

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Declaratory Judgment

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,

Court File No. 62-CV-11-10079

Judge Margaret M. Marrinan

Plaintiffs,

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF SUMMARY
JUDGMENT ON COUNT ONE**

vs.

Minnesota State Board of Investment,

Defendant.

INTRODUCTION

The Minnesota State Board of Investment (SBI), the defendant, has invested millions of dollars of public employee retirement funds in the purchase of Israel Bonds.

Because Minnesota law does not permit the SBI to invest in Israel Bonds, the Court should enter summary judgment for the plaintiffs on Count One of the Complaint declaring that the SBI has unlawfully invested in Israel Bonds and order the SBI to divest from all Israel Bonds.

LEGAL ISSUE

WHETHER THE STATE'S INVESTMENTS IN ISRAEL SOVEREIGN BONDS VIOLATE THE APPLICABLE MINNESOTA STATUTE WHICH ONLY AUTHORIZES INVESTMENTS IN U.S. AND CANADIAN SOVEREIGN BONDS?

DOCUMENTS COMPRISING RECORD

The record consists of legislative facts (i.e. the various provisions of the Minnesota Constitution and Statutes cited herein), undisputed adjudicative facts subject to judicial notice pursuant to Evidence Rule 201 and the Affidavit of Phillip E. Benson with attached exhibits A-K containing SBI records and correspondence to and from SBI.

STATEMENT OF UNDISPUTED FACTS

I. The SBI

The State Board of Investment (SBI) is an agency of the State of Minnesota, established pursuant to Article XI, Section 8, of the Minnesota Constitution to invest all state funds, including public employee retirement funds. All investments undertaken by the SBI are governed by Minnesota Statutes, Chapter 11A and Chapter 356A. Pursuant to Minnesota Statutes 356A.02 and 356A.04, the members of the SBI Board and its executive director are statutory fiduciaries who, by law, owe their fiduciary duties to the

beneficiaries of the covered public employee pension plans, to Minnesota's taxpayers and to the State of Minnesota. Not only are these fiduciaries held by law to a prudent person standard, they are expressly obligated by law to select investment products and to invest plan assets in a manner consistent with law. Minn. Stat. § 356A.05(b).

State law controls the asset classes in which the SBI is permitted to invest. These asset classes are listed in the six subdivisions of Minnesota Statutes § 11A.24. The statute prescribes the maximum percentage of fund assets that may be invested in various asset classes and it contains specific restrictions to ensure the quality of the investments. (See Affidavit of Phillip E. Benson, hereinafter "Benson Aff.", ¶ 2 ; Exhibit A, pg 1.)

The SBI's investments in sovereign debt (the "Government obligations" asset class) are controlled by Minn. Stat. § 11A.24, subd. 2, which specifically includes "governmental bonds." This subdivision permits the SBI to invest in the government bonds of: (a) the United States and the individual states, including municipalities, political subdivisions, agencies, instrumentalities or organizations of the United States and the individual states, (b) Canada and its provinces, and (c) various United States Government sponsored organizations of which the United States is a member (e.g., Inter-American Development Bank), so long as the bonds are backed by the full faith and credit of the issuer or the issue is rated among the top four quality rating categories by a nationally recognized rating agency. The statute specifically requires that the principal and interest from any investments in the government obligations of Canadian or U.S. sponsored

organizations be repaid in United States dollars. The “Government obligations” asset class in Minn. Stat. § 11A.24, subd. 2, does not list Israel Bonds, or any sovereign debt or governmental bond issued by the State of Israel. The five remaining subdivisions of Minn. Stat. § 11A.24 list other permissible investment asset classes, but none of them include government obligations or Israel Bonds.

