A120945
STATE OF MINNESOTA
IN COURT OF APPEALS

Minnesota Break the Bonds Campaign, Bil'in Popular Committee Against the Wall and Settlements, Women Against Military Madness-Middle East Committee, Lucia Wilkes Smith, Margaret Sarfehjooy, Catharine Abbott, Barbara Hill, Polly Mann, Leona Ross, Sylvia Schwarz, Nadim Shamat, Sarah Martin, Robert Kosuth, Mary Eoloff, Nick Eoloff, Vern Simula, Cynthia Arnold, Newland F. Smith, III, Ronnie Barkan, Ofer Neiman, David Nir, Leehee Rothschild, Renen Raz, Dorothy Naor, Gal Lugassi, Boycott From Within, and David Boehnke,

Appellants,

vs.

Minnesota State Board of Investment,

Respondent.

APPELLANTS' BRIEF AND ADDENDUM

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LEGAL ISSUES

I. Do citizen taxpayers, pension plan beneficiaries with a direct stake in the investments made by the Minnesota State Board of Investment ("SBI") and others, including public interest organizations that include taxpayers and pension plan beneficiaries as their members, have standing to bring an action to restrain the SBI from unlawfully investing state retirement funds?

The District Court held that the plaintiffs had alleged no concrete injury in fact, that the lawsuit was based primarily on policy disagreements with discretionary decisions and that none of the appellants' interests fell within the zone of interest of the enabling legislation, notwithstanding the appellants' mostly undisputed allegations in the complaint that (i) 14 of the twenty three individually named plaintiffs are Minnesota taxpayers, (ii) five of them are actual pension plan beneficiaries of the funds invested by the SBI, (iii) the SBI's investments are funding international law violations against members of one of the organizational plaintiffs and (iv) the purpose of the appellants' declaratory relief action was to restrain the SBI from investing state pension funds both unlawfully and in breach of its statutory fiduciary duties to its plan beneficiaries and Minnesota taxpayers.

McKee v. Likins, 261 N.W.2d 566 (1977)

Sayer v. Minnesota Department of Transportation, 769 N.W. 2d 305 (Minn. App. 2009); aff'd, 790 N.W.2d 151 (Minn. Oct 28, 2010)

State by Humphrey v. Phillip Morris, Inc., 551 N.W.2d 490 (Minn. 1996)

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52 n. 2, 127 S.Ct. 1297 (2006)

II. Did the District Court Err in its Interpretation of Minn. Stat. § 11A.24?

The District Court held that the "plain and ordinary" meaning of Minn. Stat. § 11A.24, subd. (a)(5), recently renumbered as Minn. Stat. § 11A.24, subd. (a)(4),[1] authorizes the SBI to invest in Israel Bonds and that even if the statute is ambiguous the court should defer to the SBI's statutory "construction."

KSTP-TV v. Ramsey County, 806 N.W.2d 785 (Minn. 2011)

Amaral v. St. Cloud Hospital. 598 N.W.2d 379, (Minn. 1999)

Custom Ag Service of Montevideo, *Inc. v. Comm'r of Rev.*, 728 N.W.2d 910 (Minn. 2007)

St. Otto's Home v. Minn. Dep't of Human Services, 437 N.W.2d 35 (Minn. 1989)

Minn. Stat. §§ 11A.24

III. Do the political question and act of state doctrines prevent the court from adjudicating Counts II and III of the complaint?

The District Court held that both the political question and act of state doctrines

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[1] Recent amendments were made to Minn. Stat. § 11A.24 which became effective May 11, 2012. App. 111A, 132A-139A; Add. 22-26. Because the general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled on the case, references to the "international securities" clause at § 11A.24, subd. 6, will be to clause "(a)(4)" or the "international securities" clause, instead of to cl. "(a)(5)". See gen. *Interstate Power Company, Inc., v. Noble County Board of Commissioners,* 617 N.W.2d 566, 575 (Minn. 2000).

precluded the Court from adjudicating the matters raised in Counts II and III of the Complaint reasoning that it would require the District Court to determine whether a foreign sovereign's acts violated the Fourth Geneva Convention, notwithstanding that (i) the political question doctrine is not triggered by a question of the illegality of a foreign sovereign's acts, but is triggered when the resolution of the case demands an inquiry into the conduct of foreign affairs by the United States government and (ii) the act of state doctrine only applies to public acts by a foreign sovereign within its own territory and violations of *jus cogens* norms, as alleged in the complaint, are exempt from the act of state doctrine under the most current and weighty case authority.

Zivotosky v. Clinton, ---U.S.---, 132 S.Ct.1421, 182 L.Ed.2d 423 (2012)

Banco Nac'l de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)

Sarei v. Rio Tinto, PLC, 671F.3d 736 (9th Cir. 2011)

Lizarbe v. Rondon, 2009 WL 2487083 (D.Md. 2009)

IV. Do Counts II and III of the complaint state claims upon which relief can be granted?

The District Court held as a matter of law that since the SBI is "merely a purchaser of bonds," it lacked the requisite purpose to aid and abet any alleged international law violations and that the court was not bound by the Complaint's "conclusory assertions of intent", notwithstanding that Counts II and III of the Complaint alleged that the SBI was more than just a mere purchaser of bonds and alleged facts showing that the SBI's

investment in Israel bonds at a minimum met the civil "knowing and substantial assistance" standard for aiding and abetting under the Restatement (Second) of Torts, § 876(b).

Matthews v. Eichorn Motors, Inc., 800 N.W.2d 823 (Minn. App. 2011)

Sarei v. Rio Tinto, PLC, 671F.3d 736 (9th Cir. 2011)

Doe v. Exxon Mobile Corp., 654 F.3d 11 (D.C.Cir., 2011)

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244(2nd Cir. 2009), cert. denied*,* 131 S.Ct. 79 (2010)

STATEMENT OF THE CASE

This case originated with the Ramsey County District Court, Second Judicial District, Judge Margaret M. Marrinan presiding. The Complaint for Declaratory Judgment and Affirmative Relief set forth three separate counts and sought a declaration from the District Court that the Respondent, the Minnesota State Board of Investment (SBI), by investing in Israel Bonds, had i) exceeded its investment authority under Minn. Stat. § 11A.24, ii) violated its statutory duty to invest plan assets lawfully, and iii) violated the prudent person standard. App.1A-33A.[2]

The SBI moved to Dismiss the Complaint for lack of subject-matter jurisdiction

[2] References in the form "App." are to specified pages of the Appellants' Appendix and references in the form of "Add." are to specified pages of the Appellants' Addendum.

and for failure to state a claim upon which relief can be granted. App. 34A-35A. The appellants concurrently moved for summary judgment on Count I of their Complaint which alleged that the SBI had invested in Israel Bonds in excess of its investment authority under Minn. Stat. § 11A.24. App. 37A-87A. After hearing argument, the District Court granted the SBI's motion to dismiss and denied the appellants' motion for Summary Judgment (Add.1-17), adopting nearly verbatim the SBI's proposed findings of fact, conclusions of law and order for judgment. App. 140A-155A.

