

1 STATE OF MINNESOTA

DISTRICT COURT

2 COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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4 Minnesota Break the Bonds
5 Campaign, Bil'in Popular
6 Committee Against the Wall and
7 Settlements, Women Against
8 Military Madness-Middle East
9 Committee, Lucia Wilkes Smith,
10 Margaret Sarfehjooy, Catharine
11 Abbott, Barbara Hill, Polly
12 Mann, Leona Ross, Sylvia Schwarz,
13 Nadim Shamat, Sarah Martin,
14 Robert Kosuth, Mary Eoloff,
15 Nick Eoloff, Vern Simula,
16 Cynthia Arnold, Newland F.
17 Smith, III, Ronnie Barkan,
18 Ofer Neiman, David Nir, Lehee
19 Rothschild, Renen Raz, Dorothy
20 Naor, Gal Lugassi, Boycott From
21 Within and David Boehnke,

District Court File No.
62-CV-11-10079

**TRANSCRIPT OF PROCEEDINGS
OF MARCH 5, 2012**

Plaintiffs,

vs.

Minnesota State Board of
Investment,

Defendant.

18 -----

19 The above-entitled matter came on for hearing
20 before The Honorable Margaret M. Marrinan, Judge of District
21 Court, on March 5, 2012, in Courtroom 1480 of the Ramsey County
22 Courthouse in the City of St. Paul, Minnesota.

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A P P E A R A N C E S

22 JORDAN KUSHNER, ESQ., and PETER NICKITAS, ESQ.,
23 appeared on behalf of the plaintiffs; and
24 KRISTYN ANDERSON, ESQ., Assistant Attorney
25 General, appeared on behalf of the defendant.

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Court Reporter: Linda Horgan

1 MONDAY, MARCH 5, 2012

COURTROOM 1480, P.M.

2 WHEREUPON, the following proceedings were had in
3 open court at 2:30 p.m.

4 THE COURT: Good afternoon. Please have a seat.

5 The Court calls the case of Minnesota Break the
6 Bonds Campaign, et al., versus the Minnesota State Board of
7 Investment.

8 There are a number of people who are standing in
9 the back of the courtroom. I am going to allow you on certain
10 conditions to sit in the jury box, but let me make it clear
11 what my rules are: Cell phones off, no reading, no
12 conversation, no nothing. My court reporter is trying to take
13 an accurate record of these proceedings, and if I find that
14 anybody is disobeying those rules, the whole jury box will be
15 out of the courtroom.

16 So those who are standing may take their places.
17 There is room for 14 people.

18 (Pause in proceedings.)

19 THE COURT: And I know my clerk has already
20 given you the instruction of the court. All cell phones are to
21 be powered off, and I don't mean they're to be put on deaf and
22 dumb; they are to be powered off. There is to be no recording
23 of anything in this courtroom except for what the court
24 reporter is doing. That is the official record.

25 If a cell phone or any electronic device does go

1 off during the course of the proceedings, the court will
2 confiscate it and you will not get it back. But I know we're
3 not going to have that problem.

4 The court has read the submissions of the
5 parties. And I'm going to ask counsel around the table if you
6 would make your appearances.

7 MR. KUSHNER: Jordan Kushner representing the
8 plaintiffs in this matter, and with me is co-counsel Peter
9 Nickitas, and the directors from the Break the Bonds Campaign,
10 Sylvia Schwarz and Elisabeth Geschiere.

11 THE COURT: Now I'm going to ask that -- we know
12 how to spell your name, of course -- that you spell the names
13 of the persons at the table with you.

14 MR. KUSHNER: Okay. Peter Nickitas, last name
15 is N-i-c-k-i-t-a-s; Sylvia Schwarz, first name is S-y-l-v-i-a,
16 last name is S-c-h-w-a-r-z; Elisabeth Geschiere, first name is
17 E-l-i-s-a-b-e-t-h, last name, I believe, is G-e-s-c-h-i-e-r-e.

18 THE COURT: Well done. Okay. You may have a
19 seat.

20 And appearing on behalf of the state?

21 MS. ANDERSON: Kristyn Anderson from the
22 Attorney General's Office on behalf of the State Board of
23 Investment.

24 THE COURT: And that's Kristyn with a K?

25 MS. ANDERSON: It's Kristyn with -- it's

1 K-r-i-s-t-y-n.

2 THE COURT: Thank you. And Anderson with an
3 o-n?

4 MS. ANDERSON: Yes.

5 THE COURT: Okay. One of the ground rules for
6 both counsel with regard to the citation of any cases, please
7 spell the case so that we get it accurately on the record.

8 This the motion of the plaintiffs -- or, wait --
9 I believe it is.

10 MR. KUSHNER: There's cross motions.

11 MS. ANDERSON: They're cross-motions.

12 THE COURT: They are cross motions. Let's start
13 with the plaintiffs' motion for summary judgment on count one.

14 MR. KUSHNER: So you want me to just address --
15 the summary judgment goes to the first count in the complaint.
16 So do you want me to just address that and deal with counts two
17 and three later --

18 THE COURT: I do.

19 MR. KUSHNER: -- in response to the state's
20 motion to dismiss?

21 THE COURT: I think that would be more orderly.

22 MR. KUSHNER: Okay. Count one of the complaint
23 is an issue of basic statutory interpretation. The Attorney
24 General has suggested that we're trying to ask the court to
25 challenge -- challenge policy and address a policy question,

1 but, actually, what this is is this was a -- this was a
2 political decision by a state agency with financial
3 responsibilities to make investments as a political statement
4 where they've invested -- at this point they have \$23 million
5 in Israeli bonds, which is --

6 THE COURT: I thought it was 18 million?

7 MR. KUSHNER: Yeah, it was -- the information
8 that we had at the time that we filed the lawsuit based on the
9 end of the 2010 reports was that it was about 17 million, and
10 the report that the plaintiff -- that the defendants provided
11 indicates that at least as of the end of December of 2011 it
12 was about 23 million, so -- we have a list of the different
13 sovereign bond investments, and so there's -- so the 23 million
14 is more than all the other sovereign bond investments combined,
15 which are 10 million.