2. Israel Bonds

Israel Bonds are government obligations (sovereign debt bonds) issued by the State of Israel.¹ According to Howard Bicker (Bicker), the SBI’s executive director, the SBI has invested approximately \$18 million of its managed funds in Israel Bonds. (Benson Aff., ¶ 3; Exhibit B, pg. 3)

3. Plaintiff’s Divestment Demand

On January 31, 2011, plaintiff Minnesota Break the Bonds Campaign (MN BBC) formally demanded that the SBI divest from all bonds or government obligations issued by the State of Israel. (Benson Aff., ¶ 4; Exhibit C) MN BBC advised the SBI that the inclusive list of all categories of government obligations in which the SBI is permitted to invest, as set forth in Minn. Stat. § 11A.24, subd. 2, did not include any government obligations issued by the State of Israel. (Exhibit C, pgs 1-2) Thereafter, on March 3, 2011, at the quarterly SBI meeting, Governor Dayton, the SBI chair, requested that the Attorney General’s Office review MN BBC’s demand letter and respond. Board member

¹ The Court is requested to take judicial notice of this undisputed adjudicative fact pursuant to Evidence Rule 201.

Rebecca Otto, State Auditor, made a motion that the SBI staff engage with MN BBC and that the Attorney General (AG) report back to the SBI at its next meeting. Ms. Otto's motion passed. (Benson Aff., ¶ 3: Exhibit B, pg. 3)

On March 10, 2011, members of MN BBC met with counsel from the AG's Office and SBI staff, including Bicker. During the meeting, Deputy AG Christie Eller (Eller), representing the SBI, indicated that the SBI had purchased Israel Bonds under the authority of another subdivision of Minn. Stat. § 11A.24 which she identified as paragraph (a), clause (5), of subd. 6. In response to a question from MN BBC co-director Phil Benson (Benson), Eller acknowledged that reading paragraph (a), clause (5) of Minn. Stat. § 11A.24, subd. 6, in a manner that permitted unrestricted investments in foreign government bonds meant that Minn. Stat. § 11A.24, subd. 2, imposed "more onerous" restrictions on the manner in which the SBI could purchase U.S. and Canadian Bonds than any restrictions that would apply to the SBI's purchase of government bonds from an international pariah such as North Korea. The colloquy between Eller and Benson included the following exchange:

Benson: "So what you're telling me is that there are more onerous restrictions on the purchase of U.S. and Canadian bonds than bonds from any other country in the world, which could include North Korea and Burma. Is that correct?"

Eller: "Yes."

(Benson Aff., ¶ 5)

On March 14, 2011, several days before the March 18 meeting, MN BBC had requested that the AG's Office prepare a legal opinion on the issue of the legality of the SBI's Israel Bonds investments. (Benson Aff., ¶ 6; Exhibit D) Eller responded on March 31, 2011. In her response, Eller stated, "The quoted language [from paragraph (a), clause(5), of Minn. Stat. § 11A.24, subd. 6] makes the *general category* of international securities an eligible investment in addition to the types of permissible investments, set forth in Minn. Stat. § 11A.24, Subds. 1-5, which include U.S. and Canadian government securities." (Emphasis added.) (Benson Aff., ¶ 7; Exhibit E)

MN BBC responded to Eller on April 8, 2011, in a letter. In the letter, MN BBC co-director Benson told Eller that her acknowledgment that the "international securities" provision in clause (5) of Minn. Stat. § 11A.24, subd. 6, was a "general category" implicated *ejusdem generis*, which is codified as a canon of construction at Minn. Stat. § 645.08(3). Accordingly, the "international securities" provision in clause (5) was restricted in its meaning to the particular investments listed in the preceding four subsections (clauses). Benson further stated that reading clause (5) in a manner that rejected the application of *ejusdem generis* would open the door for the investment statute to be read in a manner that could lead to absurd results. (Benson Aff., ¶ 8; Exhibit F)

Benson had asked for a response in MN BBC's April 8, 2011 letter to Eller. On April 26, 2011, Benson spoke directly to Eller over the phone. Eller told Benson that her

opinion remained the same regarding “international securities” and that she would not be responding in writing to his April 8, 2011, letter. (Benson Aff., ¶ 9; Exhibit G) Instead, on June 1, 2011, Bicker provided a letter to the SBI which stated that, “it has been determined by the Attorney General’s office that the [Israeli Bonds] investments are legal.” (Benson Aff., ¶¶ 10-11; Exhibits H and I, pg. 3) MN BBC sent two subsequent letters to the SBI, one on July 18, 2011, and the other in September of 2011, repeating the group’s demand that the SBI divest from its Israel Bonds investments. The SBI never responded. (Benson Aff., ¶¶ 12-13; Exhibits J and K)