STATEMENT OF FACTS

The appellants are a diverse group of individuals and organizations comprised of at least five Minnesota state pension plan beneficiaries, an additional nine Minnesota citizens, Israelis, Palestinians, Christians, Jews, educators and community organizers and organizations who share the common purpose of promoting equality, justice and human rights for the indigenous Palestinian population in both the State of Israel and the occupied Palestinian territories. App. 2A-12A; Add.16. Respondent SBI is an agency of the State of Minnesota established pursuant to article XI, § 8, of the Minnesota Constitution, "for the purpose of administering and directing the investment of all state funds" which extends to include administering and directing the investment of all covered state pension and retirement plan funds. Minn. Stat. § 11A.02, subds. 2 and 4.

All investments undertaken by the SBI are governed by Minnesota Statutes,

Chapter 11A and Chapter 356A. App. 11A-12A, 49A. Pursuant to Minn. Stat. §§ 356A.02, 356A.04 and 356A.05, the SBI's Board members and its chief administrative officer are statutory fiduciaries who owe their fiduciary duties to the beneficiaries of the covered pension and retirement plan funds they administer. These statutory provisions hold the SBI to a prudent person standard and expressly obligate the SBI to select investment products and to invest plan assets "in a manner consistent with law." Minn. Stat.§ 356A.05(b).

Other than requesting a formal Attorney General Opinion more than 40 years ago to determine its authority to invest in Canadian corporate bonds, there is no evidence that at any time prior to January 31, 2011, when appellant Minnesota Break the Bonds Campaign ("MN BBC") first demanded that the SBI divest from Israel Bonds based on both moral and legal grounds, that the SBI ever obtained an advisory opinion from the Attorney General regarding any foreign bond investments, government or corporate. There is no evidence that the SBI has ever formulated any investment policies or guidelines regarding "international investments" in "governmental bonds." App. 110A, 113A-116A.

For nearly a year leading up to the filing of the Complaint and beginning on January 31, 2011 [App.59A], appellant MN BBC repeatedly demanded that the SBI divest from its Israel Bond investments. MN BBC informed the SBI that its multi-million dollar investments in Israel Bonds were not authorized pursuant to Minn. Stat. § 11A.24

and that monies invested in Israel Bonds were used by Israel to violate international law, but the SBI refused to divest and even increased its investments, contending that it had unrestricted investment authority to invest in the government bonds of any foreign government under the "international securities" clause at Minn. Stat. § 11A.24, subd. 6(a)(4) (2012). App. 39A-42A, 55A-87A, 89A-90A, 97A, 106A.

After first presenting its divestment demand to the SBI, MN BBC pressed the Attorney General's Office for an opinion. At a meeting on March 18, 2011, the Attorney General's Office admitted that reading the "international securities" clause at § 11A.24, subd. 6, in a manner that permits unrestricted investments in foreign government bonds meant that § 11A.24, subd. 2, imposes "more onerous" restrictions on the manner in which the SBI can purchase U.S. and Canadian bonds than the restrictions that would apply to the purchase of government bonds from an international pariah such as North Korea. App. 40A. In correspondence dated March 31, 2011, the Attorney General's Office further identified the "international securities" clause at § 11A.24, subd. 6, as a "general category." App. 69A. MN BBC advised the Attorney General's office that its acknowledgment that the "international securities" clause was a "general category" meant that under the principle of *ejusdem generis,* which is codified as a canon of construction at Minn. Stat. § 645.08(3), the type of "international securities" that could be purchased by the SBI were restricted to those types of investments described in the preceding subsections (clauses) of the subdivision, which would preclude the purchase of Israel

Bonds. Further, MN BBC's letter stated that if the statute was interpreted to permit investment in Israel Bonds, then the restrictions at subsection subd. 6(b)(3) would be inapplicable, compounding the absurdity by permitting 100% investment participation by the SBI in the government bonds issued by an international pariah like North Korea. App. 72A-73A.

In response to the appellants' summary judgment motion on Count One of the Complaint, the SBI submitted the affidavit of its executive director, Howard Bicker ("Bicker"). In his affidavit, Bicker stated that the "international securities" clause was added to the statute in 1988, that the SBI had drafted the "international securities" clause at § 11A.24, subd. 6, and that it had requested the legislation "to enable it to further diversify its holdings by the purchase of foreign . . .government debt, beyond the . . . government debt already authorized in other provisions of Minnesota Statutes Section 11A.24." Bicker also stated in his affidavit that he "understood" that the 1988 inclusion in the statute of the "international securities" clause at § 11A.24, subd. 6, authorized the SBI "to purchase foreign government bonds, beyond just Canadian government bonds." App. 89A.

In their Reply brief, the appellants objected to Bicker's affidavit on the grounds that his comments regarding the SBI's purpose in promoting the inclusion of the "international securities" clause and the legislative intent in passing it constituted

inadmissible opinion and hearsay which was also lacking in foundation.[3] The District Court never ruled on the objection, but stated in its conclusions of law that if the statute were ambiguous, the Court "defers to the SBI's construction that it is authorized to invest in bonds of foreign governments, including those of Israel." Add. 7-8.

Bicker attached a page from the SBI's 1988 Annual Report as Exhibit A to support the statements made in his affidavit. Exhibit A to Bicker's Affidavit actually described the 1988 legislation as follows:

> "The legislature approved the Board's request to add international securities as authorized investments for the funds under its control. Under the statute adopted by the Legislature, international investments *will be considered an alternative asset class.* Previously, the legislature authorized real estate, venture capital, resource fund investments and unrated debt as alternative assets (sic) classes.

(Emphasis added.) App. 93A. There was no mention of "government debt."

The SBI's annual reports have consistently identified real estate, private equity and resource funds, which parallel the first three clauses of Minn. Stat. § 11A.24, subd. 6(a), as "alternative assets." See SBI Annual Reports for 2002-2011 at http://www.sbi.state.mn.us/publications.html under subheading "Alternative Investment

[3] See, e.g., *Look v. Pact Charter School,* 763 N.W.2d 675, 680 (Minn. App. 2009).

Pool" under "Investment Pools."[4] The SBI's Annual Reports have never included governmental bonds in the "alternative asset" class. According to the SBI's Annual Reports, investments for any "alternative assets" investment "must involve at least four other investors" and the "SBI's participation in an investment may not exceed 20% of the total investment." Additionally, "investments in all alternative asset classes, including international securities, are capped at 35% of a fund." App.93A. These are the same investment restrictions that appear at Minn. Stat. § 11A.24, subd. 6(b), cl. 1-3.

