STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Declaratory Judgment

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

Court File No. 62-CV-11-10079

Judge Margaret M. Marrinan

Plaintiffs,

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNT ONE

vs.

Minnesota State Board of Investment,

Defendant.

INTRODUCTION

In Opposition to the Plaintiffs' Summary Judgment Motion on Count One, the defendant (SBI) argues that the "plain meaning" of "international securities" as used in Minn. Stat.§ 11A.24, Subdivision 6(a)(5) permits it to invest in any foreign governmental

bond unconstrained by anything other than federal law. The only way that the SBI can make such an assertion, however, is to completely ignore the maxim of 'expressio unius est exclusio alterius' (codified at Minn. Stat. § 645.19) and to disavow the applicability of the canon of 'ejusdem generis,' which has also been codified. Rather than apply these time-honored tools of statutory construction, the SBI argues that the court should instead simply defer to the SBI's so-called "longstanding" policy of investing in governmental bonds not authorized by Minn. Stat.§ 11A.24, Subdivision 2.

The SBI has provided no factual or legal grounds upon which the court can rely to deny the plaintiffs' summary judgment motion. Both the maxim of 'expressio unius est exclusio alterius' and the canon of 'ejusdem generis', in addition to the SBI's own internal policy manuals and legislative history, rigidly restrict the SBI from making any investments in governmental bonds, domestic and international, other than those authorized by Minn. Stat. §11A.24, Subdivision 2. Other international investments are limited to the "alternative investments" described in Subdivision 6(a)(1)-(4), the "Other investments" asset class under Minn. Stat. §11A.24. None of these "alternative investments" include governmental bonds.

The SBI now unlawfully holds more than $27,000.000 in Israel Bonds in excess of its statutory authority. Not only has it refused to divest from these bonds, but it appears to have purchased even more after receiving specific notice from the plaintiffs that a portion of the money Israel obtains through the sale of its governmental bonds is used by Israel

for unlawful settlement activities in the occupied Palestinian territories. The court should grant the Plaintiffs' Motion for Summary Judgment on Count One.

I. WHEN READ IN ITS PROPER CONTEXT, SUBDIVISION 6(a)(5) OF MINN. STAT. § 11A.24 DOES NOT AUTHORIZE THE SBI TO INVEST IN FOREIGN GOVERNMENT OBLIGATIONS OTHER THAN THOSE AUTHORIZED IN SUBDIVISION 2.

The SBI insists that the Court should disregard established and codified rules of statutory construction by arguing that the meaning of "international securities" unambiguously includes foreign government obligations beyond those authorized by Minn. Stat. § 11A.24, Subdivision 2. Plaintiffs do not dispute that "international" means beyond the national borders, but in order to be plainly understood, the term "international securities" must be read in the context of the statutory scheme in which it resides.

Statutory interpretation begins with the plain language of the statute. *KSTP-TV v. Ramsey County,* 806 N.W.2d 785, 788 (Minn. 2011)**.** 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. Words and phrases must be read "to avoid absurd results and unjust consequences." *Id.*

The plaintiffs do not believe that Minn. Stat. §11A.24, when addressed to the issues in this case and read as a whole, is ambiguous. The maxim of 'expressio unius est exclusio alterius' (codified at Minn. Stat. § 645.19) precisely limits the specifically enumerated subject of "governmental bonds" at Subdivision 2 to the exclusion of the

remaining asset classes in §11A.24.[1] However, the SBI's attempt to force an interpretation of "international securities" to include "governmental bonds" that is inconsistent with the application of the maxim lays the foundation for other statutory rules of construction that are required to be used to discern the meaning of ambiguous terms, not the least of which is *ejusdem generis*.

As a matter of course, whenever the meaning of "securities" has arisen as an issue in various federal and state cases, the courts have considered the term to be ambiguous and employed the traditional means to discern its meaning. Unlike what the SBI urges this court to do, however, they have not merely ascribed to "securities" the most broadly worded dictionary definition plucked from the latest edition of *Websters* coupled with a vague and conclusory agency opinion that results in an interpretation wholly inconsistent with the rules of construction and legislative intent.