5. Statutory Limitations Related to Iran and Sudan

Minn. Stat. § 11A.243 imposes restrictions on the SBI’s investment in “scrutinized companies” with operations in 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 provision of Minn. Stat. §§ 11A.243 and 11A.244 specifically restricts the SBI from investing in the sovereign bonds of either the Islamic Republic of Iran or the Republic of the Sudan.

6. Administrative Policy Limitations on International Investments

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 omit any procedure for investing in the government obligations of a “Group II” country. 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. (Benson Aff., ¶ 2; Exhibit A, pgs. 49-50).

SBI’s Report on the International Stock Pool refers to the “International Stock Pool” stocks, and “international stock program.” (Benson Aff., ¶ 2; Exhibit A, pgs. 19-20). Its “Guidelines on International Investing” repeatedly refers to “stock investments” and “stock managers.” (Benson Aff., ¶ 2; Exhibit A, pgs. 49-50). There is no mention of sovereign bonds in the report and guidelines relating to international investments.

ARGUMENT

1. No Legitimate Interpretation of Minnesota Law Allows the SBI to Purchase Israel Bonds

SBI's attempt to justify its purchase of Israel Bonds based on the "*general category*" of "international securities" in paragraph (a), clause (5) of Minn. Stat. § 11A.24, Subd. 6, violates the most basic rules of statutory construction. A statute is to be read and construed as a whole "to give effect to all of its provisions; 'no word, phrase or sentence should be deemed superfluous, void or insignificant.'" Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999). The SBI's flawed interpretation of the generalized wording in Minn. Stat. § 11A.24, Subd. 6, paragraph (a), clause (5), to justify its Israel Bonds investments renders the more specific provisions of Minn. Stat. § 11A.24, Subd. 2, superfluous and insignificant, potentially yielding absurd results and violating the principle of *ejusdem generis*, a canon of construction codified at Minn. Stat. § 645.08(3).²

2. The Purchase of Israel Bonds is Not Permitted by Minn. Stat. § 11A.24, Subd. 2

Minn. Stat. § 11A.24, subd. 2, restricts the SBI's investment in "Government obligations", including "governmental bonds", to four categories, none of which include sovereign Israel Bonds. To read subd. 2 any other way would yield absurd results. For example, if the SBI's investments under subd. 2 were not limited to the four enumerated categories, while the purchase of Canadian Bonds and the bonds of United States

² "645.08 CANONS OF CONSTRUCTION . . . (3) general words are construed to be restricted in their meaning by preceding particular words."

government sponsored organizations of which the United States is a member are required to be paid back to the SBI in U.S. Dollars, the governmental bonds of other foreign countries could be re-paid in any currency, including Zimbabwean Dollars, North Korean Won, Sudanese Pounds, Iranian Rials or even Somali Shillings. Reading Subdivision 2 in such a manner thus yields an absurd result contrary to the rules of statutory construction. See, generally, Park Towers Limited Partnership v. County of Hennepin, 498 N.W.2d 450, 454 (Minn. 1993).

If subd. 2 is read in a manner that allows the SBI to purchase Israel Bonds, it would also permit the SBI to purchase Iranian and Sudanese governmental bonds, or the sovereign bonds of any country regardless of how unstable, yet another absurd result. Because the most logical interpretation of subd. 2 disallows investments in the government obligations of any foreign sovereign other than Canada, the Iranian and Sudanese investment restrictions in Minn. Stat. §§ 11A.243 and 11A.244 and the SBI's administrative policy restrictions on investing in "Group II" countries, which are limited to the non-governmental assets of "companies", require no express provisions forbidding the SBI from purchasing governmental bonds from Iran, the Sudan or Israel. The SBI is already restricted by subd. 2 from making any such purchases. Any additional provisions are unnecessary and would be redundant.

