STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Type of Case: Declaratory Judgment Action

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, LuciaWilkes 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,

Plaintiffs,

vs.

Minnesota State Board of Investment,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR SUMMARY JUDGMENT

The above-entitled matter came on for hearing before this Court on March 5, 2012, at the Ramsey County Courthouse on the defendant's Motion to Dismiss and the plaintiffs' cross Motion for Summary Judgment on Count One of the Complaint. Jordan S. Kushner and Peter J. Nickitas appeared on behalf of the plaintiffs. Assistant Attorney General Kristyn Anderson appeared on behalf of the defendant.

Having considered the pleadings, briefs and memoranda submitted by all the parties, the affidavits and exhibits admitted as evidence and the arguments of counsel, the Court denies the defendant's Motion to Dismiss, makes the following Findings of Fact and Conclusions of Law and orders judgment for the plaintiffs on Count I.

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BACKGROUND, CLAIMS AND JURISDICTION

Summary of Allegations in the Complaint

Parties

1. The plaintiffs are comprised of four organizations and twenty-three individuals who oppose the purchase of Israel Bonds by the defendant, the Minnesota State Board of Investment (SBI) on legal and moral grounds.
2. Of the twenty three individual plaintiffs, fifteen are Minnesota citizens and five are plan beneficiaries of the funds invested by the SBI.
3. Two of the organizational plaintiffs, Minnesota Break the Bonds Campaign (MN BBC) and Women Against Military Madness – Middle East Committee (WAMM-MEC), include Minnesotans as their members.
4. Co-plaintiff Bil'in Popular Committee Against the Wall and Settlements (BPC) is a non-Minnesota organization whose members include the residents of Bil'in, a small West Bank Palestinian village in the occupied Palestinian territories. BPC opposes Minnesota's investment in Israel Bonds because the money Israel raises from the sale of Israel Bonds funds Israel's illegal settlement activities in the occupied Palestinian territories, victimizing the residents of Palestinian villages like Bil'in.
5. Co-plaintiff Boycott from Within (BTW) is a non-Minnesota Israeli association that has joined the worldwide call for a Boycott, Divestment and

Sanctions (BDS) campaign against Israel until Israel complies with international law and human rights. Co-plaintiffs Barkan, Neiman, Nir, Rothschild, Naor and Raz are Israeli members of BTW who have taken a pledge to continue to call for a boycott against Israel and its West Bank settlements in defiance of Israeli law making it an offense to call for such a boycott.

6. Co-plaintiff Newland F. Smith, III, is a retired academic and religious based peace activist who resides in Illinois and has worked from within the Episcopal Church and other faith based organizations to advocate for Palestinian human rights.

7. Defendant SBI is an agency of the State of Minnesota established pursuant to the Minnesota Constitution to invest all state funds, including 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 SBI owes its fiduciary duties to retirement plan beneficiaries, Minnesota taxpayers and the State of Minnesota. The SBI is held by law to a prudent person standard and required by law to invest plan assets in a manner consistent with law.

Count I

8. Israel Bonds are sovereign debt bonds sold by the Government of Israel.

9. The SBI has exceeded the scope of its investment authority pursuant to the investment restrictions at Minn. Stat. § 11A.24. By investing in Israel Bonds in excess of its statutory authority, the SBI has invested plan assets unlawfully. Plaintiffs have demanded that the SBI divest from Israel Bonds but the SBI continues to retain its unlawful investments in Israel Bonds.

Count II

10. Proceeds from the sale of Israel Bonds are used in substantial part by Israel to fund settlement activities in the occupied Palestinian territories which violate Article 49 of the Fourth Geneva Convention. By investing in Israel Bonds with knowledge that a portion of the proceeds that Israel obtains from Minnesota's purchase of Israel Bonds will be used to violate article 49, the SBI has exceeded its statutory duty to invest plan assets lawfully.