Thus, in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 839 F.2d 47, 56-61 (2nd Cir. 1988), the Court decided that the term

---

[1] The maxim of 'expressio unius est exclusio alterius' (the expression of one or more things in a class implies the exclusion of all not expressed), which is also codified at Minn. Stat. § 645.19, is one of the means that ensures that a statute is read in a manner that avoids absurd and unjust results. See, generally, *Anderson v. Twin City Rapid Transit Co.,* 250 Minn. 167, 175 (Minn. 1957). Because this maxim limits the specifically enumerated subject of "governmental bonds" to Minn. Stat. §11A.24, Subd. 2, application of the subject of "governmental bonds" should not be extended to other asset class subjects 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.").

"securities" as used in the Glass-Steagall Act proscribing affiliations of banks with entities that are engaged principally in underwriting and dealing in securities did not encompass "governmental securities" which banks themselves were allowed to underwrite, noting that the term "securities of any sort" is just as ambiguous as the word "securities" standing alone. *Id.* at 61.

In *Developers Mortgage Company v. TransOhio Savings Bank,* 706 F.Supp. 570, 575 (S.D. Ohio 1989), the Court found that loan participation agreements and notes and certificates which transferred loan participating ownership interests were not "securities" within the meaning of the Securities and Exchange Act. Rejecting "the notion that the title given to the instruments involved controls the determination of whether an obligation is a 'security'," the Court concluded "that the plain language of the statutes is insufficient to reveal whether or not the instrument and obligation involved were 'securities'." With scant legislative history on point for guidance, the Court turned to judicial interpretations of the statutes and "certain tests propounded in the case law" to resolve the issue. *Id.*

Outside of statutory construction, the Courts have found the term "securities" to be ambiguous when used in written instruments, most notably wills. See, e.g., *Oxley v. Oxley,* 262 N.W.2d 144, 147-148 (Iowa 1978) ("In our opinion the term 'securities,' in the context of the phrase at issue ['stocks, bonds and/or securities'], is ambiguous." "Research indicates various courts have grappled with its meaning and come to widely divergent conclusions." "In light of our. . . finding the term 'securities' is ambiguous, we

must now apply technical rules of construction . . . ."); *Huckabee v. Hanson,* 422 S.W.2d 606, 608-609 (Tex. App. 1967) ("It is our opinion that by the use of the specific language 'stocks and bonds' immediately preceding the general expression 'and other securities' testatrix evidenced her intent to restrict the meaning of 'securities' to those of the same nature as stocks and bonds, under the recognized legal principle that 'Where words of a general nature follow or are used in connection with the designation in a will of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation, under the rule of 'ejusdem generis'.").

The SBI is on the horns of a dilemma. If the SBI insists on a construction of the term "international securities" by basic rules of statutory construction, the maxim of 'expressio unius est exclusio alterius" wipes out its argument that Subdivision 6(a)(5) permits the SBI to purchase Israel Bonds. Rather than addressing it or attempting to distinguish it, the SBI has employed the tactic of simply ignoring the maxim (codified at Minn. Stat. § 645.19) as if it doesn't exist, even though it appears in close proximity to other interpretive provisions that the SBI does cite (i.e. Minn. Stat. § 645.16).

If the SBI concedes that the term "international securities" is ambiguous, it loses the argument that Subdivision 6(a)(5) permits the SBI to purchase Israel Bonds upon the elegant application of the canon of 'ejusdem generis.' The SBI has no respect at all for this canon.

The SBI contends that even if the term "international securities" is ambiguous, there are several reasons that preclude the application of "ejusdem generis." [2] It argues that the language "in addition to" at the beginning of Subd. 6 permits an expansive interpretation of "international securities" to include foreign governmental bonds beyond those specifically permitted by Subd. 2 (an argument already foreclosed by the 'expresio unis' maxim). This is a non-sequitur. Limiting the meaning of Subdivision 6(a)(5) to the first four categories of Subdivision 6(a) does not read into the statute a limitation that was not included by the legislature. The legislature has limited the otherwise limitless ambiguity-laden boundaries of Subd. 6(a)(5) by addressing the scope of authorized "governmental bonds" in Subd. 2 and through the governing application of 'ejusdem generis" (Minn. Stat. § 645.08(3)). By doing so, it has given coherent effect to all of the "Other investments" of Subdivision 6.