SBI's own recent annual report from 2010 only refers to "stocks" where it describes its international investments and sets forth its guidelines for international investments.

(Benson Aff., ¶ 2; Exhibit A, pgs. 19-20, 49-50). There is no mention of foreign sovereign bonds as an international investment instrument. (Id.) SBI therefore reveals through its own publication its understanding that the “international securities” it is authorized to invest in consist of stocks and not sovereign bonds.

3. The Purchase of Israel Bonds is Not Permitted by Minn. Stat. § 11A.24, Subd. 6

An interpretation of Minn. Stat. § 11A.24, subd. 6 in a manner that allows the SBI to purchase Israel Bonds also yields absurd results. The interpretation of the “*general category*” of international securities in paragraph (a), clause (5), of subd. 6 that permits the SBI to purchase Israel Bonds, as the SBI has contended, would also allow the SBI to purchase the governmental bonds of any sovereign entity in the world. Under this interpretation, the SBI could invest in any rogue government unconstrained by any of the restrictions listed in subd. 6, paragraph (b). Nothing in the SBI’s absurd interpretation of subd. 6 would prevent it from currently purchasing 100% of the market value of the entire sovereign bond fund of a violence ravaged Syria or a starving North Korea, to do so as the sole bond fund investor, and to receive repayment of principal and interest entirely in distressed Syrian Pounds or North Korean Won. A retired state employee would hope that the SBI would take better care of the pension funds under its management, but under the SBI’s extraordinary interpretation of the wording in the statute, nothing in the statute would prohibit such an investment decision. If the phrase “international securities” is read to include “governmental bonds,” the statute is necessarily rendered absurd.

The only sensible reading of Subdivision 6 is guided by the time honored canons of statutory construction, including the rule that a specific statute governs over a general statute. Roehrdanz v. Brill, 682 N.W.2d 626, 631 (Minn. 2004). Thus, if Minn. Stat. § 11A.24, subd. 2, logically limits governmental bond investments to the entities specifically enumerated in subd. 2, than paragraph (a), clause (5) of subd. 6, even accepting the SBI’s expansive view, is equally constrained. Not only is this a more preferable result, it is the law. See 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, —N.W.2d—, 2012 WL 118239 (Minn.App., Jan. 17, 2012) (Same.)

Additionally, under the canon of *ejusdem generis*, codified at Minn. Stat. § 645.08, subd. 3, when the same statute contains both specific and general provisions, the specific provisions prevail. See Custom Ag Service of Montevideo, Inc., v. Commissioner of Revenue, 728 N.W.2d 910, 917 (Minn.2007). Thus, the correct interpretation of paragraph (a), clause (5), of subd. 6, is to limit it to the specific asset categories listed in the four immediately preceding clauses. Accordingly, the SBI may invest in “international securities” but only if they are “(1) venture capital investment businesses . . .; (2) real estate ownership interests . . .; (3) regional and mutual funds through bank sponsored collective funds . . .; and (4) resource investments . . ., none of which include

governmental bonds. See, e.g., Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn.1998) (applying principle of *ejusdem generis*, as codified in Minn. Stat. § 645.08, subd. 3, to require 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.”).

The logically inescapable reason that paragraph (b) of Minn. Stat. § 11A.24 does not and need not expressly impose its investment restrictions on paragraph (a), clause (5), of subd. 6, is that the canon of *ejusdem generis* and Minn. Stat. § 645.08, subd. 3, carries its restrictions by law into the generally worded paragraph (a), clause (5), by virtue of the preceding specifically enumerated asset classes in clauses (1) through (4).

CONCLUSION

Plaintiffs respectfully request that this Court uphold the investment restrictions imposed by law on the SBI by declaring that the SBI’s investments in Israel Bonds are unlawful. Plaintiffs further request that the Court issue an order directing the SBI to divest

from all of its Israel Bonds investments.

Dated: February 5, 2012

Respectfully Submitted,

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