NO. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG

Petitioner,

–v–

CAROL P. SACHS

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEOFFREY BECKER
COUNSEL FOR THE RESPONDENT
BECKER & BECKER
1370 RELIEZ VALLEY ROAD
LAFAYETTE, CA 94549
(573) 751-8377
GEOFFREY.BECKER@COMCAST.NET

APRIL 2, 2014

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

An important fact that the petition does not recognize is the court's finding that the sale was ratified.

> "We also agree with Sachs that even if we were to conclude that the sale was originally unauthorized, this ratification of the pass by OBB gives it the 'effect as if originally authorized.' *Rayonier v. Polson,* 400 F.2d 909, 915 (9th Cir. 1968)." Petitioner's Appendix ("Pet.App.") 19-20, footnote 6.

> "Moreover, RPE's actual authority to sell the Eurail pass can be inferred from OBB's sale of the couchette bed upgrade to Sachs. Sachs could purchase the couchette upgrade only if she had a valid Eurail pass. Otherwise, she would have been required to purchase an entirely new ticket, not just an upgrade. If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have not duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized." Pet.App.19.

The question therefore is whether OBB carried on commercial activity in the United States when it ratified the sale that took place in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

REASONS TO DENY THE PETITION

I. THERE IS NOT A CONFLICT AMONG THE CIRCUITS AND THE NEED FOR UNIFORMITY WAS RECOGNIZED

Rule 10 of this Court provides that certiorari may be granted where there is conflict among the circuits that ought to be settled. The Ninth Circuit decision does not conflict with any other circuit decision regarding whether the purchase of a ticket from a travel agent in the United States creates a contract of carriage subjecting the state to federal court jurisdiction. In fact, the decision relies on *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964 and *Kirkham v. Societe Air France*, 429 F. 3d 288, 290, 291, 295 (D.C. Cir. 2005). The petition will have the court grant certiorari in order to displace years of precedent that a foreign state is not immune from federal court jurisdiction when it enters into a contract of carriage in the United States for travel abroad.

The Ninth Circuit acknowledged that "Congress passed the FSIA to promote uniformity in the treatment of foreign sovereign immunity, and because we think that Congress intended to permit suit in the United States against foreign sovereign common carriers that sell tickets in the United States through agents, we see no compelling reason to create a split with our sister circuits. *See Kelton Arms Condo. Owners Ass'n. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) (When a law is

"best applied uniformly, . . . we decline to create a circuit split unless there is a compelling reason to do so."). Pet.App.18.

A. No Conflict with *Nelson's* Definition of "Based On"

The petition suggests that *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993) supports the conclusion that Ms. Sachs' claims are not based on the railway's commercial activity in the United States because the negligence allegedly occurred in Innsbruck. *Saudi Arabia v. Nelson,* 507 U.S. 349, 357. The petition overlooks *Nelson's* reference to *Santos v. Compagnie Nationale Air France*, 934 F. 2d 890, 892-894 (7th Cir. 1991) and the fact that *Santos* cited *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964, upon which the Ninth Circuit relied. *Nelson's* definition of "based on" did not alter the thorough explanation of "based on" in *Santos*. *Santos* explained that in a personal injury case, an element of the claim is that the defendant owed the plaintiff a duty of care. *Id.* at 892-894. Proof of the duty of care is established by showing a passenger-carrier relationship which requires proof that a ticket or pass was purchased. Since proof of the ticket/pass purchase must be made in order for the plaintiff to prevail, the claim is based on the purchase which occurred in the United States. *Id.* at 892-894. In accord is *Kirkham v. Societe Air France*, 429 F. 3d 288, 290, 291, 295 (D.C. Cir. 2005). As clearly stated in *Barkanic*, once the contract of carriage herein was entered into in the United States, there was jurisdiction over the railway. *Id.* at 13.

In *Barkanic* and *Kirkham*, a travel agent over whom the foreign state did not exercise any control, sold the ticket in the United States. Here, the Eurail pass was sold to Sachs in the United States by the Rail Pass Experts. In *Barkanic*, the CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.–issued tickets for the passage of the decedents on the date in question. *Id.* at 14. The OBB acknowledged that the pass sold by the Rail Pass Experts allowed Ms. Sachs to board the train in Innsbruck and she could not have purchased the couchette upgrade without a valid pass.

II. *BANCEC* IS NOT A RELEVANT DECISION WITH WHICH THIS DECISION CONFLICTS

Rule 10 allows certiorari when the decision conflicts with relevant decisions of this court . *Phanuef* pointed out that *Bancec* is not a relevant decision by saying at footnote 3 that "We distinguish the issue here from the inquiry undertaken to determine whether an agency or instrumentality of a foreign state is the 'alter ego' of the foreign state." *Phanuef v. Indonesia* 106 F. 3d 302, 307 (9th Cir. 1997), cert. denied, 535 U.S. 987, *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 627-633, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) ("*Bancec*"). The issue here is not alter ego, the issue is whether a travel agent's sale of the

Eurail pass in the United States is the railway's commercial activity in the United States.

