STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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SUBJECT: Minnesota Break the Bonds Campaign, et al. v. Minnesota State Board of Investment
Court File No. 62-CV-11-10079

TRANSMISSION BY FACSIMILE

NUMBER OF PAGES (including cover page): 12

COMMENTS:

Enclosed please find:
1) Filing and Service Letter
2) Defendants' Reply Memorandum of Law In Support Of Motion to Dismiss.
Copies to follow by United States Mail.

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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February 28, 2012

Hand Delivered

Court Administrator
600 Ramsey County Courthouse
15 Kellogg Boulevard West
St. Paul, MN 55102

Re: *Minnesota Break the Bonds Campaign, et al., v. Minnesota State Board of Investment*
Court File No. 62-CV-11-10079; Judge Margaret M. Marrinan

Dear Court Administrator:

Enclosed for filing please find:

1. Defendant's Reply Memorandum Of Law In Support Of Motion To Dismiss;

2. Affidavit of Service by Facsimile and United States Mail.

Courtesy copies of the above documents are being delivered to the Honorable Margaret M. Marrinan.

Also by copy of this letter, service is being made upon counsel for Plaintiffs by facsimile and U.S. Mail.

Sincerely,

KRISTYN ANDERSON
Assistant Attorney General

(651) 757-1225 (Voice)
(651) 282-5832 (Fax)

Enclosures
cc: The Honorable Margaret M. Marrinan (w/encs.) (hand delivered)
Jordan S. Kushner (w/encs.) (via fax and U.S. Mail)
Bruce D. Nestor (w/encs.) (via fax and U.S. Mail)
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AG: #2966038-v1

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Court File No. 62-CV-11-10079
Judge Margaret M. Marrinan

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, Lehee Rothschild, Renen Raz, Dorothy Naor, Gal Lugassi, Boycott From Within and David Boehnke,

Plaintiffs,

vs.

Minnesota State Board of Investment,

Defendant.

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendant demonstrated in both its Memorandum in support of its Motion to Dismiss and its Memorandum in opposition to Plaintiffs' summary judgment motion, that the SBI has the clear authority to invest in foreign government bonds, including bonds issued by Israel. Plaintiffs' incorrect use of cannons of construction does not support a contrary conclusion. Plaintiffs' claims are also non-justiciable and fail to state a claim for aiding and abetting alleged international law violations. Plaintiffs' Complaint must be dismissed in its entirety.

ARGUMENT

I. THE ALLEGATIONS IN THE COMPLAINT DEMONSTRATE THAT PLAINTIFFS LACK STANDING.

The real dispute raised by Plaintiffs in this case is a policy disagreement with the discretionary decisions made by the Legislature and the SBI. This lawsuit cannot redress the injuries they rely upon for standing. Indeed, Plaintiffs' actual interest in this case is set forth in Paragraph 2 of their Complaint:

> Members of MMBBC believe that the citizens of Minnesota, through their governmental representatives, have the moral obligation to make sound investments that will not aid the oppression of any race, creed or people.

(Compl. ¶ 2.)

Policy disagreements, no matter how deeply felt, do not confer standing. *See St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 589-90 (Minn. 1977) (citizen with policy dispute "must take its case to the legislature"). Even when a taxpayer's challenges to state action are "'based primarily on [the taxpayer's] disagreement with policy or the exercise of discretion by those responsible for executing the law,' they are insufficient to confer standing." *Olson v. State*, 742 N.W.2d 681, 685 (Minn. Ct. App. 2007), quoting *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App. 2004), *rev. denied* (Minn. Oct. 19, 2004) (finding no taxpayer standing where challenges were based on policy disagreements).[1]

Ultimately, the authority to make social, political and economic policy decisions of the sort Plaintiffs request in this lawsuit resides with the Legislature and the SBI, not this Court. *See Westling v. County of Mille Lacs*, 581 N.W.2d 815, 822 (Minn. 1998) (noting that "social policy decisions are committed to the legislature"), *cert. denied*, 525 U.S. 1105 (1999).