11. The United States is a party to the Fourth Geneva Convention which was ratified in 1955. Pursuant to Clause 2 of Article VI (the "Supremacy Clause") of the U.S. Constitution, the Geneva Convention is the "law of the land" and is binding on the State of Minnesota and all of its departments and agencies, including the SBI. It is specific and obligatory and has gained such universal acceptance that it has become customary international law.

12. Israel's violation of Article 49 of the Fourth Geneva Convention is not subject to any reasonable dispute. Numerous resolutions have been passed

by the U.N. Security Council condemning Israel's Article 49 violations. The International Court of Justice has issued an advisory opinion finding that Israel is in violation of Article 49 and the United States Government has consistently opposed Israel's settlement activities in the occupied Palestinian territories and reduced the amount of loan guarantees it has extended to Israel by amounts equal to Israel's estimated spending on settlement construction. By law, U.S. loan guarantees cannot be used to finance Israeli settlement building in areas occupied by Israel after the 1967 War.

13. Despite universal public condemnation of Israel's unlawful settlement enterprise, including condemnation by the world's foremost human rights and international law governmental and non-governmental organizations and with full knowledge that unrestricted Israel Bond funds are being used by Israel for unlawful settlement activities in violation of customary international law, namely Article 49 of the Fourth Geneva Convention, the SBI continues to provide direct material support and financial aid to Israel for these unlawful purposes by investing in Israel Bonds and holding them in its portfolio. Given that the foreseeable and apparently intended consequence of the SBI's investment in Israel Bonds is to aid Israel's violation of Article 49, the Board members of the SBI and its executive director, with extraordinary impunity, are willingly, knowingly and/or

purposively aiding, abetting and assisting Israel in violating Article 49 of the Fourth Geneva Convention.

Count III

14. The SBI has violated its statutory duty to act prudently by willfully, knowingly and/or purposively aiding and abetting Israel's international law violations by investing in Israel Bonds which exposes the SBI to liability under the Alien Tort Statute. In purchasing Israel Bonds, the SBI is and was aware that the likely use of such funds will, in part, support Israel's continued and accelerated settlement expansion projects in the occupied Palestinian territories.

MOTION TO DISMISS

The SBI has challenged the plaintiffs' standing to contest the SBI's purchase of Israel Bonds, the justiciability and sufficiency of Counts II and III and the plaintiffs' interpretation of Minn. Stat. § 11A.24 with respect to Count I. The Court's finding s and conclusions regarding the proper statutory construction of Minn. Stat. § 11A.24 are addressed, *infra*, in the Court's findings of fact and conclusions of law regarding the plaintiffs Motion for Summary Judgment on Count I.

Standard of Review

1. "A pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief requested." *Bahr v. Capella University* , 788 N.W. 2d 76, 80 (Minn. 2010). Only the factual allegations set forth in the complaint may be considered. Those facts must be accepted as true and all reasonable inferences construed in favor of the party against whom the motion to dismiss is brought, but a legal conclusion in the complaint is not binding on the court. A plaintiff must provide more than labels and conclusions. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).
2. The SBI's challenge of the plaintiffs' standing and the justiciability of Counts II and III are jurisdictional challenges. See *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011); *Edina Community Lutheran Church v. State*, 673 N.W.2d 517, 521 (Minn.App. 2004). Subject matter jurisdiction is a question of law. *Shaw v. Bd. Of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. App. 1999), *rev. den.* (Minn. July 28, 1999).

Standing

3. The plaintiffs meet the standing requirements. Although the plaintiffs oppose the SBI's investment in Israel Bonds on moral grounds, this action is

based on more than just a policy disagreement or difference of opinion. *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn.1977) (citizens are generally precluded from bringing lawsuits against governmental agencies "based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law.") (emphasis added). The plaintiffs have alleged that the SBI is breaking the law by investing taxpayer funded state retirement funds in Israel Bonds. Fifteen of the twenty three individually named plaintiffs are Minnesota taxpayers and five of them are actual plan beneficiaries of the funds invested by the SBI. Minnesota taxpayers have the right "to maintain an action in the courts to restrain the unlawful use of public funds." *McKee*, 261 N.W.2d at 571; 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.").