Applying the canon of 'ejusdem generis' to reign in an otherwise unwieldy and ambiguously limitless term like "securities" within an "Other investments" restricted asset class is nothing new. In *Smith v. Davis*, 323 U.S. 111, 116-118, 65 S.Ct. 157 (1944),

---

[2] Although the SBI argues that 'ejusdem generis' is not substantive law, the legislature appears to have made its application mandatory, although subject to exceptions which are not applicable here. See Minn. Stat. § 645.08(3) ("In construing the statutes of this state, the following canons of interpretation *are to govern*, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: (3) general words are construed to be restricted in their meaning by preceding particular words.") (emphasis added).

involving analogous statutory language, the Supreme Court restricted the term "other obligations" in a section of the federal tax code that read "All stocks, bonds, Treasury notes, and other obligations of the United States, . . . to refer only to obligations or securities of the same type as those specifically enumerated." (Emphasis added.)

The SBI further argues that the application of 'ejusdem generis' to the term "international securities", as it is used in § 11A.24, renders Subdivision 6(a)(5) superfluous, but this is also false. The plaintiffs do not agree that the application of 'ejusdem generis' or any other rule of construction, including the maxim of 'expressio unius est exclusio alterius,' would render Subdivision 6(a)(5) meaningless and deprive the SBI of the ability to invest in the stock of foreign corporations other than the stock of Canadian domiciled corporations. Quite the contrary. Application of the canon of 'ejusdem generis' simply limits the SBI to those types of "international securities" that are defined by the prior four subsections of Subdivision 6(a) that conform to the restrictions in Subdivision 6(b). In fact, the SBI's unwieldy interpretation of Subdivision 6(a)(5) would render vast portions of Subdivisions 2-5 completely superfluous with respect to Canadian investments, governmental or corporate, which are also "international," and it would otherwise create an absurd disparity in the particularized requirements for investing in Canada and the United States compared to an unconditional authorization to invest anywhere else in just about anything, which would be the product of the SBI's unconstrained proposed definition of "international securities."

The SBI's attempt to use the Minnesota Supreme Court decision in *Westerlund v. Kettle River Co.,* 162 N.W. 680, 682 (Minn. 1917) to bolster its contention that Subdivision 6(a)(5) means that the SBI can make unconditional investments in any government bonds other than U.S. and Canadian government debt is also wrong. In *Westerlund,* the Supreme Court's rejection of the use of 'ejusdem generis' was based on the fact that the "general clause" addressed "matters not specifically mentioned" in the statute when "taken as a whole," which is completely different from the statutory provisions at issue here which include specific mention of "governmental bonds" in Subdivision 2.

The specifically enumerated subject of "governmental bonds" is mentioned in only one asset class under Minn. Stat. §11A.24. That asset class is "**Subd. 2. Government obligations**." Under Subd. 2, "governmental bonds" only include "guaranteed or insured issues of (a) the United States, its agencies, its instrumentalities, or organizations created and regulated by an act of Congress; (b) Canada and its provinces, provided the principal and interest is payable in United States dollars; (c) the states and their municipalities, political subdivisions, agencies or instrumentalities; (d) the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, or any other United States government sponsored organization of which the United States is a member, provided the principal and interest is payable in United States dollars." It does not include Israel

Bonds. Because the maxim of 'expressio unius est exclusio alterius' prevents the extension of "**Government obligations**" to any of the subject items listed in the asset class of "**Other investments**" in Minn. Stat. §11A.24, Subd. 6, the plain language of Subd. 6(a)(5) is not susceptible to any reasonable interpretation of "international securities" that includes any governmental bonds, including Israel Bonds. Thus, the specific mention of "governmental bonds" in Subdivision 2, consistent with the Minnesota Supreme Court's decision in *Westerlund v. Kettle River Co.*, mandates the application of the governing 'ejusdem generis' provisions of Minn. Stat. § 645.08(3) to define the scope of the otherwise unwieldy language of Subdivision 6(a)(5).

The SBI's final attempt to avoid application of 'ejusdem generis' is to suggest that it doesn't apply because Subdivision (6)(a)(5) was added to § 11A.24 later in time than the provisions of both Subdivision 2 and Subdivision 6(a)(1)-(4). This suggestion is supported by a partial cite in the SBI's brief to Minn. Stat. § 645.26, Subd. 1. The SBI's truncated cite disingenuously omits key language in the statute that makes the last in time rule applicable only in circumstances that involve irreconcilable conflicts between a general and a special provision.[3] There are no conflicts between the special and general

[3] Minn. Stat. § 645.26, Subd. 1, reads in its entirety as follows: "When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail."

provisions of § 11A.24 and none that are irreconcilable, nor does the SBI argue that such a conflict even exists.