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[1] To the extent Plaintiffs rely on taxpayer standing, the non-resident Plaintiffs cannot even claim that as a basis for their standing.

II. DEFENDANT HAS SHOWN THAT IT IS AUTHORIZED TO PURCHASE ISRAEL BONDS.

Defendant demonstrated in both its Memorandum in support of its Motion to Dismiss and its Memorandum in opposition to Plaintiffs' Motion for Summary Judgment on Count One that the plain language of Minn. Stat. § 11A.24, subd. 6(a)(5) authorizes the SBI to purchase foreign government bonds. Plaintiffs' arguments to the contrary in their responsive memorandum to this Motion are simply repetitive of their arguments in their summary judgment memorandum, and are likewise unavailing.

Plaintiffs' citations to cannons of statutory construction are inapplicable because Subdivision 6(a)(5) is plain on its face. (See Def.'s Response Mem. Summ. J., pp. 6, 9.) Moreover, as discussed in Defendant's response to Plaintiffs' summary judgment motion (pp. 6-9), *ejusdem generis* does not apply for several other reasons, including that Subdivision 6(a)(5) was added after the supposedly more specific provisions cited by Plaintiffs. *See* Minn. Stat. § 645.26, subd. 1 (specific provision does not control the general provision where general provision was enacted at a later session). *Compare* Minn. Laws 1980, ch. 607, art. 14 § 22 *with* Minn. Laws 1988, ch. 453, § 8 (adding subdivision 6(a)(5)).

In addition, as discussed in Defendant's memorandum in opposition to summary judgment (pp. 9-10), contrary to Plaintiffs' argument, it is Plaintiffs' construction that would lead to unreasonable and absurd results. Namely, Plaintiffs' construction conflicts with the SBI's interpretation of its own statute, would deprive the SBI of the ability to comply with its statutory duty to diversify its investments, Minn. Stat. § 356A.06, subd. 2, and would require the

divestment of millions of dollars of current investments in the bonds of non-Canadian foreign countries.[2]

Plaintiffs' Count I should be dismissed.

III. PLAINTIFFS' COUNTS II AND III ARE NOT JUSTICIABLE.

As discussed in Defendant's initial memorandum (pp. 7-9), the political question doctrine "is based upon respect for the pronouncements of coordinate branches of government that are better equipped and properly intended to consider issues of a distinctly political nature." *Doe I v. State of Israel*, 400 F. Supp.2d 86, 111 (D.D.C. 2005). The act of state doctrine is a rule of law that "prevents a U.S. court 'from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of United States, foreign, or international law) of official action by a foreign sovereign performed within its own territory.'" *Malewicz v. City of Amsterdam*, 517 F. Supp.2d 322, 336-7 (D.D.C. 2007) (citations omitted). The Court should dismiss Counts II and

[2] Contrary to Plaintiffs' assertion (Pls.' Response Mem. Mot. Dism., p. 31, n. 8), the Court may take judicial notice of the SBI's prior and current holdings, which are public records that are publicly available. *See, e.g., Minnesota Majority v. Mansky*, 789 F. Supp.2d 1112, 1123, n.8 (D. Minn. 2011) (taking judicial notice of publically available voting-age population statistics taken from Virginia Division of Legislative Services website on a motion to dismiss pursuant to 12(b)(6)). Additionally, the SBI's holdings show its consistent interpretation of Subdivision 6(a)(5) to authorize its purchase of non-Canadian foreign government bonds, which is entitled to deference by this Court. *See In re Minnesota Power*, 807 N.W.2d 484, 488 (Minn. Ct. App. 2011), *rev. granted* (Minn. Feb. 14, 2012) (finding that "'judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.'").

