses personal jurisdiction: "***Personal jurisdiction*** over a foreign state shall exist as to every claim for relief over which ***the district courts*** have jurisdiction under subsection (a) and where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b) (emphasis added).

In other portions of the FSIA, Congress draws a clear distinction between state and federal courts, using the language "Courts of the United States and the States." *See, e.g.*, 28 U.S.C. §§ 1602, 1604. When Congress includes particular language in one section of the statute, but omits it in another section of the same act, "it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S.23, 29-30 (1997). If Congress intended, as part of the

FSIA, to confer personal jurisdiction in state courts, it would have provided so in Section 1330, which expressly regulates personal jurisdiction under the FSIA in federal district courts.

Thus, the plain language of the provision of the FSIA that expressly addresses personal jurisdiction does not confer personal jurisdiction in state courts. An analysis of personal jurisdiction must begin with the plain language of section 1330, and the analysis ends if the plain language is unambiguous. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Legislative history is not determinative if the plain language of the statute unambiguously indicates Congress's intent. *Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 93 (2007).

Since the plain language of the FSIA's personal jurisdiction provision confers personal jurisdiction on the district courts, but not state courts, section 1330 clearly demonstrates that Congress did not intend to confer personal jurisdiction in state courts, and Missouri's personal jurisdiction analysis governs.

Lambert cites a host of federal cases holding that, in federal court, there is a very simple formula for determining personal jurisdiction under the FSIA: "subject matter jurisdiction plus service of process equals personal jurisdiction." Lambert's Brief at 13. This formula has nothing to say about the analysis employed by this Court or any state court.

Sections 1602 and 1604 of Chapter 97 of Title 28 of the United States code respectively declare the purpose and findings of Congress and establish the general immunity of foreign states from courts of the United States and the States. Neither

section operates to confer personal jurisdiction. In section 1602, Congress found that claims of foreign states to sovereign immunity "should henceforth be decided by courts of the United States and the States in conformity with the principles set forth in this chapter." Section 1604 provides that, subject to existing international agreements, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to certain FSIA exceptions. The plain language of these sections allows both federal and state courts to determine if a foreign state may assert sovereign immunity pursuant to the FSIA.

Contrary to Lambert's suggestion, sections 1602 and 1604 do not purport to impose personal jurisdiction in state courts. The phrase personal jurisdiction does not appear in sections 1602-1611 of the FSIA. Rather, Congress' grant of personal jurisdiction is confined to section 1330. Like section 1330, sections 1602 and 1604 of the FSIA do not confer personal jurisdiction on state courts. Missouri courts properly apply their own personal jurisdiction analysis.

V. Lambert could not properly initiate its claims against ASA in a federal district court in Missouri.

Lambert's argument that ***any and every*** state court ***must*** exercise personal jurisdiction over a foreign state based on the foreign state's contacts with the entirety of the United States would unduly burden foreign states and state courts. The FSIA does not contemplate such an undue burden, and it even modifies venue requirements to prevent it in federal district courts. Specifically, in actions brought against foreign states, venue is only appropriate in districts with some relation to the dispute:

> (1) any district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
>
> (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
>
> (4) in the United States District court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1391(f).

As shown by the undisputed facts, ASA does not meet any of these criteria as to any federal district courts in Missouri. Thus, Missouri federal courts would not be proper venues for Lambert to commence its underlying claims against ASA. *See Shirobokova v. CSA Czech Airlines, Inc.,* 335 F. Supp. 2d 989 (D. Minn. 2004) (venue improper in a district where entity of a foreign sovereign was not doing business).

Congress recognized that the venue must bear some relationship to the claim. Thus, the FSIA outlines specific venues that are appropriate in federal court. Lambert's baseless interpretation of the FSIA offers no similar protection in state court. If, as Lambert contends, state courts cannot perform their own personal jurisdiction analysis, then foreign states must defend in any state court the plaintiff chooses, regardless of whether the court has any rational relationship to the cause of action. Lambert's

interpretation fails to consider the burden on the foreign state and the state court's interest in providing a forum. Such a result is untenable.

Surely, Congress did not intend to expressly limit the number of appropriate venues in federal court and simultaneously confer personal jurisdiction in ***any*** state court, regardless of the court's lack of any relationship to the dispute. If it had intended such an absurd result, Congress could have explicitly stated so in the FSIA. Lambert's request that this Court should impose this result by implication is unsupported.

CONCLUSION

Despite Lambert's argument to the contrary, a primary purpose of the FSIA is to make it ***difficult*** for private litigants to bring foreign governments into court, thereby avoiding affronting them. *See Shirobokova v. CSA Czech Airlines, Inc.,* 335 F. Supp. 2d 989, 990 (D. Minn. 2004). The FSIA, by its clear terms and as a function of its purpose, does not make it ***easy*** to sue a foreign sovereign in any and every state court. It certainly does not make personal jurisdiction in every state court automatic, while at the same time restricting the federal venues that are appropriate.

Under the plain terms of the statute, the personal jurisdiction provisions of the FSIA do not apply in state court. Missouri law does not permit the exercise of personal jurisdiction over ASA in light of the complete lack of contacts between ASA and this state. Accordingly, the Court should direct Respondent to dismiss the third-party petition as to ASA.

Respectfully submitted,

/s/ Jeffery T. McPherson

J. Kent Lowry #26564
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
Matthew J. Reh #49418
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, MO 63105
314.621.5070 (phone)
314.621.5065 (facsimile)
klowry@armstrongteasdale.com
tweaver@srmstrongteasdale.com
jmcpherson@armstrongteasdale.com
mreh@armstrongteasdale.com

ATTORNEYS FOR RELATOR

CERTIFICATE OF SERVICE

This document was filed and served through the Court's electronic notice system on August 31, 2012.

/s/ Jeffery T. McPherson

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 3,882, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

/s/ Jeffery T. McPherson