4. Because at least one plaintiff has standing, the standing requirement is satisfied for the remaining plaintiffs. The presence of only one plaintiff with standing is required. 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).

5. Even if the presence of other plaintiffs with standing is not a sufficient basis to satisfy the standing requirement for all remaining plaintiffs, two of the organizational plaintiffs, Minnesota Break the Bonds Campaign (MN BBC) and WAMM-MEC, include Minnesota taxpayers as members and therefore have 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 other remaining plaintiffs, Bil'in, BFW, the Israeli members of BFW and Newland Smith, III, have alleged personal interests in the legal dispute ensuring that they will vigorously and adequately present the factual and legal issues sufficient to permit them to participate as plaintiffs. See *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007) ("The primary goal of the standing 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).

Justiciability of Counts II and III

6. The Court has jurisdiction to restrain the SBI from aiding and abetting a

violation of the Fourth Geneva Convention. Minn. Stat. § 356A.05(b) requires the SBI to only invest "in a manner consistent with law." The law includes ratified treaties and conventions as much as the state's own 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). Accordingly, 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 Minnesota Supreme Court has long held that the lawfulness of the SBI's fiscal decisions is subject to court review. See *Rockne v. Olson*, 191 Minn. 310, 254 N.W. 5, 6-7 (1934). 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).

7. Because this case involves a challenge to the SBI's exercise of its fiduciary

duties, Minn. Stat. § 356A.12 provides an additional statutory basis for jurisdiction. All three Counts challenge the SBI's actions as a fiduciary. While Counts I and II challenge the actions of the SBI in not acting in a manner consistent with law required pursuant to Minn. Stat. § 356A.05(b), Count III also challenges 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. 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 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).

8. The "political question" doctrine is not applicable to this case. This case does not involve a controversy which revolves "around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v.*

Am. Cetacean Society, 478 U.S. 221, 230 (1986). It does not call on the Court to judge the conduct of foreign relations by the United States government but, instead, calls on the Court to judge the conduct of a state agency. The declaratory and injunctive remedy requested by the plaintiffs does not conflict with existing U.S. foreign policy. 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."). The United States government is neither directly nor indirectly involved in the SBI's investment decisions. Unlike the SBI's alleged conduct in knowingly financing Israel's violations of Article 49 in the occupied Palestinian territories, the United States government has voiced its objections to Israel's underlying settlement activities, it has participated in United Nations Security Council resolutions condemning such activities and it has taken steps to ensure that its foreign aid is not used to support those very same activities by scaling back loan guarantees and passing legislation preventing U.S. loan guarantees from being used for activities outside of Israel's 1967 borders. This case is not like *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) in which the United States government financed the conduct at issue. *Sarei v. Rio Tinto,* ---F.3d---, 2011 WL 5041927, *15 (9th Cir., Oct. 25, 2011) (en banc) ("Nor does the fact that [the

Court] must look to international law create a political question.").

9. The "act of state" doctrine is also not applicable to this case. The Court rejects the SBI's argument, based entirely on a single 2005 U.S. District Court decision, 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). More recent federal case law, including the en banc decision of the Ninth Circuit in *Sarei v. Rio Tinto*, has plainly held that violations of customary international law and *jus cogens* violations preempt the act of state doctrine. See *Sarei v. Rio Tinto,* 2011 WL 5041927, at *17 ("*[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.").

Sufficiency of Counts II and III

10. The complaint adequately alleges facts showing that the SBI has aided and abetted Israel's international law violations by investing in Israel Bonds and by refusing to divest. More recent federal case law (which post-dates the case law submitted by the SBI) that has examined both the scienter and actus reus requirements for bringing a claim based on aiding and abetting a violation of international law has adopted the "knowing and substantial