Minn. Stat. § 11A.243 imposes restrictions on the SBI's investment in "scrutinized companies" with operations in the Sudan. Minn. Stat. § 11A.244 requires the SBI to take a series of steps to identify companies that do business in Iran, communicate with those companies and divest stock and bonds over a specified period of time if the companies continue their business activities in Iran. No part of Minn. Stat. §§ 11A.243 and 11A.244 specifically restricts the SBI from investing in the government bonds of either the Islamic Republic of Iran or the Republic of the Sudan. Similar to the statutory restrictions on the SBI's investments in "companies" that do business in Iran and Sudan, the SBI has adopted internal administrative policies that impose procedural restrictions on investments in "companies" domiciled in "Group II" countries but do not include any

[4] More recently, the SBI's Annual Reports have begun to refer to "yield-oriented" investments (which "typically provide a current return and may have an equity component" "such as subordinated debt investments and mezzanine investments") as "alternative assets."

procedures for investing in the government obligations of a "Group II" country.[5] A "Group II " country is one that has been cited by the U.S. State Department for workers and human rights violations that may lead to economic and social disruption which may have an adverse effect on its financial markets. Israel has been consistently rated by the SBI as a "Group II" country since the SBI began reporting on countries included in its International Program asset class target reviews in the 1990s. An active stock manager may only invest in "companies" domiciled in a "Group II" country if the manager believes that it would be a breach of fiduciary responsibility not to do so. If a manager chooses to make the investment in such a company, the manager must notify the SBI in writing. No similar justification and notification procedure permitting the SBI's managed funds to be invested in the governmental bonds of a Group II country are provided in the SBI's policy directives. App. 39A-40A, 52A-53A.

When the SBI reports on its international investments in its Annual Reports, it refers to its "International Stock Pool" and "international stock program." App. 39A-40A, 50A-51A . Its "Guidelines on International Investing" repeatedly refers to "stock investments" and "stock managers." App. 49A-50A. There is no mention of governmental bonds in the SBI's reports relating to international investments.

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[5] Minn. Stat. § 11A.24, subd. 5, authorizes the SBI to invest funds in the corporate stock of any corporation listed on an exchange that is regulated by an agency of the United States or of the Canadian National Government, regardless of the corporation's domicile.

ARGUMENT

I. THE APPELLANTS HAVE STANDING

An appeal from an adverse ruling on the issue of standing is reviewed *de novo.* *Olson v. State,* 742 N.W.2d 681, 684 (Minn. App. 2007).

Fourteen of the appellants are Minnesota citizens. Five of the fourteen are also plan beneficiaries. They all meet the requirements for taxpayer standing.[6] In denying them standing, the District Court erroneously characterized the appellant's case as based "primarily" on a "policy disagreement" best left to the legislature and the SBI to resolve, noting that "the bottom line here is that the plaintiffs object to the SBI investing in Israeli (sic) Bonds." Although the appellants strongly oppose the SBI's investment in Israel Bonds on moral grounds, their declaratory relief action never asked the court to decide whose policy, opinion or exercise of discretion it preferred. Taxpayer standing does not turn on the question of motive, but on the legal grounds for the relief requested. The authority to grant the type of relief requested by the appellants resides only in the courts, not in the legislature and not with the SBI.

Although citizen taxpayers are generally precluded from bringing lawsuits against

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[6] Not only is taxpayer standing an enduring part of Minnesota's common law (see *Rockne v. Olson,*191 Minn. 310, 254 N.W. 5, 6-7 (Minn. 1934)), state statutory provisions recognize that a breach of the SBI's fiduciary duties can be addressed by the remedies available at common law. See Minn. Stat. § 356A.09. The SBI's fiduciary duties are owed to the state, the taxpayers and the plan beneficiaries under § 356A.04. See generally *In Re Custody of DTR,* 796 N.W.2d 509, 512 (Minn. 2011) (standing may be conferred by statute or by appellant's status as aggrieved party).

governmental agencies based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law, they do have the right "to maintain an action in the courts to restrain the unlawful use of public funds."*McKee v. Likins,* 261 N.W. 2nd 566, 571 (Minn. 1977); see also *Sayer v. Minnesota Department of Transportation,* 769 N.W.2d 305, 308 (Minn.App. 2009) ("An individual has standing as a taxpayer to maintain an action to restrain a state from spending public money illegally."). The right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied.

The appellants did not complain that the SBI was wasting tax money by investing in Israel Bonds. See *Olson*, supra, at 742 N.W.2d at 684–85 ("[T]he line is drawn where a taxpayer seeks to challenge what the taxpayer perceives to be an illegal expenditure or waste of tax monies."). Concerns about liquidity, interest rates and return on investment were not part of their complaint. The appellants complained that the SBI is unlawfully investing state pension and retirement funds in Israel Bonds in excess of its investment authority under Minn. Stat. § 11A.24, its statutory obligation to Minnesota's taxpayers and state pension plan beneficiaries pursuant to Minn. Stat. § 356A.05 to make only lawful investments and its statutory fiduciary obligation under Minn. Stat. §§ 356A.02 and 356A.04 to make only prudent investments.[7]

[7] The prayer for relief in the Complaint specifically asked the Court to determine and declare that by investing in Israel Bonds, 1) the SBI had exceeded its investment authority, 2) the SBI had violated its statutory duty to invest plan assets lawfully, and 3)

Because at least one plaintiff had taxpayer standing, the standing requirement for all remaining plaintiffs should have been satisfied. Under stricter federal standing requirements, the presence of only one plaintiff with standing satisfies the standing requirement for all. See, generally, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc,* 547 U.S. 47, 52 n.2, 126 S.Ct. 1297 (2006) (holding that the presence of one party with standing satisfies the case-or-controversy requirement); *Arlington Heights v. Metro Housing Development Corp.,* 429 U.S. 252, 264, 264 n.9, 97 S.Ct. 555 (1977). There is no sound policy justification for holding otherwise.

Even if the presence of other plaintiffs with standing is insufficient to satisfy the standing requirement for all remaining plaintiffs, two of the organizational appellants, MN BBC and Women Against Military Madness - Middle East Committee, include Minnesota taxpayers as members and therefore qualified for associational standing. See, e.g., *State v. Humphrey v. Phillip Morris Inc.,* 551 N.W.2d 490, 493-498 (Minn. 1996); *Citizens for Rule of Law v. Senate Committee on Rules and Administration, et al.,*770 N.W.2d 169, 175 (Minn. App. 2009).