III based upon these doctrines.[3]

Doe I v. State of Israel is directly on point. There, plaintiffs sued the State of Israel and Israeli officials under the Alien Tort Claims Act. The court found that the plaintiffs' claims would have required it to determine that Israeli settlement activities are illegal or tortious. *Id.* at 112. The court found that any such determination was precluded both by the political question and act of state doctrines, rendering the case non-justiciable. 400 F. Supp.2d at 111-114. In deciding that the political question doctrine applied, the court stated:

> [Such a decision] is a foreign relations determination to be made by the Executive or Legislative Branches, and the Court would usurp the roles of those coordinate branches if it were to intrude. Such a conclusion would also implicitly condemn American foreign policy by suggesting that the support of Israel is wrongful. Conclusions like these present a potential for discord between the branches that further demonstrates the impropriety of a judicial decision on these quintessential political issues.

Id. at 112.

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[3] Plaintiffs ask this Court to presume that Israel's acts are unlawful simply based on the allegations in their Complaint. (Pls.' Response Mem. Mot. Dism. pp. 28-29.) Such a presumption is unfounded. First, the act of state doctrine creates a presumption that a foreign sovereign's acts are valid. *Doe I v. State of Israel*, 400 F. Supp.2d at 113. Second, Plaintiffs' allegations are in the nature of legal conclusions or conclusory assertions which are not deemed to be true for purposes of this Motion. *See Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that legal conclusions in the complaint are not binding on the court, and the plaintiff "must provide more than labels and conclusions"). Third, Plaintiffs have failed to show that any action of an international organization is enforceable by American courts. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 511, 518 (2008) (rejecting notion that International Court of Justice interpretations or decisions were intended to be enforceable by American courts); *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976) (finding U.N. Security Council resolution did not confer rights enforceable in American courts); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311-12 (E.D.N.Y. 1995) (finding no private right of action for violation of U.N. Security Council resolution). Indeed, Plaintiffs' argument implicates the very concerns which make this case non-justiciable under the political question and act of state doctrines.

The *Doe I* court also concluded that the act of state doctrine applied, stating "[t]he actions challenged by plaintiffs are classic acts of state." *Id.* at 113-114. The court rejected the argument, similar to the argument made by Plaintiffs, that the act of state doctrine does not apply because of allegations of *jus cogens* violations. *Id.* at 114 ("The fact that plaintiffs have alleged *jus cogens* violations does not change things. Within our territorial borders, the law of the United States is paramount, under which the law of nations does not preempt the act of state doctrine even if the conduct at issue allegedly violates international law."). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431 (1964) ("[T]he act of state doctrine is applicable even if international law has been violated."). Instead, the court concluded that a determination of such violations "would offend notions of international comity and sovereignty" and declined jurisdiction based upon the act of state doctrine. 400 F. Supp.2d at 114. *Accord Corrie v. Caterpillar, Inc.*, 403 F. Supp.2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (finding act of state doctrine precluded aiding and abetting claims based on allegations that Israel's official policy violated international law).[4]

Since both the political question and act of state doctrines apply to this case, Counts II and III should be dismissed.

[4] Plaintiffs' citation to *Sarei v. Rio Tinto*, ___F.3d ___, 2011 WL 5041927 (9th Cir. Oct. 25, 2011), *pet. for cert. filed*, 80 BNA USLW 3335 (Nov 23, 2011), is inapposite. There, the court found that the case did not involve the potential for interference in the conduct of foreign affairs or notions of international comity since the foreign government at issue had sent a letter to the court urging it to hear the lawsuit. *Id.* at *16.

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM THAT THE SBI COULD EVER BE LIABLE FOR AIDING AND ABETTING ALLEGED INTERNATIONAL LAW VIOLATIONS THROUGH ITS PURCHASE OF ISRAEL BONDS.

Even if Plaintiffs' claims were justiciable, the cases cited by Defendant in its initial memorandum are dispositive of this issue. (See Def.'s Mem. Mot. Dism., pp. 9-10.)