16 And so the state argues that we're going to
17 force them to divest millions and millions of dollars in bond
18 investments; actually, this is all a tiny fraction of the \$53
19 billion investment portfolio that the State Board of Investment
20 has, but out of these -- this \$34 million in foreign sovereign
21 bond investments - 34 million, its total - 23 of those million,
22 which is two-thirds, are Israeli investments. The next largest
23 investment is in Mexican bonds, which is about 8 million, and
24 then there's some small investments in other bonds.

25 The point here on count one is that it just --

1 it goes against the -- any common-sense reasonable reading of
2 the state statutes that provides for what kind of investments
3 that the state can make.

4 And so the -- the state is in -- they're relying
5 on 11 -- this is 11A.24 of the Minnesota Statutes, and the
6 state is relying on subdivision 6, sub (a)(5), which says they
7 can invest in international securities as a list of five other
8 investments that they can make in addition to investments that
9 are listed earlier on in the statutes.

10 Now, the problem with this, if you just look at
11 it -- the international securities exception, they're asking
12 the court to interpret that section to allow any kind of
13 international security, with that word -- that term is broadly
14 interpreted as possible to include bonds, stocks, commercial
15 paper, any kind of investments. And given the other
16 restrictions in the statute, that interpretation doesn't make
17 sense because this provides no restrictions what -- if you just
18 read that clause alone it provides no restrictions whatsoever
19 on the kind of international securities that could be
20 purchased; they can purchase any kind of international
21 securities whatsoever regardless of the financial stability of
22 those securities.

23 And so our point is that that just -- that
24 interpretation is absurd, especially when you look at the
25 restrictions earlier on in the statutes.

1 So 11A.24, subdivision 2, talks about the
2 conditions for purchasing government obligations, which would
3 include sovereign bonds, and if you want to -- if the State
4 Board of Investment wants to interpret -- purchase U.S. bonds
5 or Canadian bonds, there are very strict terms. It says that
6 either the -- either the -- the obligation has to be backed by
7 the full faith and credit of the issuer or the issue -- the
8 security -- the bond has to be rated among the top four quality
9 ratings by a nationally recognized rating agency, and then it
10 has narrow categories of government obligations that could be
11 purchased, including U.S. bonds, Canadian bonds that are
12 payable in U.S. dollars, as well as state or municipal bonds,
13 and then certain -- bonds of certain international
14 organizations like the International Bank for Reconstruction
15 and Development, Inter-American Development Bank, and a couple
16 of other development banks or U.S. Government sponsored
17 organizations.

18 So if you were to purchase a U.S. savings bond,
19 it has to be backed -- or a Canadian bond for that matter has
20 to be backed by the government or it has to have a rating -- a
21 top rating by a nationally recognized rating agency and it has
22 to be payable in U.S. dollars.

23 And, yet, when we get to international
24 securities, based on the state's interpretation, if you're
25 purchasing a foreign bond, which obviously doesn't have the

1 automatic -- inherent credibility of a U.S. bond and doesn't
2 have the -- have the benefits of investing in something that
3 supports -- supports directly the United States or municipal
4 bond or municipality, as the state reads that statute at this
5 point there's -- none of those requirements are in place; it
6 doesn't have to be backed by the full faith and credit of the
7 issuing agency of that government or it doesn't have to be
8 rated by any rating agency and it doesn't have to be payable in
9 U.S. dollars.

10 So that's not a reasonable interpretation that
11 the -- that the legislature would have intended to have such --
12 such strict requirements when it comes to government
13 obligations that apply to U.S. bonds or U.S. government
14 sponsored organizations or Canadian bonds, but when it comes to
15 foreign bonds that there wouldn't be any such requirement.

16 THE COURT: Okay. I'm going to interrupt you
17 right now.

18 MR. KUSHNER: Yes.

19 THE COURT: Number one, I'd like you to take a
20 breath every once in a while.

21 Secondly, we have an hour allocated for both
22 sides, so each will get 30 minutes. So I should let you know I
23 have read the submissions --

24 MR. KUSHNER: Okay.

25 THE COURT: -- of both of you and I've

1 highlighted things that I think are important. So if you would
2 hit on those.

3 MR. KUSHNER: Okay.

4 THE COURT: And I know this is important, but
5 hit on your major points so you fit within your timeframe.

6 MR. KUSHNER: Okay. So, you know, we've -- I
7 posted -- we put together rules of construction that are
8 critical here in order to get a sensible reading of the
9 statutes, and it's important to recognize that the statute has
10 to be read as a whole; it has to be interpreted in light of the
11 surrounding sections, and words and phrases have to be read to
12 avoid absurd results or unjust consequences. And then if
13 there's -- if there are general and specific provisions of the
14 statutes, the general provisions are taken into effect only to
15 the degree that the general language is not within the language
16 of the special provision, and they have to -- you know, general
17 wording has to be read in conjunction with the specific
18 wording.

19 So what -- so the only reasonable interpretation
20 here is to look at the government obligations that are
21 permitted as being limited by subdivision 2, and then under the
22 -- under the category of other investments that are allowed,
23 there are four previous ones, and so what's reasonable is to
24 look at 5 as modifying 1 through 4, that you can purchase
25 international securities that are within -- that are described

1 by categories 1 through 4 and that that's the reasonable
2 reading of that provision.

3 Otherwise -- and in the case of Amaral versus
4 St. Cloud Hospital and KSTP -- Amaral is A-m-a-r-a-l -- and
5 KSTP versus Ramsey County it talks about that the statute is to
6 be read to give effect to all of its provisions; no word,
7 phrase or sentence shall be deemed superfluous, void or
8 insignificant. And so unless we read international securities
9 in conjunction with those other provisions that regulate
10 purchases of various obligations, then those other requirements
11 become superfluous and don't have any effect. So that's why
12 it's critical to read the statutes as a whole.