The remaining appellants all alleged personal interests in the legal dispute sufficient to ensure that they would vigorously and adequately present the factual and legal issues allowing them to participate as plaintiffs in the action. See *Lorix v. Crompton Corp.,* 736 N.W.2d 619, 624 (Minn. 2007) ("The primary goal of the standing

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the SBI had violated the prudent person standard.

requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented."). "Standing exists if, *among other things*, the party has suffered an injury-in-fact." *Krueger v. Zeman,* 781 N.W.2d 858, 861 (Minn. 2010) (emphasis added).

Appellant, Bil'in Popular Committee Against the Wall and Settlements is a particularly poignant example of the type of personal interests in the legal dispute that the appellants brought to the action which was more than sufficient to ensure that the issues would be adequately and vigorously presented. The Bil'in Popular Committee is comprised of Palestinian villagers in the occupied West Bank village of Bil'in who have suffered the full onslaught of Israel Bonds funded illegal settlement activities, including arbitrary military detention, death and illegal land expropriation. App. 2A-3A, 31A.

II. MINNESOTA STATUTE 11A.24 DOES NOT AUTHORIZE THE SBI TO INVEST IN ISRAEL BONDS

The interpretation and construction of a statute is a question of law the appellate courts review de novo. *Schatz v. Interfaith Care Center,* 811 N.W.2d 643, 649 (Minn. 2012).

Statutory interpretation begins with the plain language of the statute. The District Court understood the plain language requirement to mean that the term "international securities" could be "plainly" interpreted by narrowly focusing on its two component

words and applying random dictionary definitions and "common usage" to each. By essentially ignoring the cardinal rule of statutory construction that a statute is to be read as a whole and that each section of the statute should be interpreted in light of the surrounding sections to avoid conflicting interpretations, the District Court employed an unbridled construction of the term "international securities" in subdivision 6 that is so broad that it not only encompasses Israel Bonds within its sweep but engulfs just about every other conceivable type of investment that may cross an international border, rendering whole sections of Minn. Stat. § 11A.24 entirely superfluous and insignificant. See generally *Emerson v. School Board of Independent School District 199,* 809 N.W.2d 679, 681-84 (Minn. 2012); *KSTP-TV v. Ramsey County,* 806 N.W.2d 785, 788 (Minn. 2011); *Amaral v. St. Cloud Hospital.* 598 N.W.2d 379, 384 (Minn. 1999) (no word, phrase or sentence should be deemed superfluous, void or insignificant).

The plain language of Minn. Stat. § 11A.24 does not permit the SBI to invest in Israel Bonds. The inclusion of "international securities" at the end of the list of alternative investments at subdivision 6(a) can only be harmonized with subdivision 2 if it does not include "governmental bonds." Reading subdivision 6 to include any "governmental bonds," is an interpretation that is repugnant to the context of the statute.

Minn. Stat. § 11A.24 is divided into six subdivisions which specify the types of securities that the SBI is authorized to purchase. Each subdivision contains a heading listing the specific types of authorized investments within the subdivision. The specific

category of "governmental bonds" appears in subd. 2, following the heading in bold, "**Government obligations."** The plain meaning of subdivisions 2-5 repetitively express the clear intent of the legislature to restrict the SBI's authorized investments in **"Government obligations"** (which includes "governmental bonds"), "**Corporate obligations**" (i.e. bonds, notes and other evidence of indebtedness), "**Other obligations**" (i.e. bankers acceptances and deposit notes, commercial paper, certificates of deposit, mortgage securities, investment contracts and savings accounts) and "**Corporate stocks,"** to securities meeting U.S. and Canadian regulated exchange listing, issuance and incorporation requirements that are specifically stated in the subdivisions.

Although headings are not part of a statute, they are intended to indicate the contents of the section and are relevant in showing legislative intent when they are present in the bill during the legislative process. See, e.g., *Thompson v. Commissioner of Public Safety,* 567 N.W.2d 280, 283 (Minn. App. 1997). The headings for all seven subdivisions of § 11A.24 were present during the legislative process, including "**Other investments,"** the heading for subdivision 6, and are therefore relevant in showing legislative intent. See Add. 22-26; App. 134A-139A.

Courts that have examined the meaning of the word "other" in the process of discerning the plain meaning of a statute have generally determined that "other" means "different than." See, e.g., *FC Investment Group LC v. IFX Markets, Ltd.,* 529 F.3d 1087,

1100 (D.C. Cir. 2008) (RICO nationwide service of process provision's reference to "all other process" meant "process other than a summons of a defendant or subpoena of a witness. This interpretation, one which gives meaning to the word 'other' by reading sequentially to understand 'other' as meaning 'different from that already stated in [prior]. . . subsections gives coherent effect to all sections . . . without rendering any of the sections duplicative . . ."); *In Re. Tanguay,* 427 B.R. 663, 671(E.D. Tenn.) ("[T]he word 'other' is a word that connotes differentiation."). In *Custom Ag Service of Montevideo, Inc. v. Commissioner of Revenue*, 728 N.W.2d 910, 916-917 (Minn. 2007), the Supreme Court rejected an assertion that the term "other tax exempt farm machinery" included grain bins sold as components of a grain drying system because it ignored "*specific* statutory language that excluded grain bins from the definition of farm machinery in favor of *general* statutory language that includes unspecified agricultural 'machinery, equipment, implements, accessories and contrivances.'"

Applying these principles, under the plain meaning rule, the **"Other investments"** listed in § 11A.24, subdivision 6, including the "international securities" at subd. 6(a)(4), cannot include "governmental bonds" because "international securities" are different than **"Government obligations."** The District Court erred when it ruled that this interpretation of the interplay between these two subdivisions of § 11A.24 would render the "international securities" clause at subd. 6(a) meaningless because "the SBI could not

invest in non-Canadian . . . government securities." While it is true that the appellants' interpretation of this interplay means that the SBI cannot invest in non-Canadian foreign government bonds, including Israel Bonds, this would not render the "international securities" clause now at subd. 6(a)(4) meaningless. Rather, construing the "international securities" clause to permit unrestrained investment in government obligations, including governmental bonds, of any sort so long as they met the dictionary definition of "international" would render the express limitations in subd. 2 on investing in non-U.S. government bonds, other than Canadian Bonds, superfluous, unnecessary and meaningless.

When the "international securities" clause is read in a manner which only includes securities "different than" than those listed in the prior subdivisions, including subdivision 2, and only as an "alternative investment," the category to which it was assigned by the SBI in its 1988 Annual Report, the clause makes perfect sense. It has meaning if it is limited in scope to the three "alternative investment" clauses that precede it, since the plain meaning of the statute ensures that the type of "international securities" that are encompassed within current subd. 6(a)(4) are "different than" those included in the prior subdivisions.