Bancec is also not relevant because it was not a commercial activity case, *Nelson* did not rely on it and *Nelson* certainly suggests, even if it does not specifically hold, that the state may carry on commercial activity through independent businesses not meeting the definition of "agency or instrumentality." *Bancec* is relevant only to the extent that it acknowledges that the FSIA is to be read consistently with principles of equity common to international and federal common law. *Id.* at 613.

III. WHETHER AN AGENT MUST MEET THE DEFINITION OF "AGENCY/ INSTRUMENTALITY" DOES NOT NEED TO BE SETTLED

Rule 10 allows certiorari when the court of appeal has decided an important question of federal law that has not been but ought to be settled by this court. or when the decision conflicts with relevant decisions of this court. Before addressing the argument that an agent of the state must meet the definition of "agency or instrumentality", it is necessary to point out that federal courts have been charged with the responsibility of determining on their own whether they have subject matter jurisdiction even if the parties conceded jurisdiction or made no contention concerning it. *California v. United States,* 215 F.3d 1009, 1015 (9th Cir. 2000) citing *Williamsport Area Sch. Dist.* 475 U.S. 534, 541

(1986). None of the circuits have suggested that OBB's reading is consistent with Congressional intent. 28 U.S.C. § 1602.

Overlooked by the petition is the fact that in *Nelson*, the court did not apply *Bancec* presumably because it was not a commercial activity case. *Saudi Arabia v. Nelson,* 507 U.S. 349. The Saudi Arabian government engaged the services of The Hospital Corporation of America, HCA, for the purpose of recruiting American citizens to work at the government owned hospital. The HCA was an independent corporation established in the Cayman Islands which, pursuant to an agreement with the government, recruited American citizens for employment at the government owned King Faisal Specialist Hospital in Riyad. *Id.* at 351-352. HCA was not an "agency or instrumentality" of the government, it was an independent corporation much like the Eurail Group was OBB's independent marketing arm in the United. As to the recruitment of Nelson by HCA in the United States and whether it was Saudi Arabia's commercial activity in the United States, the court stated, as follows:

> "Although HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the hospital, the District Court reasoned, it did not amount to commercial activity "carried on in the United States" for purposes of the Act. *Id.*, at 94-95." *Id* at 354.

Before this court could consider whether the claim in *Nelson* was based on commercial activity in the United States, it had to first be satisfied that

Saudi Arabia had carried on commercial activity in the United States. 28 U.S.C. § 1605(a)(2). The court of appeal in *Nelson* found that the recruitment and hiring were commercial activities of Saudi Arabia and the hospital and this court did not disagree. *Id.* at 355. The only matter about which this court and the court of appeal disagreed was whether the tort claim was "based on" the recruitment. Since the court found that the claim was not based on the recruitment, it necessarily follows that the court agreed the recruitment by HCA was Saudi Arabia's commercial activity.

Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384, 386 (2nd Cir. 2000) involved a commercial activity case arising from an act performed outside the United States having a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The defendant was an instrumentality of the Republic of China and the plaintiff was a German corporation referred to as TASK. TASK contracted the hiring of its vessels to VSL, which represented itself as the defendant's agent. VSL was not an "agency or instrumentality" of the defendant or the Republic of China. *Id.* at 386. Although the claim was not based on the act, the following language suggests that whether one must be an "agency or instrumentality" in order to carry on commercial activity does not need clarification:

> "Both the questions of whether the effect is enough to meet the statutory requirements and whether the necessary principal-agent relationship exists are complex. But we need not decide them. We will instead

> assume, for purposes of this opinion, that TASK has raised sufficient issues of fact as to each so that at this stage of the proceedings it is appropriate to act as if an 'effect in the United States' exists and as if there were the kind of principal-agent relationship between SFTC and VSL that would make that effect directly attributable to SFTC." *Id.* at 388-389.

In *Phaneuf v. Indonesia* 106 F. 3d 302, 308 (9th Cir. 1997), cert. denied, 535 U.S. 987, the question was whether the agent needed the sovereign's actual or apparent authority for purposes of the commercial activity exception, the Ninth Circuit disagreeing with the Second Circuit's *First Fidelity Bank* decision that apparent authority was sufficient. *First Fidelity Bank N.A. v. Government of Antigua and Barbuda–Permanent Mission*, 877 F. 2d 189 (2nd Cir. 1989). On its own, the Ninth Circuit could have found that the commercial activity exception did not apply even if the state's agent had its actual authority to bind it unless the agent met the definition of "agency or instrumentality" under the FSIA. Likewise, the Second Circuit did not find that an agent with apparent authority to bind the foreign state does not engage in commercial activity on behalf of the state unless the agent is a "agency or instrumentality" of the state. The denial of certiorari in *Phaneuf* certainly suggests that whether one must be an "agency or instrumentality" in order to be an "agent" is settled.