13 And so an interpretation of securities on the
14 basic dictionary definition is not reasonable in this
15 circumstance. We've cited many court decisions in our brief
16 that go through a lot of effort to try and define what
17 securities means in various contexts. It's not that clear cut.
18 But in this particular case securities needs to be read as
19 being modified by the other language in the statutes.

20 Finally, SBI's own records indicate that even
21 though they talked about agency deference, first of all agency
22 deference is not applicable when you're interpreting the plain
23 language of a statute and the meaning of the statutes. And
24 their own records, which they themselves have partly provided
25 and which we've provided, indicate that they didn't intend for

1 international securities to apply to foreign government bonds
2 because whereas they have guidelines -- very specific
3 guidelines regarding corporate investments, corporate stocks,
4 they haven't issued any kind of guidelines when it comes to
5 foreign bonds. So the -- so it becomes clear that they
6 themselves haven't understood this provision this way
7 historically.

8 But, in any event, a reading of the statute for
9 the reasons in the brief requires that international securities
10 be limited and that foreign bonds can't be purchased under any
11 condition but they have to be limited to the very specific
12 conditions provided in subdivision 2 of the statutes.

13 And I guess I'll save the rest of my time in
14 order to respond to the state. Thank you.

15 THE COURT: Okay. Thank you. From the state?

16 MS. ANDERSON: Your Honor, may it please the
17 court.

18 If you'll permit me, Your Honor, I'd like to
19 actually approach the bench with a copy of the -- a physical
20 copy of 11A.24 because I think it may be easier to follow.

21 THE COURT: Sure.

22 MS. ANDERSON: (Handing.)

23 Your Honor, I'd just like to take a tiny bit of
24 time to walk through the statute because I think when we walk
25 through the statute it becomes abundantly clear that the plain

1 meaning of "international securities" really does include
2 foreign government bonds of the sort that we're talking about
3 here.

4 And, of course, as Your Honor is very familiar,
5 as a matter of statutory interpretation, if the plain meaning
6 of a statute dictates a certain interpretation, then these
7 canons of construction that counsel laid out are just not
8 reachable.

9 The issue of adjustum generis and all of the
10 other Latin phrases that counsel uses and even the concept of
11 what's reasonable is not at issue. What's at issue is the
12 plain meaning of the statute. And, in fact, one of the cases
13 that I cited in my brief, Hyatt, H-y-a-t-t, versus Anoka Police
14 Department, says that a reviewing court, even if it considers
15 the result to be unreasonable or bad policy, it doesn't matter
16 as long as the plain language dictates the result.

17 And here, Your Honor, I would posit, just as an
18 aside, Counsel is not correct that there are just no standards
19 that bind the State Board of Investment in investing in foreign
20 government bonds. In fact, the State Board of Investment is
21 bound by the prudent person standard and follows the prudent
22 person standard, which is both imposed by Common Law and by the
23 statute, in making all of its investments.

24 But, Your Honor, let's just walk through the
25 statute: 11A.24, Authorized Investments. Subdivision 1 talks

1 about securities generally: "The State Board shall have the
2 authority to purchase, sell, lend or exchange the following
3 securities that are made subject to this section." And later
4 on in that same subdivision it talks about the securities
5 described in subdivisions 2 to 6.

6 So let's walk through 2 to 6. Subdivision 2,
7 Government Obligations, Bonds of U.S. and Canada; Subdivision
8 3, Corporate Obligations, Bonds of U.S. and Canadian Companies;
9 Subdivision 4, Other Obligations - things like certificates of
10 deposits, commercial paper, et cetera; Subdivision 5, Corporate
11 Stocks of United States and Canadian Domiciled Corporations;
12 and, finally, we get to Subdivision 6, Other Investments - key
13 here, Your Honor - in addition to the investments authorized in
14 subdivisions 1 to 5 -- in addition to all of those that I've
15 just listed, and in 1988 the legislature added number 5,
16 International Securities.

17 Now, international securities, by the plain and
18 ordinary common usage of the word "securities," securities
19 includes bonds.

20 Your Honor, I took a look at -- I cited some
21 definitions in my memorandum, but I also took a look at Black's
22 Law Dictionary, 9th edition, 2009, on pages 1475 to 1476 to
23 find "security." Definition number four: "An instrument that
24 evidences the holder's ownership rights in a firm, e.g., a
25 stock; the holder's creditor relationship with a firm or

1 government, e.g., a bond or the other rights, including an
2 option."

3 So even the Black's Law Dictionary definition, a
4 common usage of this term includes government bonds. And
5 there's no dispute about whether "international" includes
6 "foreign government" -- "foreign" because both of the parties
7 agree with that. So, Your Honor, the plain and ordinary
8 meaning of the word "securities" just in terms of common usage
9 includes government bonds.

10 But it's also instructive, Your Honor, to look
11 at the statute itself. Subdivision 1, again, talks about "the
12 following securities," securities described in subdivisions 2
13 to 6. Well, in subdivisions 2, 3 and 5 we're talking about
14 stocks; we're talking about bonds.

15 It's very clear that the legislature intended
16 when it talks in terms of the word "security" to include bonds.
17 And, in fact, in my brief, Your Honor, I cited to several other
18 Minnesota statutes where the legislature uses the catch-all
19 term "securities" to include bonds. Again, Your Honor, the
20 plain language, the plain meaning of "international securities"
21 includes international government bonds.

22 Now, Your Honor, Counsel says that because
23 subdivision 2 includes -- covers government obligations,
24 government bonds, that that must mean that subdivision 6(a)(5)
25 can't include government bonds. Well, this is wrong for a few

1 different reasons. Number one, that reading completely leaves
2 out the beginning of subdivision 6, which says, "in addition to
3 the investments identified in subdivisions 1 through 5."

4 Also this argument just proves too much because
5 if what's covered under subdivision 2 -- if subdivision
6 6(a)(5), international securities, can't include anything
7 that's included in subdivisions 2 through 5, that means that
8 international securities not only don't include government
9 bonds but, since subdivision 3 includes corporate obligations,
10 that means international securities don't include corporate
11 obligations.

