IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STATE ex rel. THE KANSAS CITY SYMPHONY,	)	
	)	
Plaintiff/Relator,	)	
	)	
v.	)	No. 06AC-CC01155
	)	
THE STATE OF MISSOURI,	)	
et al.,	)	
	)	
Defendants/Respondents.	)	

JUDGMENT

Introduction

The issue presented by this case is whether the Missouri legislature is bound by state statutes that proscribe how certain tax revenues will be spent. At issue in this lawsuit is Chapter 143 which provides that sixty percent of state income taxes collected from nonresidential professional athletes and entertainers are to be paid into the Missouri Arts Council Trust Fund (Arts Fund). The Legislature has generally ignored this funding obligation, choosing instead to spend the money elsewhere. Plaintiff Kansas City Symphony is one of the many organizations that rely on the Arts Fund for its funding. Plaintiff seeks a declaration that the Legislature is bound by Chapter 143 and an order requiring the State to pay the Arts Fund a calculated delinquency of $63,902,716.69, plus interest.

The State has filed a Motion for Judgment on the Pleadings and a Motion to Dismiss citing numerous legal grounds, including the claim that a state statute cannot

constitutionally limit how the Legislature appropriates public money and the claim that the State is protected in this lawsuit by sovereign immunity. The case was argued on August 26, 2008, and post argument briefs were submitted on September 15, 2008. Because the Court finds merit in the two cited claims, it is unnecessary to resolve the remaining grounds advanced by Defendants. For the reasons stated hereafter, the Court finds that judgment should be entered in favor of Defendants and against Plaintiff on all claims.

Sovereign Immunity

Plaintiff sues only the State of Missouri and the Missouri Legislature. This clearly raises the issue of sovereign immunity because the only two defendants are the State itself and an arm of the State. *State ex rel. Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). Sovereign immunity is not merely immunity from liability or the entry of a judgment, it is an immunity from suit. 687 S.W.2d at 181; *State of Ohio v. Missouri State Treasurer*, 130 S.W.3d 742, 744 (Mo. App. 2004). As a result, the State cannot be sued without its consent. Such consent, a waiver of sovereign immunity, can come only from the General Assembly. *State ex rel. Regional Justice Information Service Comm'n v. Saitz*, 798 S.W.2d 705 (Mo. banc 1990). Any such statutory waiver must be strictly construed. 130 S.W.3d at 744; *McNeill Trucking Co., Inc. v. Missouri State Highway & Transportation Comm'n*, 35 S.W.3d 846, 848 (Mo. banc 2001). The Court finds no language in § 143.183.5 RSMo 2007 Supp. which could reasonably be interpreted as an explicit waiver of sovereign immunity, particularly when the relief

sought is millions of dollars in a forced appropriation. Thus, as framed, the plaintiff's suit is barred by the doctrine of Sovereign Immunity.

Section 143.183.5 RSMo 2007 Supp.

Section 143.183.5 provides as follows:

> Notwithstanding other provisions of this chapter to the contrary, the commissioner of administration, for all taxable years beginning on or after January 1, 1999, but none after December 31, 2015, **shall** annually estimate the amount of state income tax revenues collected pursuant to this chapter which are received from nonresident members of professional athletic teams and nonresident entertainers. For fiscal year 2000, and for each subsequent fiscal year for a period of sixteen years, sixty percent of the annual estimate of taxes generated from the nonresident entertainer and professional athletic team income tax **shall** be allocated annually to the Missouri arts council trust fund, and **shall** be transferred from the general revenue fund to the Missouri arts council trust fund established in Section 185.100, RSMo, and any amount transferred **shall** be in addition to such agency's budget base for each fiscal year. (Emphasis added).

Perhaps hypnotized by the liberal use of the word "shall" in the above statute, Plaintiff believes either:

1) No appropriation by the Legislature is necessary to accomplish the transfer of funds contemplated by the statute; or

2) The Legislature is required to appropriate the money.

Plaintiff's interpretation and belief, however, run afoul of the Missouri Constitution.

This very issue was confronted by the Missouri Supreme Court over 100 years ago in *State ex rel. Fath v. Henderson*, 60 S.W. 1093 (Mo. 1901). In that case the legislature had created a separate fund by statute and directed that that the proceeds of a particular tax be paid into the fund and used for a particular purpose. A lawsuit followed when the Legislature subsenquently failed to follow through with the statutory directive. In

observing that one General Assembly cannot bind another, the Supreme Court concluded that the creation of a special fund or purpose is not an appropriation or disbursement , and a separate appropriation is still required to withdraw the money from the treasury, id. at pp. 1096-97. Moreover, the Supreme Court held that any money in the fund "still belongs to the state, and may be appropriated to another and different use," *id.*

The principles which governed the decision in the *Fath* case are equally applicable today.[1] The power and discretion over public moneys is conferred on the Legislature by Article III of the Missouri Constitution. Article III, Section 36 of the Constitution states:

> All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law.

Article IV, Section 28 provides that no money may be withdrawn from the treasury except by appropriation and that all appropriations expire within six months after the period for which they were enacted; Section 23 provides that appropriations may not be made for more than two years; finally, Article IV, Section 26 gives the Governor a line item veto power over any appropriation. Apart from the absence of textual support for Plaintiff's claim that Section 141.183 constitutes an appropriation, no statute can constitutionally qualify as an automatic or recurring appropriation without violating the aforementioned constitutional provisions The general revenue fund referenced by the statute is clearly part of the state treasury. An appropriation is required to remove these

moneys from the State Treasury. . *Mo. Health Care Assoc. v. Holden*, 89 S.W.3d 504, 508 (Mo. banc 2002). § 33.543 RSMo.

Thus, construing the statute as an automatic and continuing appropriation would violate: 1) Art. IV, § 26 of the Missouri Constitution which authorizes the Governor to make line item vetoes of appropriation bills; 2) Art. IV, § 23 providing that an appropriation cannot last for more than two fiscal years; and 3) Art. IV, § 28 providing that appropriations do not authorize incurring obligations after the expiration of the fiscal period and expire six months after the end of the fiscal period.

The legislative practice of enacting new taxes with a claimed promise to taxpayers as to how the money will be spent is all too common, bringing to mind the old axom, "Fool me once, shame on you; fool me twice, shame on me". Unfortunately, while there are many statutues with seeming "promises" by the Legislature as to how revenues from a particular tax will be spent, these "promises" are but empty words that have no legal consequence.[2]

Judgment and Order

For the foregoing reasons, the Court enters judgment in favor of Defendants and against Plaintiff on all claims.

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1 The policy underlying this constitutional principle is the Legislature must be free to respond to the needs of the times.

2 This pronouncement does not apply to revenues dedicated by provisions of the Missouri Constitution or federal law.

So ordered this 20th day of October, 2008.

Richard G. Callahan
Circuit Court Judge, Division II

Missouri Constitution or federal law.