assistance" standard 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"). See *Doe v. Exxon Mobile Corp.*, F.3d 11, 39 (D.C. Cir., 2011); See also *Sarei v. Rio Tinto*, 2011 WL 5041927, at *25 (Pregerson, J., concurring). It is also consistent with the Restatement (Second) of Torts, § 876(b), the civil standard adopted by the Minnesota courts for aiding and abetting liability. See, e.g., *Mathews v. Eichorn Motors, Inc.*, 800 N.W. 2d 823, 830 (Minn. App. 2011). If this standard is sufficient for criminal prosecution, it should be sufficient for civil liability. See, e.g., 18 U.S.C. §2339C ("Whoever . . ., by any means, directly or indirectly, unlawfully and willfully provides funds . . .with the knowledge that such funds are to be used, in full or in part, in order to carry out – any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population . . . shall be punished . . . .").

11. Although the SBI argues that the complaint merely alleges labels and conclusions, the complaint recites detailed facts supportive of the allegations. It includes reference to Israel's alleged international law

violations based on the investigative findings of reputable international human rights organizations like B'Tselem, the Human Sciences Research Council of South Africa, Amnesty International and Human Rights Watch and explains how the SBI's knowing investment in Israel Bonds has provided substantial financial assistance to Israel in committing those violations. The complaint includes the following allegations:

a) 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. (¶ 18)

b) The International Committee of the Red Cross, the International Court of Justice and the United Nations Security Council have all determined that Israel has violated and is violating Article 49 of the Fourth Geneva Convention. (¶¶ 28-30)

c) Various reputable international organizations and tribunals have repeatedly cited and condemned Israel's myriad and numerous international law and human rights violations. (¶¶ 37-40)

d) Proceeds from the sale of Israel Bonds are used to support and promote illegal settlement activities which violate international law and human rights. 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. Israel's settlement activities are inconsistent with U.S. foreign policy and U.S. public laws and 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. (¶¶ 17, 29, 31-32)

e) 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), that this show of solidarity was made despite Minnesota law that prohibits investments in "governmental bonds" other than those listed in MN Stat. § 11A.24, Subd. 2, that 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, a cocoa collective or even an oil company doing business in Iran, the Sudan or Nigeria), that 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), that 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, that a portion of the money has been used for such war crimes to the injury of the local indigenous population and that repayment of the monies may not be guaranteed by the United States for this very reason. (¶¶ 20, 27- 41)

f) 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. (¶¶ 14, 17-25, 32-33, 41)

12. Applying the civil standard for aiding and abetting liability pursuant to the Restatement (Second) of Torts, § 876(b), the complaint sufficiently alleges facts that meet this standard by showing that a) Israel has violated various customary international law and *jus cogens* norms which includes causing injury and death to the indigenous population in the occupied Palestinian territories, b) the SBI is aware that by purchasing millions of dollars of Israel bonds, it is playing a role in Israel's international law and *jus cogens* violations, and c) the SBI knows that the millions of dollars it is giving to

Israel is substantially assisting Israel in committing customary international law and *jus cogens* violations. See, generally, *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

Ruling: The defendant's Motion to Dismiss is hereby denied.

MOTION FOR SUMMARY JUDGMENT ON COUNT I

The statutory interpretation of Count I is a question of law for the court. *Emerson v. School Bd. of Independent School Dist. 199* ,--- N.W.2d ---, 2012 WL 280384 (Minn. 2012).

Findings of Fact

1. 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).

2. 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.)

3. 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 governmental 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 specifically include governmental bonds or Israel Bonds.

4. Minn. Stat. § 11A.24, Subdivisions 2, 3, 4 and 5 broadly restrict the SBI's investments in non-domestic stocks and debt obligations to Canadian or United States Government sponsored organizations of which the United States is a member.

5. Israel Bonds are government obligations issued by the State of Israel. As of March 3, 2011, the SBI had invested approximately $18 million of its managed funds in Israel Bonds. (Benson Aff., ¶ 3; Exhibit B, pg. 3) According to its most recent Asset Listing in December 2011, the SBI has now purchased more than $23 million in Israel Bonds, thus increasing its investments in Israel Bonds by approximately $5 million after receiving a divestment demand from co-plaintiff MN BBC on January 31, 2011. See Affidavit of Howard Bicker, "Bicker Aff.", at ¶ 5, Exhibit C, pgs. 76, 108.