12 It also means that since subdivision 5 includes
13 corporate stocks, that means that international securities as
14 used in 6(a)(5) also doesn't including international company
15 stocks, and that's clearly, Your Honor, not what the
16 legislature intended to do when using this broad catch-all
17 "international securities" word.

18 Your Honor, I cited cases in my memorandum that
19 talk about the fact that when the legislature uses this kind of
20 catch-all phraseology, "international securities," they're
21 clearly intending to sweep into that things that aren't
22 included in other statutes, and especially when they use words
23 like "in addition to investments that are authorized in
24 subdivisions 1 through 5."

25 Your Honor, Counsel also wants to try to make an

1 argument that subdivision 6(a)(5) is limited to international
2 varieties of what's addressed in subdivision 6(a)(1) through
3 (4), but, Your Honor, that doesn't seem to make sense based on
4 the plain language.

5 If you look on subdivision 6(a)(3), it talks
6 about mutual funds registered under the Federal Investment
7 Company Act of 1940. Obviously, that doesn't include
8 international securities. You can't really get those two.
9 It's very clear that international securities means something
10 very different.

11 And, frankly, Your Honor, the fact that this
12 provision for international securities was added in 1988, after
13 all of these other provisions, makes clear that the legislature
14 meant to include something in international securities that
15 wasn't included in any of the other provisions of 11A.24, 1
16 through 6(a)(4), something different all together, which
17 includes, as a matter, again, of plain meaning, Your Honor,
18 foreign government bonds.

19 And, Your Honor, even if you think that the
20 statute is ambiguous, this court needs to look at longstanding
21 agency interpretation, especially here where the agency
22 actually requested the statute to be amended to include
23 international securities and actually was involved in helping
24 to draft it.

25 I included an affidavit from Howard Bicker, the

1 executive director of the SBI, who was the executive director
2 in 1988 at the time the statute was amended to include
3 international securities, and he makes clear that the -- what
4 the SBI was asking for was authority to invest beyond what was
5 already invested, allow for investments under the existing law.
6 And, indeed, the SBI has since at least 1991 used that
7 authority to invest in international government bonds.

8 Counsel for plaintiff talks about these
9 guidelines -- these investment guidelines that the SBI has
10 adopted and seems to argue that because those guidelines don't
11 include foreign government bonds that that therefore must mean
12 that the SBI doesn't actually think that it has the authority
13 to invest in foreign government bonds.

14 But that's not the case and it's clear for two
15 reasons. Number one, as I put in Mr. Bicker's affidavit, the
16 SBI's reports over the years show that they have indeed been
17 investing in foreign government bonds. And, as Mr. Bicker also
18 explained, these guidelines for investment actually have
19 absolutely nothing to do with government bonds at all; it's for
20 the investment -- the stock pool, international stock pool.
21 And the reason why those guidelines were created were really a
22 reaction to concern expressed by unions and environmental
23 groups about the competitive edge that companies -- foreign
24 companies might get because of the -- of the countries that
25 they were in, and so the board came up with these investment

1 guidelines to try to address those specific -- really specific
2 issues raised by union and environmental interests that really
3 only had to do with corporate issues.

4 So, again, Your Honor, the plain meaning of the
5 statute is quite unavoidable here. It can't be argued that
6 international securities doesn't include foreign government
7 bonds when you look at the words of the statute. And for that
8 reason, Your Honor, plaintiffs' motion should be denied and,
9 frankly, defendant's motion should be granted really on the
10 same basis.

11 And, Your Honor, I don't know if you want me to
12 address the other issues in my motion or if I should sit and
13 let Counsel rebut or how --

14 THE COURT: Here's what I would suggest, because
15 we've -- we're not quite at the halfway mark here, and I assure
16 you I have read your submissions; I took some time to do that
17 last week -- I would suggest that you move right on into your
18 motion and then Mr. Kushner can respond to that, and then if
19 there's any time after that that you wish to clean up on any of
20 these, that will be your option.

21 MS. ANDERSON: Thank you, Your Honor. That
22 makes sense to me too.

23 Your Honor, the effect of what counsel for
24 plaintiffs is asking for is that the State Board of Investment
25 cannot invest in any foreign government bonds. That result --

1 the logical result of that is that the State Board of
2 Investment would have to divest from all of its dozen current
3 holdings in foreign government bonds.

4 But it's interesting, Your Honor, that's not the
5 relief that plaintiffs seek. What plaintiffs seek in this
6 lawsuit is divestment of only one country's bonds. And that
7 leads me to the standing argument that I want to make, Your
8 Honor.

9 Looking at the allegations of the complaint and
10 the relief that plaintiffs are seeking, divestment from one
11 country's bonds, it's clear, Your Honor, that the interests of
12 the plaintiffs in this case really are a matter of policy
13 disagreement. And policy disagreements, no matter how strongly
14 felt - and I know that they are strongly felt - aren't
15 sufficient to confer standing on parties.

16 Even when even taxpayers challenge an issue, if
17 their primary issue with the statute is one of policy
18 disagreement, there is no standing. And that's what we've got
19 here, Your Honor.

20 Your Honor, what plaintiffs ask this court to do
21 -- and I'll do this very briefly -- is to get this court
22 involved in a matter of foreign policy that's highly political
23 and, frankly, not an area for this court to wade into. We have
24 cited cases directly on point in our brief which explain why
25 this type of very, very sensitive politicized policy issue is

1 just not one to be decided by the courts, both under the
2 political question and the Act of State doctrines.

3 And, Your Honor, I cited to the Doe versus
4 Israel case and the Caterpillar case, both of which are
5 absolutely directly on point and both of which find that these
6 doctrines preclude courts from wading into these kinds of
7 highly charged policy political decisions.

8 Even if this case were justiciable, though, Your
9 Honor, we've also cited cases that are directly on point which
10 show that the State Board of Investment's mere investment in
11 bonds is so far removed from any potential alleged
12 international law violations that it could never be the source
13 of an aiding and abetting liability, which is really what their
14 claims -- counts 2 and 3 boil down to.