For example, in *Corrie v. Caterpillar, Inc.*, the plaintiffs claimed that Caterpillar was liable under the Alien Tort Claims Act for aiding and abetting Israel's alleged international law violations committed using the Caterpillar bulldozers sold to the Israeli army. The plaintiffs asserted that since Caterpillar knew or should have known that the bulldozers would be used to commit violations of the Geneva Conventions, it was guilty of aiding and abetting those violations. 403 F. Supp.2d at 1023-24. The court rejected this argument, stating that "[a] theory of accessory liability does not obtain in this case because there is no allegation of the right or ability to control the Israeli soldiers' conduct." *Id.* at 1027. The court concluded that "Plaintiffs' claim of aiding and abetting fails because where a seller merely acts as a seller, he cannot be an aider and abettor. . . ." *Id.*[5]

Multiple courts have come to the same conclusion that simply doing business with a country cannot form the basis for an aiding and abetting claim. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2nd Cir. 2009), *cert. denied*, 131 S. Ct. 79 & 131 S. Ct. 122 (Oct. 4, 2010) (dismissing claim that corporation aided and abetted violations of international law by simply doing business with Sudan, and stating that any other conclusion would allow "private parties to impose embargos or international sanctions through civil actions

[5] The court also noted that since the United States government has not restrained trade with Israel in any manner, a contrary conclusion by the court would "impinge directly upon the prerogatives of the executive branch of government." *Id.* at 1032.

in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations."); *Rothstein v. UBS AG*, 647 F. Supp.2d 292 (S.D. N.Y. 2009) (granting motion to dismiss claim against international bank that bank's funds indirectly facilitated international law violation, and reasoning that bank loans were not significant source of funds to government, and the money could be used for multiple legitimate uses); *In re South African Apartheid Litig.*, 617 F. Supp.2d 228, 257-258, 269 (S.D. N.Y. 2009) (dismissing aiding and abetting claims and stating that "[i]t is (or should be) undisputed that simply doing business with a state or individual" is insufficient to create aiding and abetting liability).

As a matter of law, the State does not aid and abet any alleged international law violations by the simple act of purchasing a foreign country's bonds.[6] As a result, Counts II and III must be dismissed for this reason as well.[7]

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[6] Plaintiffs erroneously argue that the Complaint should not be dismissed because they have alleged sufficient intent by the SBI to support aiding and abetting liability. (Pls.' Response Mem. Mot. Dism., pp. 28-30.) First, Plaintiffs' allegations of the SBI's intent are not plausible on their face, so need not be taken as true by this Court for purposes of this Motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1951-2 (2009) (holding that to survive motion to dismiss, complaint must allege facts sufficient to plausibly suggest defendant's state of mind, and court is not bound by conclusory assertions of knowledge or intent, and describing as conclusory allegations that defendants "knew of, condoned, and willfully and maliciously" acted). Second, regardless of Plaintiffs' allegations of intent, as shown by the cases cited above, the SBI's conduct in merely purchasing government bonds is not the type of conduct subject to aiding and abetting liability as a matter of law.

[7] It should also be noted that the court in *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 738 F. Supp. 937, 942 (W.D.Pa. 1989), determined that investment in Israel bonds is not imprudent.

CONCLUSION

Defendant respectfully requests the Court to grant Defendant's Motion to Dismiss Plaintiffs' Complaint in its entirety.

Dated: February 28, 2012

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

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OF INVESTMENT

AG: #2963223-v1

AFFIDAVIT OF SERVICE BY
FACSIMILE TRANSMISSION AND U.S. MAIL

Re: *Minnesota Break the Bonds Campaign, et al., v. Minnesota State Board of Investment*
Court File No. 62-CV-11-10079; Judge Margaret M. Marrinan

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Patricia L. Brunelle, being duly sworn, says:

That at the City of St. Paul, County and State aforementioned, on February 28, 2012, she caused to be served:

1. Defendant's Reply Memorandum Of Law In Support Of Motion To Dismiss;

All documents were served via facsimile transmission on the following parties and also by depositing true and correct copies in the United States mail at said City of St. Paul, properly enveloped, with postage prepaid:

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Patricia L. Brunelle
PATRICIA L. BRUNELLE

Subscribed and sworn to before me on
this 28th day of February, 2012.

NOTARY PUBLIC

JULIE L. TINKHAM
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2015