6. Although the SBI claims to be currently invested in 13 foreign government bonds other than Canadian Bonds, an examination of these bonds that are listed in the SBI's December 2011 Asset Listing indicates that only four are actual government issued bonds in which the income generated through sales is used for government purposes. The remainder are bonds issued by corporations and other commercial entities with government ownership in which the income generated from sales is used for commercial purposes. The total current value of these actual government bonds which the SBI has purchased (i.e. Republic of Italy, Russian Foreign Bond, United Mexican States and Israel Bonds) is $34,421,105 of which $23,560,000 are Israel Bonds. Israel Bonds account for more than two thirds of the SBI's total investments in actual foreign government bonds, other than Canadian Bonds. The SBI's total investment in Israel Bonds is three times more than its investment of $7,851,000 in United Mexican States bonds, the SBI's next highest non-Canadian foreign governmental bond investment. See Bicker Aff., at ¶ 5, Exhibit C.
7. According to the SBI's most current Annual Report, the value of its assets under control is $61.6 billion. Thus, the SBI's current investment in approximately $34.5 million in actual non-Canadian non-commercial foreign government bonds is .05% of the SBI's total investments.

See http://www.sbi.state.mn.us/publications/2011AnnualReport.pdf.

8. On January 31, 2011, co-plaintiff 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, pgs 1-2. 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.

9. The SBI contends that it is authorized to purchase Israel Bonds under the authority of Minn. Stat. § 11A.24, Subd. 6(a)(5), although the Minnesota Attorney General (AG), legal counsel for the SBI, has admitted that reading paragraph (a), clause (5) of Minn. Stat. § 11A.24, subd. 6, in a manner that permits unrestricted investments in foreign government bonds meant that Minn. Stat. § 11A.24, subd. 2, imposes "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. Benson Aff., ¶ 5. The AG's office contends that, "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)

10. MN BBC has advised the AG's that given its acknowledgment that the "international securities" provision in clause (a)(5) of Minn. Stat. § 11A.24, subd. 6, was a "general category", the canon of *ejusdem generis*, which is codified as a canon of construction at Minn. Stat. § 645.08(3), is implicated. Accordingly, MN BBC has advised the AG that the "international securities" provision in clause (a)(5) is restricted in its meaning to the particular investments listed in the preceding four clauses. Benson Aff., ¶ 8; Exhibit F. Despite several additional demands from MN BBC that the SBI divest from Israel Bonds, the SBI has still refused to divest. Benson Aff., ¶¶ 9-13; Exhibits G-K.

11. 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.

12. 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 procedures 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).

13. The 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 governmental bonds in the report and guidelines relating to international investments.

14. Other than seeking an advisory opinion from the AG's Office to determine its authority to invest in Canadian corporate bonds (Second Benson Aff., ¶ 4), no evidence has been submitted showing that prior to MN BBC's 2011 divestment demand, the SBI ever sought an advisory opinion from the AG's Office regarding any foreign or international bond investments. No evidence has been submitted by the SBI showing that it has any investment policies or guidelines regarding "international investments" in "governmental bonds." Second Benson Aff., ¶¶ 2-3.

15. According to the SBI's 1988 Annual Report (Bicker Aff., Exhibit A), the "international securities" provision at clause (a)(5) of Minn. Stat. § 11A.24, subd. 6, ("Other investments") was added by the Legislature to the "alternative asset" class in the 1988 changes to Minn. Stat. § 11A.24. "Alternative assets" are defined in the investment and securities industry as "assets that have the potential to provide economic value to the owner but are not traditionally considered assets, such as collectibles. See definition at http://www.investorwords.com/186/alternative_assets.html#ixzz1p3geTmaQ.