15 Even one of the cases that they cite, Doe versus
16 Nestle, N-s-t-l-e [sic], says plaintiffs must allege something
17 more than ordinary commercial transactions to state a claim for
18 aiding and abetting. And that's exactly what -- plaintiffs'
19 claim here is really it's a commercial transaction; the State
20 Board of Investment has purchased government bonds.

21 Other cases that we cited in our brief, for
22 example, the In Re South African Apartheid Litigation, there
23 one of the defendants bought government bonds and the court
24 said, "No, that is not the sort of action that could ever state
25 a claim for aiding and abetting liability."

1 So, Your Honor, for all of these reasons not
2 only is this case not justiciable but, even if it were, Your
3 Honor, there's a failure to state a claim against the SBI
4 absolutely, and the plain meaning of the statute permits these
5 investments and this court should not grant summary judgment in
6 favor of the plaintiffs but should grant dismissal in favor of
7 the defendants.

8 Thank you.

9 THE COURT: Thank you. Mr. Kushner?

10 MR. KUSHNER: Thank you.

11 The plaintiffs are not just challenging the
12 state on foreign policy. What they're doing -- what we're
13 doing is we're challenging the state's decision to make foreign
14 policy when it violates the statutes on count one, and on count
15 two where it violates their obligations under the prudent
16 person standards to follow the law with respect to
17 international law.

18 We were specifically requesting divestment in
19 Israeli bonds at the time we filed the lawsuit. The only
20 foreign government bonds we were aware of that SBI invested in
21 were Israeli bonds. We believe -- and there hasn't been
22 discovery yet and that's one of the reasons why this motion to
23 dismiss is very premature, but we weren't able to ascertain
24 when these other bond investments were even purchased. We
25 believe they were purchased after objections were raised by

1 Minnesota Break the Bonds Campaign to investments in Israeli
2 bonds.

3 They talk about how this is going to have some
4 big effect on their investment portfolio. It's a -- their
5 foreign bond investments are a tiny portion of their overall
6 portfolio. But the overwhelm -- as the first chart I presented
7 to the court had showed, most of these foreign bond investments
8 are specifically Israeli bonds. And so this was a specific
9 design to make a political statement on their part.

10 Now, starting with what the plain meaning of the
11 statute means, the plain meaning of the statute isn't just
12 about what one specific phrase says, but it's about what one
13 specific phrase means in light of the other provisions.

14 And so when subdivision 6(a) talks about that it
15 can make these investments in addition, it doesn't mean that
16 they can make any investments completely unmodified. What it
17 means is they can make investments in addition to the previous
18 investments as long as it's within the restrictions that are
19 previously provided by the statutes.

20 Ms. Anderson talked about corporate obligations,
21 which is subdivision 3. Well, in order to invest in a
22 corporate obligation it has to be -- it has to be rated by a
23 nationally recognized rating agency; it has to have a top
24 rating, and it has to be payable in U.S. dollars. And so if we
25 have those kinds of restrictions on domestic investments or

1 Canadian investments, it does not make sense that there be no
2 such restriction when it comes to foreign investments.

3 The -- our position would not require the state
4 to divest from all corporate stocks. Most -- most
5 international corporate stocks are tradable on U.S. markets;
6 they're repayable in U.S. dollars; they can be rated by a
7 rating agency. We're talking specifically about sovereign bond
8 investments where it's contradictory to interpret it in a
9 manner that -- that the state is interpreting, which is that,
10 whereas there's many restrictions for foreign -- for government
11 obligations and corporate stocks in the previous provisions of
12 the statutes, but then when it comes to international
13 securities there's no restriction whatsoever and the state can
14 purchase any stock or any bond it wants. That -- that
15 eliminates all the restrictions previously in the statutes.

16 Subdivision 6(a), the previous provisions talk
17 about investing in corporations, so it does provide the state
18 with the ability to invest in corporate -- foreign corporate
19 stocks. Because of the other restrictions on bonds, though, it
20 does not permit investment in foreign sovereign bonds.

21 Now, on the -- let me just address the affidavit
22 of Howard Bicker. He's not competent to testify as to
23 legislative intent, and that's what the state is in effect
24 doing with his affidavit when he talks about "This is why we
25 asked for the change." He -- they're using him to be a witness

1 as to the legislative intent. It's not valid for a legislator
2 to submit an affidavit and say, "This was our intent." That
3 eliminates -- eviscerates the separation of powers -- the
4 purposes of the separation of powers where the court needs to
5 rely what's on the books [sic], what the legislative -- what
6 the legislature passed, but the evidence is of legislative
7 history.

8 So it's not based on what Howard Bicker thinks
9 the legislative intent was, but it's based on what the -- what
10 the statute says. It's based on what the statute says as a
11 whole, not based on what portions of the -- not based on -- on
12 what the -- on a specific witness, a lay person, who decides to
13 say, "This is why we passed the statutes."

14 Now, on -- the state, I think, kind of mixes up
15 the standing issues with the policy with its argument that
16 we're trying to challenge policy. I don't think there's any
17 question that the -- there's no question raised that some of
18 the plaintiffs are actually stakeholders in the state pension
19 funds; these are Minnesota Taxpayers and federal case law
20 standing is conferred. As long as one of the plaintiffs has
21 standing, standing is usually recognized for the group of
22 plaintiffs.

23 Now, the state -- the state statute in a couple
24 different provision under 356A specifically authorizes legal
25 challenges to pension plans, including SBI, if they're

1 violating the law or they're violating their fiscal
2 responsibilities. So there is basis for that challenge to be
3 made.

4 And what the argument is is that they're
5 violating the law and violating their fiscal responsibility by
6 investing in bonds that aren't authorized by statutes, bonds
7 that violate international law and could subject the state
8 potentially to tort claims, lawsuits to the extent that they're
9 participating in an illegal -- by financing directly government
10 obligations that are used to finance a foreign -- illegal
11 foreign occupation-- ongoing illegal foreign occupation and the
12 displacement of another population by the occupy -- by the
13 population of the occupying power.