This plain meaning of "international securities" is buttressed by the limitations on the "alternative investments" at subd. 6(b) of Minn. Stat. § 11A.24 which begins by stating that the "*investments authorized in paragraph (a)* must conform to the following

provisions" and then proceeds to list the limitations applicable to clauses (a)(1)-(3), but not (a)(4). It also squares with the SBI's pronouncements in its own annual reports that investments in "international securities" are limited to the restrictions at Minn. Stat. § 11A.24, Subdivision 6(b), which serves as an admission that the scope of subdivision 6(a)(4) is limited to the specific asset categories listed in the three immediately preceding clauses. Additionally, if subd. 6, paragraph (b) is read to exclude clause (a)(4) from its applicability, then not only is the meaning of "international securities" rendered ambiguous, but the failure to confine it within the list of "alternative investments" in clauses (a)(1)-(3) lends itself to absurd results.

Words and phrases in a statute must be read "to avoid absurd results and unjust consequences." *KSTP-TV v. Ramsey County,* supra, at 806 N.W.2d 788. To avoid the absurd result (admitted by the Attorney General's Office) of reading subdivision 6(a)(4) in a manner which imposes more onerous restrictions on the SBI's purchase of U.S. and Canadian bonds than the purchase of governmental bonds from a foreign pariah state, the plain and unambiguous language of Minn. Stat. § 11A.24 cannot permit the SBI to invest in Israel Bonds. Not applying the "alternative investment" restrictions at subd. 6(b) to the immediately preceding "international securities" clause at subd. 6(a)(4) and not confining the scope of subd. 6(a)(4) to the "alternative investments" in the preceding 3 clauses of subd. 6(a), which include no governmental bonds, would compound those absurd results. There would be no restriction on the SBI owning 100% of the market value of the

governmental bonds issued by the foreign pariah state, it could be the sole owner of those bonds and it could commit to 100% SBI participation.

Reading the plain and unambiguous language of Minn. Stat. § 11A.24 in a manner that does not permit the SBI to invest in Israel Bonds also complies with Minn. Stat. § 645.19 (the codification of the maxim of 'expressio unius est exclusio alterius') which states, "Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a statute shall be construed to exclude all others." Because this maxim limits the specifically enumerated subject of "governmental bonds" to those investments specified in Minn. Stat. § 11A.24, subd. 2, application of the subject of "governmental bonds" cannot be extended to other asset class subjects, including the "alternative investments" listed in subd. 6, by process of construction. See *Welfare of R.S. and L.S.,* 805 N.W.2d 44, 51 (Minn. 2011) ("Where a statute is clearly limited to specifically enumerated subjects, we do not extend its application to other subjects by process of construction."); *City of Moorhead v. Red Valley Cooperative Power Association,* 811 N.W.2d 151, 152-53 (Minn. App. 2012) (under doctrine of 'expressio unius,' fair market value was not proper measure of damages in eminent domain proceeding, but rather, the calculation of damages was limited to the four factors specifically enumerated in eminent domain provision in Public Utilities Act). Accordingly, the words "international securities" in subd. 6 cannot extend beyond the "governmental bonds" investment provisos and exceptions in subd. 2.

Even assuming that the term "international securities" as used in current subdivision 6(a)(4) is ambiguous, reading Minn. Stat. § 11A.24 in a manner that permits the SBI to invest in Israel Bonds violates the rule of construction, codified at Minn. Stat. § 645.26, subd. 1, that a specific statute governs over a general statute. See *Roehrdanz v. Brill,* 682 N.W.2d 626, 631 (Minn. 2004); *Ehlert v. Graue*, 195 N.W.2d 823, 826 (Minn. 1972) ("[W]here two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision."); *Cisar v. Slyter,* 812 N.W.2d 151 (Minn. App. 2012) (same). Because Minn. Stat. § 11A.24, subdivision 2 limits governmental bond investments to the entities specifically enumerated in subdivision 2, subdivision 6(a)(4) must be at least equally constrained. It is worth noting that the Attorney General's Office has admitted that the "international securities" clause is a "general category." App. 69A.

The District Court held that even if the statute were ambiguous, § 645.26, subd. 1, and its cousin, the doctrine of *ejusdem generis,* codified at Minn. Stat. § 645.08(3), would not apply because the "international securities" clause was added in 1988, after subdivisions 2-5 were enacted. In conflating these two somewhat different statutory provisions, the District Court got it wrong on both, completely avoiding any *ejusdem generis* analysis under § 645.08(3) and ignoring that part of § 645.26, subd. 1, that

permits the later enacted "general provision" to prevail only when the specific and the general provisions are *irreconcilable*.

If both doctrines had been appropriately applied, the unavoidable conclusion is that subd. 6(a)(4) is elegantly restricted under the doctrine of *ejusdem generis* to the preceding three clauses and the special "government obligations" subdivision limiting investment in "governmental bonds" to U.S. and Canadian bonds prevails over the admittedly general "international securities" clause at the tail end of subd. 6(a) because it is easily reconciled by the "different than" definition of the word **"Other"** in the heading to subd. 6. See, e.g., *Lefto v. Hoggsbreath Enters., Inc.,* 581 N.W.2d 855, 856 (Minn. 1998) (applying principle of *ejusdem generis* requires that "[g]eneral words are construed to be restricted in their meaning by preceding particular words"); *Goplen v. Olmsted County Support and Recovery Unit,* 610 N.W.2d 686,689 (Minn. App. 2000) ("Under the doctrine of *ejusdem generis*, the general wording of a statute must be interpreted to include only matters of the same kind or class as those specifically enumerated.").

As a final measure, the District Court erred by granting "judicial deference" to the SBI's "construction" of the statute when the SBI had never devised a formal policy nor secured any legal advice regarding its investments in non-Canadian foreign governmental bonds. The only agency construction was the SBI's flawed legal argument to the District Court which the court adopted whole cloth. This agency deference was grossly inappropriate because the decision turned on the meaning of words in a statute and the

statutory language at issue was not "technical." "When a decision turns on the meaning of words in a statute . . ., a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise." *St. Otto's Home v. Minn. Dep't of Human Services,* 437 N.W.2d 35, 39-40 (Minn. 1989) (citations omitted). See, e.g., *In re City of Redwood Falls,* 756 N.W.2d 133, 137 (Minn. App. 2008) (Deference may be appropriate "when '(1) the statutory language is technical in nature, and (2) the agency's interpretation is one of longstanding application.'") (cites omitted) (emphasis added). Since the words in the statute, "international securities," are not technical, which was confirmed by the District Court's resort to common dictionary meanings, deference to the SBI's interpretation was not due. The fact that the SBI may have decided long ago to begin violating Minn. Stat. § 11A.24, subd. 2, by purchasing non-Canadian foreign governmental bonds was not a relevant "agency interpretation of longstanding application" and should not have been considered.