II. OBJECTIVE HISTORICAL RECORDS CONFIRM THAT SUBDIVISION 6(a)(5) OF MINN. STAT. § 11A.24 IS LIMITED IN SCOPE TO SUBDIVISION 6(a)(1)-(4).

The SBI was recently asked to produce "all investment policies adopted by the SBI regarding international investments" pursuant to the Minnesota Government Data Practices Act, Minn. Stat. § 13.03, Sub. 3. In response, it produced documentation related to the promulgation of the SBI's internal "guidelines for investment managers to follow in order to invest in stock in international companies" (See Affidavit of Howard Bicker ("Bicker Affidavit"), ¶ 8), [4] but produced no "investment policies" or guidelines regarding "international investments" in "governmental bonds." See Second Affidavit of Phillip E. Benson ("Second Benson Affidavit"), ¶¶ 2-3.

Since the SBI now admits that its guidelines do not address governmental bonds, it would be reasonable to conclude that the SBI has no guidelines at all for its fund managers to follow when investing in foreign governmental bonds. The most logical explanation for this omission is that other than the specific statutory directives in Minn.

---

[4] To the extent that the Bicker Affidavit, submitted as part of the SBI's Opposition to Plaintiffs' Summary Judgment Motion on Count One, includes inadmissible opinion and hearsay, the plaintiffs object. Accordingly, the plaintiffs object to the fourth sentence in paragraph 4 of the Bicker Affidavit on hearsay grounds. The plaintiffs further object to the first sentence in paragraph 5 of the Bicker Affidavit on the grounds that it constitutes inadmissible opinion testimony which also lacks foundation. Bicker is simply not competent to provide evidence of legislative intent, manifest or otherwise.

Stat. § 11A.24, Subdivision 2, with respect to the specific foreign governmental bonds authorized therein, the SBI requires no other guidance because the statute permits investment in no other governmental bonds.[5] It is simply too absurd to believe that the SBI would promulgate extensive guidance for non-governmental international investments based on the human rights records of the governments of targeted countries, but have no guidance at all with respect to investing in the sovereign debt of the actual governmental human rights offender.

The fact that the SBI may actually know this and understands the significance of the application of the maxim of 'expressio unius est exclusio alterius' and the canon of 'ejusdem generis' can be gleaned from an examination of the documentation it did produce in response to the Data Practices Act request. In the early part of 2011, the SBI completed a draft of its "Investment Policies and Management Practices." This policy manual categorized the asset class reflected in Minn. Stat. § 11A.24, Subdivision 6 ("Other investments") as "alternative investments." The "international securities" provision at Subdivision 6(a)(5) was not excluded from this category. According to the SBI, these "alternative investments" include real estate, private equity, resource and yield-oriented investments that typically "are structured as limited partnerships, or another form of pooled, non-publicly traded vehicle." In other words, "alternative investments" are the

[5] The SBI certainly knows how to obtain written guidance when it seeks to invest in a foreign country. It did so when it sought to invest in the bonds of Canadian corporations. Second Benson Affidavit at ¶ 4, Exhibit A.

same types of investments described in Minn. Stat. §11A.24, Subdivision 6(a)(1)-(4). They do not include governmental bonds. See Second Benson Affidavit, ¶ 5, Exhibit B. The addition of the general language of Subdivision 6(a)(5) at the end of the "alternate investment" list merely authorizes the SBI to make the "alternative investments" listed in clauses (a)(1)-(4) beyond the borders of the United States.

In its opposition, the SBI has admitted that the 1988 legislative changes to §11A.24 added "international investments" as part of the "alternative asset classes." The SBI has also admitted that "investments in all alternative asset classes, including international securities, are capped at 35% of a fund." See Bicker Affidavit, ¶4, Exhibit A. In its "Investment Policies. . ."draft, the SBI also admits that up to 20% of the market value of its combined funds is targeted for alternative investments. Second Benson Affidavit, ¶ 5, Exhibit B. Thus, according to the SBI's own documents, "international securities" are within the scope of the "alternative asset classes" which is capped at 35% of a fund and limited to 20% of the SBI's total participation. These are the same restrictions codified at § 11A.24, Subdivision 6(b)(1) and (3).