14 The international law that Ms. Anderson cites in
15 her brief we submit is inapplicable or outdated. The -- an act
16 of state, when it violates the -- the Geneva convention on war
17 crimes - and that's what we're alleging as stated in the
18 complaint, that these are -- that this is financing of a war
19 crime, the -- an act of state can be challenged.

20 That's indicated in the case that we cited,
21 which is more recent -- much more recent than Doe versus
22 Israel, first Lizarbe, L-i-z-a-r-b-e, versus Rondon,
23 R-o-n-d-o-n, which is a 2009 case in the Federal District of
24 Maryland, and what we think is a very significant case that was
25 decided in 2011 in the Ninth Circuit, Sarei, S-a-r-e-i, versus

1 Rio Tinto, R-i-o, next word T-i-n-t-o, Inc., and that was a
2 Ninth Circuit 2011, which states when there is actually a
3 violation of the -- of The War Crimes Act, that international
4 law can be raised and acts of state can be challenged under
5 those circumstances, and that was the basis for an
6 international law challenge.

7 And we're also -- it's also critical to note
8 that we're not here -- we're not challenging U.S. policy; we're
9 challenging this -- and so the Act of State doctrine doesn't
10 apply here; a political question doctrine -- political question
11 doctrine doesn't apply. Act of state applies to foreign
12 states. And then this is the basis where we can challenge it
13 because of the type of violation it is.

14 But a political question doctrine applies to the
15 U.S. Executive and Legislative branch; it limits the ability to
16 challenge U.S. Government actions. But that's not what's
17 involved here. We're specifically challenging state government
18 actions, the actions of the Minnesota state government, and
19 that it -- again, that it violates their own laws.

20 And we're challenging their decision to try and
21 make foreign policy, but it's not -- so it's not U.S. foreign
22 policy that's being challenged, but it's whether their --
23 Minnesota's own act of engaging in foreign policy is illegal
24 under state statute and international law, and we do have
25 standing to do that and there is jurisdiction to do that.

1 So there's a -- you know, another -- one other
2 case that we cite here that says that claims for violations of
3 international norms proscribing war crimes is In Re Xe Services
4 - that's Z-e Services - a tort litigation -- actually, it's not
5 Z-e but X-e.

6 The case that the state cites of Jones versus
7 Baskin, where it said that Israeli bonds is not imprudent, that
8 was a private employment dispute; it was -- did not deal with
9 any of the issues that we're dealing with in this particular
10 case, and it just had to do with whether it was prudent
11 investment based on there being poor returns.

12 Now, there's also -- the state raised the
13 standard of what would constitute aiding and abetting. Their
14 contention is that purchase of bonds is insufficient to
15 constitute aiding and abetting.

16 Again, we think that there's recent authority
17 that's instructive on that. One is Presbyterian Church of
18 Sudan versus Talisman Energy, T-a-l-i-s-m-a-n, and that -- they
19 rely on the standards based on Federal Common Law, the
20 Nuremberg court and international tribunals, which is just
21 knowing assistance to committing a violation. And that's also
22 the standard that Minnesota courts adopted in Matthews versus
23 Eichorn Motors - E-i-c-h-o-r-n, Motors - where they were
24 dealing -- what the standard for civil liability is.

25 And so the appropriate standard for civil -- the

1 standard that's used for state civil liability should be the
2 same when it comes -- or when the state court is applying what
3 the standard is for international law violations.

4 And then also the Sarei versus Rio Tinto case,
5 that the purpose -- the purpose of the action, that it's in
6 furtherance of a crime -- it's whether there's purposeful
7 action in furtherance of a war crime. And here SBI is making a
8 political decision to invest in Israeli bonds knowing full well
9 the international legal implications. And so that is
10 sufficient for them to be potentially liable for aiding and
11 abetting and why it's appropriate to order them to divest in
12 these bonds under international law and international law as
13 incorporated by the state law which requires pension plans to
14 follow the law and act based on a prudent person standard.

15 Thank you.

16 THE COURT: Thank you. In response?

17 MS. ANDERSON: Just a few quick things, Your
18 Honor.

19 First of all, as to the issue of statutory
20 construction, Counsel seems to argue that because 6(a)(5)
21 international securities don't have the same sort of
22 restriction as subdivision 2, that must mean that that
23 provision doesn't include government bonds. Well, those sorts
24 of restrictions also exist in the other subdivisions, and the
25 fact is subdivision 6(a)(5) just says "International

1 Securities."

2 Again, the State Board of Investment is bound by
3 its fiduciary duty. But the court, when the statute is plain,
4 and it is, can't read things into a statute that the
5 legislature omits. That's just not permissible under statutory
6 construction.

7 The second point, Your Honor, we do not submit
8 Howard Bicker's affidavit as a modicum of legislative intent.
9 What we're submitting Howard Bicker's affidavit is to show what
10 -- the longstanding interpretation of the agency in charge of
11 the enforcement of the statute.

12 And one of the cases that I cited in my brief,
13 Your Honor, is right on point, Bremer, B-r-e-m-e-r, versus
14 Commissioner of Taxation, which says that courts give
15 considerable weight to a construction contemporaneous with the
16 statute's enactment by the agencies charged with its
17 administration because that construction is, quote, "relevant
18 and material evidence of the understanding and opinions of
19 those who are charged with the responsibility of putting the
20 statute in operation and who were familiar with and probably
21 active in drafting the statute."

22 Mr. Bicker's affidavit shows what that
23 contemporaneous understanding of that agency that's charged
24 with enforcing this statute is and is used for that
25 proposition.

1 Your Honor, the cases that we cited -
2 Caterpillar, Doe versus State of Israel - directly show how the
3 Act of State doctrine and political question doctrines are at
4 play here and don't allow the court to wade into this issue.

5 The Sarei case that counsel cites to, although
6 more recent, is very distinguishable. There the court noted
7 that the foreign government at issue actually wrote a letter to
8 the court urging the court to keep the case, to exercise
9 jurisdiction. So there -- clearly there wasn't any sort of
10 political question issue or issues of international comity that
11 the political question doctrines and the Act of State doctrine
12 are designed to address because there the foreign government
13 was actually asking the court to wade in.