Additionally, longstanding administrative procedures that are erroneous or contrary to the plain meaning of the law are not binding. *Twin Ports Convalescent, Inc. v. Minn. State Bd. Of Health,* 257 N.W.2d 343, 348 (Minn. 1977). Even assuming the language "international securities" is technical, when an agency asks the court to accept its "longstanding" administrative interpretation of a statute, it should show that it took a hard look at the issues and engaged in a reasonable degree of reflection. See, e.g., *Claim for Benefits by Meuleners,* N.W.2d 121, 123 (Minn. App. 2006) ("An agency's decision is

not supported by substantial evidence if there is a 'combination of danger signals that suggest . . . the decision lacks articulated standards and reflective findings.'"). The record of any hard look, reflective findings or articulated standards by the SBI is non-existent. The record is devoid of any facts showing that the SBI sought any opinion from the AG in discerning the scope of its statutory authorization to invest in any foreign bonds of any kind other than Canadian and there is no record of any internal administrative policy or guidance addressing investment in any non-Canadian foreign governmental bonds.

The District Court's order dismissing Count I of the complaint and denying the appellants' motion for summary judgment on Count I was in error. The Court of Appeals should reverse the judgment of the District Court and remand with directions to enter judgment for the appellants on Count I.

III. COUNTS II AND III WERE JUSTICIABLE

Justiciability is an issue of law that the appellate courts review de novo. *McCaughtry v. City of Red Wing,* 808 N.W.2d 331, 337 (Minn. 2011).

A. POLITICAL QUESTION DOCTRINE

The District Court dismissed Counts II and III of the Complaint based on the political question and act of state doctrines by concluding that it would be required to

"determine whether a foreign sovereign's acts have violated the Fourth Geneva Convention." The District Court erred.

The political question doctrine is not triggered by a question of the illegality under international law of a foreign sovereign's acts. It is triggered when resolution of the case demands an inquiry into the conduct of foreign affairs by the United States government. See *Sarei v. Rio Tinto, PLC,* 671F.3d 736, 756 (2011) (en banc) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." "The law to be applied emanates from international sources, and its application could call into question the actions of other nations. This case, however, in no way calls upon the courts to judge the conduct of foreign relations by the United States government. . . . This is not a case like ***Corrie*** [8] in which the United States government financed the conduct the plaintiffs sought to challenge." "Nor does the fact that [the Court] must look to international law create a political question. [cites omitted] An ATS suit, such as this one, requires courts to apply the law of nations, as manifested in customary international law integrated into the United States' common law."); *See also Donn v. A.W. Chesterton, Inc.,* —F.Supp.2d—, 2012 WL 288500, *8 (E.D. Pa.) ("[T]he fact that resolution of the merits of the case would have 'significant political overtones does not automatically invoke the political question doctrine.'").

[8] *Corrie v. Caterpillar, Inc.,* 503 F.3d 974, 982 (9th Cir. 2007).

A political question arises " . . . where there is 'a textually demonstrable constitutional commitment of the issue [in the lawsuit] to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotosky v. Clinton,*---U.S.---, 132 S.Ct.1421, 1427, 182 L.Ed.2d 423 (2012). In *Zivotosky,* the Supreme Court vacated the lower court's decision that dismissed a declaratory judgment action seeking an order directing the State Department to list "Jerusalem, **Israel"** as the place of birth on the passport of a United States citizen pursuant to the Foreign Relations Authorization Act. The D.C. Circuit had concluded that "only the Executive–not Congress and not the courts–has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem" and "how best to implement that policy." In vacating the decision, the Supreme Court noted that the courts "are not being asked to supplant a foreign policy of the political branches with the courts' own unmoored determination of what the United States policy toward Jerusalem should be. Instead, Zivotosky requests that the courts enforce a specific statutory right." *Id.*

Here, the District Court did not find that it was being asked to supplant the foreign policy of the political branches of the United States with its own unmoored determination of what the United States' policy toward Israel's continued unlawful settlement activities in the occupied Palestinian territories might be. Nor did the Court find that in any degree it was being asked to make any inquiry into the conduct of foreign affairs of the United States government.

Looking then to the United States Supreme Court for guidance, the appellants seemingly have a greater statutorily based right of action than the one brought by Zivotosky. Zivotosky directly challenged the State Department's policy refusal to stamp "Jerusalem, **Israel**" in his U.S. passport as his place of birth, whereas the appellants' challenge to the SBI's unlawful investment decisions is more closely moored to the United States' policy pronouncements regarding Israel's occupation activities in the Palestinian territories, including East Jerusalem. App. 21A-23A. And like Zivotosky's right of action under a federal statute giving him a claim, Minnesota taxpayers and covered plan holders have a right to challenge in court the SBI's failure to invest lawfully and prudently. See Minn. Stat. §§ 356A.09 and 356A.12.

A failure by the SBI to comply with the Fourth Geneva Convention arising from its investment in Israel Bonds is a failure to comply with its statutory obligation to only invest "in a manner consistent with law" pursuant to Minn. Stat. § 356A.05(b). See *Hamdan v. Rumsfeld***,** 548 U.S. 557, 626-27, 126 S.Ct. 2749, 2793-94 (2006) (alien could invoke Geneva Conventions to challenge procedures used by military commission in his trial; conventions were part of the law of war, and court-martial authority was required by statute to act in a manner consistent with the law of war). The Minn. Stat. § 356A.05(b) requirement that the SBI only invest "in a manner consistent with law" means that it should not violate ratified treaties and conventions like the Fourth Geneva Convention, either directly or vicariously, which are as much a part of the state's own laws as the

Minnesota Statutes. *Amaya v. Stanolind Oil & Gas Co.,* 158 F.2d 554,556 (5th Cir. 1947); *Froland v. Yamaha Motor Company, Ltd.,* 296 F.Supp2d 1004, 1007 (D.Minn. 2003).

The Minnesota Supreme Court has long held that the lawfulness of the SBI's fiscal decisions is subject to court review. See *Rockne,* supra, at 191 Minn. 310, 254 N.W. 6-7. It has also held that the courts not only possess the power but the duty to prevent treaty violations. *Minnesota Canal & Power Co. v. Pratt,* 101 Minn. 197, 231-33, 112 N.W. 395, 405-06 (Minn. 1907).