Wikipedia further defines an alternative investment as an investment product other than the traditional investments of stocks, bonds, cash, or property. The term is a relatively loose one and includes tangible assets such as art, wine, antiques, coins, or stamps and some financial assets such as commodities, private equity, hedge funds, venture capital, film production and financial derivatives. http://en.wikipedia.org/wiki/Alternative_investment.

16. The SBI has consistently identified real estate, private equity (venture capital) and resource funds, which are reflected in the first four clauses of Minn. Stat. § 11A.24, subd. 6(a), as "alternative assets." More recently, the SBI has 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." See SBI Annual Reports for 2002-2011 at http://www.sbi.state.mn.us/Publications.html under sub-heading "Alternative Investment Pool" under "Investment Pools." The SBI's Annual Reports do not include governmental bonds in the "alternative asset" class.

17. According to the SBI's Annual Reports, the SBI's 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, according to the SBI, all alternative asset classes,

including “international securities,” are capped at 35% of a fund. Bicker Aff., Exhibit A. These are the same investment restrictions that are codified at Minn. Stat. § 11A.24, subd. 6(b), clauses 1-3.

18. Unlike Minn. Stat. § 11A.24, subd. 6, the “Other investments” asset class specifically created by statute for “alternative assets,” Minn. Stat. § 11A.24 does not specifically include a “bond pool” asset class. Rather, Minn. Stat. § 11A.24 authorizes the SBI to purchase specifically designated and restricted types of U.S. and Canadian “governmental bonds” under Subd. 2, and U.S. and Canadian corporate bonds under Subd. 3. No bonds are specifically listed as an authorized investment in Subd. 6.

19. The Israel Bonds purchased by the SBI are sold only on the primary market. The “primary market” is defined in the investment and securities industry as the financial market where securities are sold directly to the purchasing investor by the issuer or the issuer’s authorized dealer. See http://en.wikipedia.org/wiki/Primary_market. The transferability of Israel Bonds is restricted. Similar to Sudanese and Iranian government bonds (Bicker Aff. at ¶ 7), the types of Israel Bonds purchased by the SBI are not available for purchase on any organized secondary open market. See subheading “Limited Transferability” under heading “Description of Bonds” in the six listed Israel Bond prospectuses at

http://www.israelbonds.com/Invest/Prospectuses.aspx. "Secondary market" is defined in the investment and securities industries as the financial market in which previously issued financial instruments are bought and sold. After the initial issuance (the "primary market"), investors can purchase form other investors in the secondary market.

http://en.wikipedia.org/wiki/Secondary_market.

Conclusions of Law

1. Plaintiffs' objection to the fourth sentence in paragraph 4 of the Bicker Affidavit on hearsay grounds is sustained.
2. Plaintiffs' objection to the first sentence in paragraph 5 of the Bicker Affidavit on the grounds that it lacks foundation and constitutes inadmissible opinion testimony is sustained. It is worth noting that if a legislator is not competent to testify about the intent of a statute, even if she or he authored it, an agency administrator's opinion regarding legislative intent should be even less competent. See, e.g., *Look v. Pact Charter School,* 763 N.W.2d 675, 680 (Minn. App. 2009). Bicker's affidavit is not probative of the intent of the legislature in adopting the "international securities" language at Minn. Stat. § 11A.24, Subd. 6(a)(5).
3. The issues raised in Count I of the complaint turn on the meaning of words in a statute. "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). However, there may be some instances when deference may be appropriate, but the interpretation of Minn. Stat. § 11A.24, Subd. 6(a)(5) is not one of them. See, e.g., *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 language at issue here, "international securities," is not technical, which the SBI repeatedly admits by its resort to common dictionary meanings, deference to the SBI's interpretation is not due and 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 is not relevant.

4. 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" was 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.