The sale in *Barkanic* was made by a Washington D.C. travel agent authorized by Pan Am to issue the

ticket and the sale herein was made by a Massachusetts travel agent authorized to issue the pass by the Eurail Group. Barkanic inferentially settles the issue relating to whether for purposes of the commercial activity exception, an agent must be an "agency or instrumentality" of the state. The CAAC in *Barkanic* was established by the Chinese government and it was authorized to arrange for transportation and to provide for it in China and the United States. *Id.* at 12. The arrangement for Barkanic's travel in China was not made by CAAC, it was made by its agents, Pan Am and the travel agent in Washington D.C. *Id.* at 12. Although CAAC was an agent of the state, Pan Am and the travel agent in Washington D.C. were not. CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.-issued tickets for the passage of the decedents on the date in question. *Id.* at 14. Certiorari was denied in *Barkanic* presumably because the court was satisfied that the sale in the United States by the agency of Pan Am and the Washington D.C. travel agent established FSIA jurisdiction even though they were not an "agency or instrumentality" of the CAAC. *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13 (2nd. Cir. 1987), cert den. 484 U.S. 964.

IV. OBB'S RATIFICATION MADE THE SALE ITS OWN

The Ninth Circuit concluded that OBB ratified the sale by RPE. Pet.App.20, footnote 6. When the ratification occurred, the sale in the United States became OBB's sale in the United States subjecting it to federal court jurisdiction. This decision does not need to be reviewed because it is entirely consistent with the definition of "commercial activity". (A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act). OBB's ratification sufficiently meets the definition of commercial transaction or act. Although OBB did not directly participate in the commercial transaction relating to the sale of the pass to Sachs, it engaged in a commercial act when it ratified the commercial transaction between RPE and Sachs.

The petition does not address what impact ratification has on the commercial activity exception presumably because OBB believes the common law of agency/ratification does not apply notwithstanding that fact the FSIA has its roots in the common law. Pet.App.10. Granting certiorari is not necessary to review whether RPE had to be an "agency or instrumentality" of OBB because when OBB ratified the sale it was as if OBB made the sale itself. Therefore, there is not a pressing need to decide the esoteric question as to whether OBB is exempt from the commercial activity exception unless the commercial activity is carried on by its "agency or instrumentality". The Ninth Circuit's conclusion regarding ratification and its impact on the

commercial activity exception is consistent with Congress' Findings and Declaration of Purpose in enacting the FSIA. 28 U.S.C. § 1602,

> "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activity is concerned . . . "

OBB does not suggest that under international law, when a state ratifies commercial activity it nevertheless is immune from jurisdiction of foreign courts. Nevertheless, it is asking for a grant of certiorari in order for this court to find that under the FSIA, the commercial activity exception does not apply even when the state ratifies commercial activity carried on in the United States for its benefit. Omitted from the petition is reference to The Findings and Declaration of Purpose which shows that the Congressional intent was not merely to devise standards to protect foreign states and their immunity claims. Allowing the court to determine jurisdiction under the FSIA was intended to protect the foreign state and litigants seeking access to the federal court. The Findings and Declaration of Purpose state the following:

> "The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts . . . " 28 U.S.C. § 1602.

OBB disagrees that Congress contemplated that the sale of tickets by travel agents within the United States for passage on foreign-sovereign owned common carriers would constitute commercial activity carried on in the United States by the foreign state. Pet.App.26-27. OBB's position, the court said, "would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that is what Congress intended." Pet.App.25. OBB says that the court offered no basis for this belief but it did when it relied on *Barkanic* and *Kirkham*. In response to the court's statement that "There is no reason to think that Congress intended such a chaotic result," OBB offered the following:

> "For example, if a foreign carrier undertakes to transport a passenger from or to the U.S., the carrier would have engaged in commercial activity 'in' the U.S. and be subject to suit here." Brief of Petitioner 21.

OBB's statement erroneously suggests that the mere undertaking of transport from or to the U.S. creates jurisdiction. It does not unless the undertaking occurred in the United States and there is the required nexus between the claim and the activity. If the undertaking occurred in Austria and the accident occurred there, there would not be jurisdiction even though transport to the United States was provided. Likewise, if the undertaking occurred in Austria and the accident occurred in the United States, jurisdiction might be based on act performed in the United States in connection with a commercial activity of the foreign state elsewhere but

it would not be based on the commercial activity exception. 28 U.S.C. § 1605(a)(2). In order for there to be jurisdiction under the commercial activity exception, there must be commercial activity in the United States and the claim must be based upon the commercial activity. 28 U.S.C. 1605 (a)(2).

CONCLUSION

For many years, the FSIA has been interpreted as allowing jurisdiction when the foreign state sells a ticket in the United States providing for travel that begins and ends abroad. *Barkanic v. General Admin. of Civil Aviation,* 822 F. 2d 11, 13, cert den. 484 U.S. 964. Accordingly, the petition ought to be denied.

Respectfully Submitted,

GEOFFREY BECKER
COUNSEL FOR THE RESPONDENT
BECKER & BECKER
1370 RELIEZ VALLEY ROAD
LAFAYETTE, CA 94549
(573) 751-8377
GEOFFREY.BECKER@COMCAST.NET

April 2, 2014