Because the case also involved a challenge to the SBI's exercise of its fiduciary duties, Minn. Stat. § 356A.12 provided an additional basis for the claim which neither required the Court to supplant any foreign policy of the United States nor even to ultimately decide whether Israel was violating the Fourth Geneva Convention. While Counts I and II specifically challenged the actions of the SBI in not acting in a manner consistent with law required pursuant to Minn. Stat. § 356A.05(b), Count III specifically challenged the actions of the SBI in not acting prudently by allegedly exposing the SBI (and the taxpayers) to the unnecessary and undue financial risk of litigation and liability under the federal Alien Tort Statute ("ATS").[9] The "prudent person standard" which directs the SBI's fiduciary investment decisions is essentially the same standard that is used under federal ERISA. Federal courts that have addressed the issue of undue risk under the ERISA statute have noted that prudence requires fiduciaries to divest their plans

[9] 28 U.S.C. § 1350.

from company stock when it becomes so risky that no prudent fiduciary, reasonably aware of the needs and risk tolerance of the plan's beneficiaries, would invest any plan assets in it, regardless of other assets in the plan portfolio. See, e.g., *Ford Motor Company ERISA Litigation,* 590 F.Supp.2d 883, 892-93 (E.D. Mich. 2008).

It warrants repeating that the appellants simply never called on the District Court to judge the conduct of foreign relations by the United States government. See *Lizarbe v. Rondon,* 2009 WL 2487083, *2 (D.Md. 2009) (No "political question" where "case does not have the potential of conflicting with any existing U.S. policy."). Even if it required the court to look at the law of nations, the appellants properly called on the District Court to judge the conduct of a state agency and to determine if that state agency had acted lawfully and prudently in its expenditure of public funds.

B. ACT OF STATE DOCTRINE

The "act of state" doctrine was also inapplicable. The act of state doctrine precludes courts from inquiring into the validity of the public acts a recognized foreign sovereign power commits within its own territory. *Banco Nacional de Cuba,* 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Israel's international law violations, which include *jus cogens* violations, violations the SBI is alleged to have aided and abetted, are being committed in the occupied Palestinian territories, which are outside of the internationally recognized territorial boundaries of Israel, a detail completely

overlooked in the District Court's dismissal order. [10]

The District Court's determination that the act of state doctrine barred the prosecution of Counts I and II was based entirely on a thinly reasoned single 2005 U.S. District Court case, also ironically involving Israel, that found that an allegation of a *jus cogens* violation does not preempt the act of state doctrine. See *Doe 1 v. State of Israel,* 400 F.Supp.2d 86, 111 (D.D.C. 2005). Although the more recent and far more influential *Sarei* decision with a diametrically opposite holding was provided to the District Court, the Court ignored it.

In *Sarei,* supra, at 671 F.3d at 757, the Ninth Circuit Court of Appeals plainly held that *jus cogens* violations of international law preempt the act of state doctrine.("*[J]us cogens* norms are exempt from the doctrine, since they constitute norms 'from which no derogation is permitted.'"); *Lizarbe v. Rondon,* 2009 WL 2487083, at *3 ("[V]iolations of customary international law are not acts of state for purposes of the doctrine.").

IV. COUNTS II AND III SUFFICENTLY STATED CLAIMS UPON WHICH RELIEF COULD HAVE BEEN GRANTED

When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, the question before an appellate court is whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of*

[10] See U.S. State Department territorial maps for the Palestinian Territories and Israel at http://www.state.gov/p/nea/ci/pt/ and http://www.state.gov/r/pa/ei/bgn/3581.htm.

Fifty Lakes, N.W.2d 226, 229 (Minn. 2008). "The standard of review is therefore de novo. The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true, and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 553 (Minn. 2003).

The District Court conflated the allegations in Counts II and III in dismissing them even though both Counts were based on separate and easily distinguishable theories of relief. Count II alleged that the SBI aided and abetted Israel's violations of Article 49 of the Fourth Geneva Convention. Count III was not dependent on confirming that the SBI had actually aided and abetted Israel's myriad international law violations, but that there were sufficient and reliable sources of information from reputable sources, including well-known international human rights organizations like Amnesty International and Human Rights Watch, pointing in that direction, exposing the SBI, the plan beneficiaries and the taxpayers to the risk and costs of lawsuits under the ATS. The question in Count III then was whether the SBI had acted prudently.

The District Court summarily disposed of both counts by making a factual finding that the SBI was "merely a purchaser of bonds" and it therefore "lacks the requisite purpose to aid and abet any alleged international law violations, as a matter of law." (Emphasis added.) Yet, the allegations in the complaint showed that the SBI was more than just a "mere" purchaser of bonds, that it had knowledge that its investments in Israel

Bonds provided substantial financial assistance to Israel in committing international law violations, especially its illegal settlement activities in the occupied Palestinian territories, and that it proceeded purposefully nonetheless in both investing and refusing to divest, even after it was presented specific information regarding Israel's use of Israel Bond funds. These allegations were more than sufficient to state a claim for aiding and abetting under the Restatement (Second) of Torts, § 876(b), the accepted civil standard in Minnesota courts for aiding and abetting liability. See, e.g., *Matthews v. Eichorn Motors, Inc.*, 800 N.W.2d 823, 830 (Minn. App. 2011) ("The Restatement (Second) of Torts legal standard . . . is consistent with . . . the ordinary meaning of aiding and abetting in a civil context . . . .").

The District Court erroneously elevated the proof bar beyond any reasonable reach in holding that "it must be shown that the SBI acted with the purpose of assisting international law violations, and that it has the right and ability to control the country's alleged conduct." (Emphasis added.) Add. 13. Other than citing to the federal Second Circuit decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 247 (2nd Cir. 2009), *cert. denied,* 131 S.Ct. 79 (2010), the District Court cited no other authority in support of this stratospheric proof requirement. Worse, this unreasonable standard was not even the standard that was set by the Second Circuit in the *Presbyterian Church of Sudan* decision. It did not include the requirement that it must be shown that an aider and abettor had "the right and ability to control the country's alleged conduct." Nor

did the District Court acknowledge any of the divergent views that currently exist in the federal courts regarding the correct *mens rea* standard for aiding and abetting or even acknowledge the Restatement (Second) of Torts, § 876(b), Minnesota's own civil standard.

For example, in *Doe v. Exxon Mobile Corp.,* 654 F.3d 11, 39 (D.C.Cir., 2011), the U.S. Court of Appeals for the D.C. Circuit more recently held that the "knowledge" standard for "aiding and abetting" under federal common law, consistent with the decisions of cases from the Nuremberg trials, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), is the appropriate standard. Similarly, in *Sarei,* the Ninth Circuit held that "*purposive* action in furtherance of a war crime constitutes aiding and abetting that crime." (Emphasis added.) Circuit Judge Pregerson, who concurred in part and dissented in part in the *Sarei* decision, disagreed with the majority's acceptance of a *mens rea* standard of 'purposive action in furtherance of a war crime,' reserving for another day a decision as to whether merely knowledge is sufficient." In arguing that the knowledge standard reflects universal customary international law, Judge Pregerson expressed his belief that "we can hold with confidence that knowledge that one is assisting unlawful activity is the applicable *mens rea* standard for aiding and abetting liability for war crimes

. . . ." *Sarei,* supra, at 671 F.3d at 772-74.[11] The District Court simply ignored these cases and applied an elevated standard that was not supported by authority.