5. Statutory interpretation begins with the plain language of the statute. When examining the plain language of a statute, the statute is to be read as a whole and each section interpreted in light of the surrounding sections to avoid conflicting interpretations. *Emerson v. School Board of Independent School District 199,* ---*N.W.2d*---, 2012 WL 280384 (Minn. 2012); *KSTP-TV v. Ramsey County,* 806 N.W.2d 785, 788 (Minn. 2011). No word, phrase or sentence should be deemed superfluous, void or insignificant. *Amaral v. St. Cloud Hospital.* 598 N.W.2d 379, 384 (Minn. 1999). When read as a whole, interpreting each section in light of the surrounding sections to avoid conflicting interpretations and declining the SBI's invitation to read Subdivision 6(a)(5) in

a manner which would deem the words "governmental bonds" in Subdivision 2 superfluous and insignificant, the plain and unambiguous language of Minn. Stat. § 11A.24 does not permit the SBI to invest in Israel Bonds. The language of Subdivision 6(a)(5) ("international securities") can only be harmonized with Subdivision 2 if it does not include "governmental bonds." Reading Subdivision 6(a)(5) to include "governmental bonds" is an interpretation that is repugnant to the context of the statute.

6. Words and phrases in a statute must be read "to avoid absurd results and unjust consequences." *KSTP-TV v. Ramsey County,* 806 N.W.2d at 788 (Minn. 2011). To avoid the absurd result (admitted by the AG) of reading Subdivision 6(a)(5) 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.
7. 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 exclusion 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 Minn. Stat. § 11A.24, Subdivision 2, application of the subject of "governmental bonds" cannot be extended to other asset class subjects, including the "alternative investments" listed in Subdivision 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."). Accordingly, the words "international securities" in Subdivision 6 cannot extend beyond the "governmental bonds" investment provisos and exceptions in Subdivision 2 and the SBI has essentially conceded that Subdivision 2 cannot be used as a statutory basis to justify its Israel Bond investments.

8. Even assuming that the words "international securities" as used in Subdivision 6(a)(5) are ambiguous, reading Minn. Stat. § 11A.24 in manner that permits the SBI to invest in Israel Bonds violates the rule of construction 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*, ---*N.W.2d*---, 2012 WL 118239 (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)(5) must be at least equally constrained. It is worth noting that the AG has admitted that Subdivision 6(a)(5) is a "general category."

9. Within Subdivision 6 itself, the related canon of *ejusdem generis*, codified at Minn. Stat. § 645.08(3) limits the "general category" of "international securities" at Minn. Stat. § 11A.24, Subdivision 6(a)(5) to the specific asset categories listed in the four immediately preceding clauses. See, e.g., *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998) (applying principle of *ejusdem generis* 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."). By confirming in its own administrative reports that investments in "international securities" are limited to the restrictions at Minn. Stat. § 11A.24, Subdivision 6(b), the SBI has admitted that the scope of Subdivision 6(a)(5) is limited to the specific asset categories listed in the four immediately preceding clauses.

10. The SBI's argument that pursuant to Minn. Stat. § 645.26(1) *ejusdem generis* is

inapplicable because Minn. Stat. § 11A.24, Subdivision 6(a)(5) was added to Minn. Stat. § 11A.24 later in time than the provisions of both Minn. Stat. § 11A.24, Subdivisions 2 and 6(a)(1)-(4) is rejected. The last in time rule only applies in circumstances that involve irreconcilable conflicts between a general and a special provision. When read as a whole, and interpreting each section of Minn. Stat. § 11A.24 in light of the surrounding sections to avoid conflicting interpretations, subdivision 6(a)(5) is easily reconcilable with Subdivisions 2 and 6(a)(1)-(4).

ORDER FOR JUDGMENT

Based on the above findings of fact and conclusions of law, the Court DECIDES, DECLARES AND ADJUDGES that the Minnesota State Board of Investment has exceeded its statutory authority by investing in Israel Bonds. Accordingly, IT IS ORDERED THAT:

1. The Plaintiffs' Motion for Summary Judgment on Count One of the Complaint is granted.
2. The Minnesota State Board of Investment is ordered to divest from all investments in Israel Bonds, including any investments in any governmental bonds of the State of Israel, within ____ days from the date of this order.

3. Costs are awarded to the plaintiffs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date:

_____

Honorable Margaret M. Marrinan
Judge of Ramsey County District Court