Subdivision 6(b)(1) and (3) can only impose the 35% and 20% limits, respectively, on Subdivision 6(a)(5) ("international securities") through the application of 'ejusdem generis." Both of these two sections of Subdivision 6(b) only make specific reference to Subdivisions 6(a)(1)-(4). Without the application of 'ejusdem generis', "international

securities" are untethered and released to float in an ambiguous and undefined universe with no fund caps and no participation limits, contrary to legislative intent.

The history of Subdivision 6(a)(5) shows that the legislature indeed intended to tether the clause to the four preceding alternate asset clauses through the canon of 'ejusdem generis.' As the SBI admits, the legislature intended to impose both the 35% and 20% alternate asset class limits on "international securities." A drafting error in the 1988 legislative changes, however, risked throwing this legislative intent into doubt. In the 1988 version of the statute, which is attached as Exhibit B to the Affidavit of Kristyn Anderson, Subdivision 6(b)(1) limits fund participation at 35% to "all investments made according to clause (a)," while Subdivision 6(b)(3) limits SBI participation to 20% "for investments made under paragraph (a), clause (1), (2), (3), or (4)." This created an apparent dichotomy inconsistent with the acknowledged intent of the legislature to tie Subdivision 6(a)(5) to all of the investment restrictions in Subdivision 6(b), including both the 35% and 20% provisions. The legislature "corrected" the error in 1995 by making each of the clauses of Subdivision 6(b) consistently applicable to clauses 1-4 of Subdivision 6(a). The correction eliminated any confusion as to whether the canon of 'ejusdem generis' tied "international securities" to both the 35% and the 20% restrictions imposed on investments in the alternate asset classes. See Second Benson Affidavit, ¶ 6, Exhibit C.

III. REQUIRING THE SBI TO OBEY THE LAW IS NOT AN ABSURD RESULT

The fact that the SBI has engaged in a longstanding practice in violation of Minn. Stat.§ 11A.24 does not make it right, especially considering its statutory fiduciary obligation only to invest in a manner consistent with law. Minn. Stat. § 356A.05(b). Nor does the fact that compliance with the law requiring "divestiture of millions of dollars of current investments in the bonds of non-Canadian foreign countries" render the plaintiffs' interpretation of the statute absurd. The issues raised in Count One 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).

Even assuming that there is any relevancy to the SBI's decision-making process leading to its "longstanding" investments in foreign governmental bonds other than those specifically enumerated in Minn. Stat.§ 11A.24, Subdivision 2, the SBI does not seem to have engaged in any decision-making process at all, given the complete absence of any internal administrative guidance.

What can be discerned from the record is that the SBI currently controls investments totaling $53.7 billion (see http://www.sbi.state.mn.us) of which only approximately 1.5% or $83 million is invested in non-Canadian foreign governmental

bonds. An order directing the SBI to divest from these investments is hardly capable of impacting the SBI's overall portfolio or interfering in its need to diversity. See Bicker Affidavit, Exhibit C. Moreover, other than the SBI's now admitted investments in $27 million in Israeli government bonds, an amount that is 300% more than the SBI's next highest non-Canadian Bond investment,[6] the identity of several of the so-called governmental bond investments highlighted in Exhibit C to the Bicker Affidavit appear questionable as actual governmental bonds.

CONCLUSION

For the foregoing reasons, in addition to those set forth in the Plaintiffs' Memorandum in Support of Summary Judgment on Count One and the Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, plaintiffs respectfully request that the Court grant summary judgment for the plaintiffs on Count One.

Dated: February 29, 2012

Respectfully Submitted,

LAW OFFICE OF JORDAN S. KUSHNER

By:_____ _____

Jordan S. Kushner, MN ID 219307
Center Village Building
431 South 7th Street, Suite 2446
Minneapolis, MN 55415
(612) 288-0545

[6] SBI's next highest foreign sovereign bond investment is approximately $8 million in Mexican bonds. (Bicker Aff., Exhibit C - "United Mexican States," the exact figure is illegible on the Defendant's exhibit).

DE LEÓN & NESTOR, LLC

Bruce D. Nestor, MN ID 318024
3547 Cedar Avenue South
Minneapolis, MN 55407
(612) 659-9019

PETER J. NICKITAS LAW OFFICE, LLC

Peter J. Nickitas, MN ID 212313
431 S. 7th St., Suite 2446
P.O. Box 15221
Minneapolis, MN 55415-0221
651.238.3445

ATTORNEYS FOR THE PLAINTIFFS