Regardless of the final resolution of the appropriate *mens rea* standard, the appellants alleged sufficient facts showing a heightened level of knowledge by the SBI bordering on the intentional or reckless, which is more than sufficient to satisfy the Minnesota standard adopted from the Restatement (Second) of Torts, § 876(b), and the most recent "purposive" and "knowledge" standards that are currently being used in the federal courts. The Complaint, *inter alia,* alleged the following:

> a) That on January 31, 2011, MN BBC demanded that the SBI divest from Israel Bonds on moral and legal grounds. On March 18, 2011, MN BBC presented its legal and moral arguments to the SBI why it should divest from Israel Bonds. App. 13A-14A.
>
> b) That on November 29, 2011, the plaintiffs served the instant Complaint on the SBI which includes extensive reference to Israel's myriad and numerous international law violations and explains how investment in Israel Bonds helps to fund those violations. App. 1A.
>
> c) That the International Committee of the Red Cross, the International Court of Justice and the United Nations Security Council have all determined that

[11] A petition for a writ of certiorari is now pending in the Supreme Court from the *Sarei v. Rio Tinto* decision. See 80 BNA USLW 3335 (Nov. 23, 2011) (No. 11-649).

Israel has violated and is violating Article 49 of the Fourth Geneva Convention. App. 16A-22A.

d) That various reputable international organizations and tribunals have repeatedly cited and condemned Israel's myriad and numerous international law and human rights violations. App. 26A-31A.

e) That proceeds from the sale of Israel Bonds are used to support and promote illegal settlement activities which violate international law and human rights, that the United States has reduced the amount of its loan guarantees by amounts equal to Israel's estimated spending on settlement construction in the occupied Palestinian territories, that Israel's settlement activities are inconsistent with U.S. foreign policy and U.S. public laws and that Israel has continued to sell Israel Bonds without the security of U.S. loan guarantees in order to continue to finance its unabated, accelerated and unlawful settlement activities. App. 12A-13A, 17A-18A, 22A-24A.

f) That despite universal public condemnation of Israel's unlawful settlement enterprise and with full knowledge that Israel Bond funds are being used by Israel for unlawful settlement activities, with extraordinary impunity, including the willingness to violate the Minnesota statute which restricts investments in "Government obligations," the SBI continues to knowingly, willingly and purposively provide direct material support and financial aid to Israel

for these unlawful purposes by investing in Israel Bonds and refusing to divest them from its portfolio. App. 11A-13A, 23A-24A, 31A-32A.

The question that the District Court should have asked is this. If the SBI knows that the millions of dollars it has given to the Government of Israel in violation of state law for the purpose of showing political and financial solidarity will be used in part to fund that government's involvement in war crimes, is this sufficient to support a claim of aiding and abetting?

The appellants agreed with the SBI's contention that "simply doing business with a state or individual" did not create liability, but argued to the District Court that such facts did not constitute the allegations in the Complaint. See *Doe v. Nestle,* 748 F.Supp.2d 1057, 1098-99 (C.D. Cal. 2010) ("[M]erely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law."), citing *In Re South African Apartheid Litig.,* 617 F.Supp.2d 228, 269 (S.D.N.Y. 2009) (emphasis added). In *Doe v. Nestle,* the U.S. District Court for the Central District of California found the plaintiffs' allegations that the defendants provided money to farmers for the purpose of obtaining cocoa and to ensure a future cocoa supply was insufficient to show that the defendants aided and abetted the farmers' use of slave labor and forced child labor. *Id.* at 1099-1103.

The Complaint sufficiently alleged more than a simple commercial transaction, looking only to a financial return on investment. This was not a simple money for cocoa

deal. The SBI's multi-million dollar purchases of Israel Bonds were willfully made to show political solidarity with Israel (a qualitatively different act than a simple and benign commercial transaction). The SBI broke the law by investing in governmental bonds other than those authorized by Minn. Stat. 11A.24, subd. 2, to show its political solidarity with Israel. App. 15A. Israel openly sells its government bonds to supporters to raise money for illegal settlement purposes (which is qualitatively different than a prospectus for a private restaurant chain, cocoa collective or even an oil company doing business in Iran, the Sudan or Nigeria). App. 23A. Israel has been universally condemned for its continuing international law and war crimes violations (including condemnation from the United States government for its illegal settlement activities). App 16A-31A. The SBI gave the substantial bounty in the millions of dollars to Israel with full knowledge that a significant portion of the money would be used for unlawful settlement activities. App. 23A-24A, 25A, 31A-32A. A portion of the money has been used for such war crimes to the injury of the local indigenous population. App. 17A-31A. And repayment of the monies may not be guaranteed by the United States for this very reason. App. 22A-23A.

This constitutes knowing and substantial assistance sufficient to more than satisfy the requirements of the Restatement (Second) of Torts, § 876(b), which is also among the "well settled theories of vicarious liability under federal common law." *Sarei,* supra, at 671 F.3d 771 (concurring opinion of Judge Reinhardt). ("This standard provides that for a defendant to incur liability, '(1) the party whom the defendant aids must perform a

wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."), citing *Halberstam v. Welch,* 705 F.2d 472, 477 (D.C. Cir. 1983). The allegations in Count II and III surpassed this standard.

Considering only the facts alleged in the complaint, accepting those facts as true, and construing all reasonable inferences in favor of the appellants, the District Court's dismissal of Counts II and III for failure to state a claim was in error. It should be reversed and the case remanded to the District Court for further proceedings.

CONCLUSION

The appellants have standing. The purpose of the Complaint was to restrain the SBI, a state agency, from unlawfully expending state funds. The appellants are taxpayers, state pension plan beneficiaries, persons directly injured by the international law violations financed with Israel Bonds and others, all of whom have personal interests in the legal dispute sufficient to ensure that the issues will be adequately and vigorously presented.

This Court should reverse the judgment of the District Court dismissing Count I and remand the case with directions to enter judgment for the appellants on Count I of the

Complaint. The plain language of Minn. Stat. § 11A.24, as well as proper statutory interpretation, all confirm that the SBI is not authorized to expend state funds to buy Israel Bonds.

This Court should reverse the judgment of the District Court dismissing Counts II and III of the Complaint and remand the case for further proceedings. Both Counts are justiciable, they do not implicate the act of state and political question doctrines and they sufficiently state claims for declaratory relief.

Respectfully submitted,

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