14 The other cases that Counsel cites, the Talisman
15 case, all of these other cases, do support our position and, in
16 fact, we cite to all these cases in our responsive brief and,
17 frankly, our original brief. These cases say that where the
18 court's decision -- actually, these cases stand for the
19 proposition that where all the defendant -- alleged defendant
20 is doing is acting in a business capacity - buying, selling,
21 purchasing bonds - that that is simply not the sort of conduct
22 that could ever lead to aiding and abetting liability.

23 And the Talisman case specifically says that to
24 come to any other conclusion that the mere act of selling and
25 purchasing would be foundation for an aiding and abetting claim

1 would actually allow for private parties to impose embargoes on
2 other countries, which the United States Government hasn't
3 itself done, which is, again, why this is right in the area of
4 political question and Act of State doctrines.

5 So, Your Honor, again, defendant opposes
6 plaintiffs' summary judgment motion and asks this court to
7 dismiss the lawsuit in its entirety.

8 THE COURT: Is there anything that you'd like to
9 say about the issue of the Geneva convention at all?

10 MS. ANDERSON: In terms of --

11 THE COURT: The position of the plaintiffs and
12 as to whether the State of Minnesota by virtue of these kinds
13 of investments is in violation of that convention?

14 MS. ANDERSON: And, Your Honor, that's exactly
15 what the -- these cases - the Talisman case and the other cases
16 - the Caterpillar case, the In Re South African Apartheid
17 Litigation, the Doe versus Nestle case that Counsel themselves
18 cite in their brief -- all of these cases stand for the
19 proposition -- these are all aiding and abetting claims, all
20 claims that say the underlying activity by the foreign
21 government violates some convention. In Caterpillar it was the
22 Geneva Convention, alleged violations by Israel of the Geneva
23 Convention.

24 And all of those cases -- even assuming that an
25 international law violation existed, all of those cases said

1 that the mere act of selling, of buying, of acting in the
2 marketplace, just like buying bonds, is not the sort of
3 activity that could ever lead to aiding and abetting liability
4 even if the underlying foreign government had violated a
5 convention.

6 THE COURT: And I do have one question that you
7 might not have the answer to.

8 MS. ANDERSON: Sure.

9 THE COURT: I think Mr. Kushner alluded to
10 Mexican bonds and other governmental bonds, not Canadian.

11 Do you have any sense of when those bonds were
12 purchased? Is this something new or is it something that's
13 historically been the practice of the Investment Board?

14 MS. ANDERSON: Sure. Your Honor, what I have in
15 the record is starting in 1991 the State Board of Investment
16 invested in foreign government bonds; there it was the Korean
17 Development Bank and the European Investment Bank. And
18 according to Howard Bicker's uncontested affidavit, the SBI has
19 been investing continuously in foreign government bonds since
20 at least 1991.

21 What I've got in the record for Mr. Howard
22 Bicker's affidavit is the current asset listing that's on their
23 website. You know, the assets that they hold change
24 constantly, and so what's on their website is the most current
25 listing as of December 31, 2011, and there are 12 different

1 foreign investments that are included on that.

2 I don't know specifically when each of them were
3 purchased. You know, I suppose we can make some inferences
4 based on what the maturity dates are, but I don't actually have
5 at my fingertips the specific dates of when those bonds were --
6 each of those bonds were purchased.

7 But, again, since at least 1991 the SBI has
8 invested in foreign government bonds, and in 1993 they started
9 investing in Israel bonds.

10 THE COURT: Okay. And this may be neither here
11 nor there for purposes of the legal discussion here, but to the
12 best of your knowledge is it accurate that at this point in
13 time there is a total of \$34 million in bonds, 23 million of
14 which are Israeli bonds?

15 MS. ANDERSON: Again, Your Honor, all I have at
16 my disposal is what's in the record, and that, again, is the
17 current -- as of December 31, 2011, asset listing. And in this
18 asset listing there is a bond for 13.5 million for Aid Israel
19 and a State of Israel bond of 10 million listed, and then a
20 variety of other bonds.

21 THE COURT: Okay. And what is the total
22 invested, if you can tell, in international bonds?

23 MS. ANDERSON: I didn't do the math. I'm sorry,
24 Your Honor.

25 THE COURT: Okay. Thank you. Okay. And,

1 again, as I said, that may be neither here nor there, but --

2 MS. ANDERSON: Right, right. And, obviously,
3 Your Honor, our argument is the plain meaning of the statute
4 allows for these investments, and the SBI has been vested with
5 the discretionary ability to make investments that it thinks
6 are prudent investments, and this is a prudent investment.

7 THE COURT: Okay. Thank you.

8 Mr. Kushner?

9 MR. KUSHNER: Thank you.

10 A few brief points. One, we're not in a
11 position to dispute or agree with the -- all the positions in
12 Howard Bicker's affidavit regarding the history of bond
13 investments. We need discovery in order to figure that out.

14 You know, development bank investments are not
15 necessarily the same as foreign government obligations. Some
16 development banks are private. They could be U.S. sponsored
17 and then fall into subdivision 2, and that's -- to the degree
18 that that's relevant, we'd have to figure that out through
19 discovery.

20 For the standard of aiding and abetting, if
21 someone goes and invests in a business without knowing what's
22 involved, then they wouldn't necessarily be liable for aiding
23 and abetting. Aiding and abetting requires knowledge.

24 What is different about the State of Minnesota
25 is that they -- the government bond -- Israeli government bonds

1 go directly to the treasury and are directly supporting the
2 illegal occupation, and the State of Minnesota is in a position
3 to know that, and they're specifically -- based on their
4 investment portfolio they are specifically investing in Israeli
5 bonds to support Israel and its actions, which is a higher
6 standard than what was -- was addressed in some of the other
7 cases that say merely buying and selling isn't aiding and
8 abetting. What we have here goes beyond buying and selling.

9 Certainly the Rio Tinto case did find liability
10 based on a corporation's activities in a foreign country, and
11 they didn't decide that there was -- that the case was
12 justiciable because the government wrote a letter saying, "We
13 support it;" it was based on a very careful, thorough
14 application of international law, which we submit is
15 instructive in this case.

16 One other point here about legislative
17 interpretation and agency deference, the Minnesota Power case,
18 which the -- which the state cites, dealt with the deference to
19 an agency interpretation of a term as a result of a --
20 contested administrative proceedings. That's very different
21 from this case. This was a -- contested administrative
22 proceedings. There was evidence taken; there was very
23 extensive deliberation and consideration by an administrative
24 law judge to determine what the terms mean of a specific rule
25 or sometimes a statute.

1 That didn't take place here. What took --
2 what's taken place here is just an affidavit submitted by an
3 official for purposes of litigation to support what his
4 interpretation is of the statute. And under those
5 circumstances deference shouldn't apply, but we urge the court
6 to engage in its own independent common sense interpretation of
7 the statutes.

8 Thank you very much.

9 THE COURT: Thank you.

10 And, finally, anything in response from the
11 state?

12 MS. ANDERSON: Just a couple of quick things,
13 Your Honor.

14 In terms of the aiding and abetting liability,
15 Your Honor, I encourage you to read the Caterpillar case that I
16 cite, particularly the District Court opinion that really walks
17 through -- I mean there the Caterpillar Company was sued for
18 aiding and abetting international law violations by the fact
19 that they knew that their bulldozers were going to be used, and
20 the court found that that -- there was no even statement of a
21 claim for aiding and abetting there.

22 I can't imagine extrapolating from that that the
23 mere purchase of foreign government bonds could ever be aiding
24 and abetting.

25 And, again, the case -- another case that I

1 cited, the In Re South African Apartheid Litigation, there
2 government bonds were purchased, defense bonds, and the Court
3 said no -- failure to state a claim for aiding and abetting
4 liability. So, again, Your Honor, the SBI's conduct is simply
5 not the sort that could lead to an aiding and abetting claim.

6 And, finally, Your Honor, in terms of this issue
7 of statutory construction and longstanding interpretations by
8 -- by agencies, I cited in my brief to Emerson, M-e-r-s-o-n
9 [sic], versus School Board of Independent School District 199,
10 a very, very recent Minnesota Supreme Court case, and there the
11 court found that even though it wasn't -- it was a school board
12 interpretation that had been -- of a statute that had been a
13 decade old or so -- applied for decades -- sorry -- and the
14 court found that that interpretation was due the same sort of
15 deference as an agency administrative interpretation even
16 though it wasn't technically an agency interpretation under
17 645.168.

18 So courts are very -- very deferential to
19 interpretations, particularly longstanding interpretations by
20 agencies.

21 And, again, the SBI has been investing since
22 1991 in foreign government bonds. And just a quick rule search
23 that I did showed the Korean Development Bank and the European
24 Investment Bank are not privately held investment banks, but
25 they're government banks and government -- government bonds.

1 So, Your Honor, again, we ask this court to
2 dismiss this lawsuit.

3 THE COURT: Okay. Anything further, Mr.
4 Kushner?

5 MR. KUSHNER: Just a brief point. We're talking
6 about Googling the information and that we need discovery in
7 order to ascertain the facts on that.

8 I have nothing further.

9 THE COURT: Okay. Obviously, there is a lot of
10 case law that has been cited by both sides in the memos that I
11 have received, and although I have read your submissions, I
12 have not checked the citations. And I'm glad that you
13 highlighted from both sides certain of the cases that you
14 believe are pivotal in this issue -- in this case.

15 It will take me some time to go through this.
16 Don't expect an immediate answer on any of this. It's too
17 complicated to give you an answer from the bench. So I will do
18 my best and use my own due diligence.

19 And what I'm going to do, though, is to ask each
20 of you to submit to the court a proposed order reflecting,
21 obviously, your own positions. And I think I have the luxury
22 of giving you some time on that because you're not going to get
23 a decision like this overnight.

24 Could you submit proposed orders -- I'll give
25 you your choice -- in a week or two weeks?

1 Let's start -- Mr. Kushner, you're the
2 plaintiff.

3 MR. KUSHNER: Well, if the choice is between one
4 or two weeks, we'll take the two weeks.

5 THE COURT: Okay. Two weeks. Would you agree
6 with that, Counsel?

7 MS. ANDERSON: I would be pleased with that,
8 Your Honor. And do you mean findings of fact, conclusions of
9 law and a proposed order?

10 THE COURT: I do, for both. And let's make them
11 contemporaneous. So today is the 5th, so --

12 THE CLERK: The 19th.

13 THE COURT: The 19th? Does that work for you?
14 Okay. Submissions on the 19th. By then I hope that I'll be up
15 to speed with both sides here.

16 MS. ANDERSON: And, Your Honor, just one more
17 question.

18 THE COURT: Yes?

19 MS. ANDERSON: Is it -- since we've got
20 competing motions, is it okay if we address both -- both
21 motions all together in one submission?

22 THE COURT: I think that would make sense.
23 Mr. Kushner, would you agree?

24 MR. KUSHNER: Yes.

25 THE COURT: Okay. And I'd like to thank

1 everyone who's here. I know some of those seats are a little
2 uncomfortable and cramped in the back there, and those of you
3 who are standing, even less so. But thank you for your
4 courtesy.

5 MR. KUSHNER: Do you want us to submit them
6 electronically?

7 THE COURT: Well, here's what I'd like you to
8 do. Submit them electronically, but would you also send a hard
9 copy, a courtesy copy, to my chambers, please?

10 MR. KUSHNER: Okay.

11 THE COURT: Great. Thank you.

12 (Court adjourned at 3:30 p.m.)

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REPORTER'S CERTIFICATE

I, LINDA M. HORGAN, an Official Court Reporter for the Second Judicial District, hereby certify the foregoing forty (40) pages to be a true and complete transcription of my original stenographic notes taken herein.

Dated: March 19, 2012



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