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,

vs.

Minnesota State Board of Investment,

Defendant.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The Minnesota State Board of Investment (SBI), the defendant, has moved to dismiss the Complaint on the grounds that: (1) the plaintiffs lack standing, (2) the Minnesota Statutes permit the SBI to invest in Israel Bonds, (3) that Counts II and III are

not justiciable, and (4) Counts II and III fail to state causes of action. For the reasons stated herein, the SBI's motion should be denied.

STANDARD OF REVIEW

"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 demanded." *Bahr v. Capella University,* 788 N.W. 2d 76, 80 (Minn. 2010). Only the factual allegations set forth in the complaint may be considered and 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. *Hebert v. City of Fifty Lakes,* 744 N.W.2d 226, 229 (Minn. 2008).

FACTS

I. The SBI

The State Board of Investment (SBI) is an agency of the State of Minnesota, established pursuant to Article XI, Section 8, of the Minnesota Constitution to invest all state funds, including public employee retirement funds. All investments undertaken by the SBI are governed by Minnesota Statutes, Chapter 11A and Chapter 356A.

Pursuant to Minnesota Statutes 356A.02 and 356A.04, the SBI and its executive director are statutory fiduciaries who, by virtue of express statutory directives, owe their fiduciary duties to the beneficiaries of the covered public employee pension plans, to Minnesota's taxpayers and to the State of Minnesota. Not only are these fiduciaries held

by law to a prudent person standard, they are expressly obligated by law to select investment products and to invest plan assets in a manner consistent with law. Minn. Stat. § 356A.05(b).

State law controls the asset classes in which the SBI is permitted to invest. These asset classes are listed in the six subdivisions of Minnesota Statutes § 11A.24. The statute prescribes the maximum percentage of fund assets that may be invested in various asset classes and it contains specific restrictions to ensure the quality of the investments.

The SBI's investments in sovereign debt (the "Government obligations" asset class) are controlled by Minn. Stat. § 11A.24, Subd. 2, which specifically includes "governmental bonds." This subdivision permits the SBI to invest in the government bonds of: (a) the United States and the individual states, including municipalities, political subdivisions, agencies, instrumentalities or organizations of the United States and the individual states, (b) Canada and its provinces, and (c) various United States Government sponsored organizations of which the United States is a member (e.g., Inter-American Development Bank), so long as the bonds are backed by the full faith and credit of the issuer or the issue is rated among the top four quality rating categories by a nationally recognized rating agency. The statute specifically requires that the principal and interest from any investments in the government obligations of Canadian or U.S. sponsored organizations be repaid in United States dollars. The "Government obligations" asset class in Minn. Stat. § 11A.24, Subd. 2, does not list Israel Bonds, or any sovereign debt

or governmental bond issued by the State of Israel. The five remaining subdivisions of Minn. Stat. § 11A.24 list other permissible investment asset classes, but in light of the statute as a whole and principles of statutory construction, none of them include government obligations or Israel Bonds [1]

2. Plaintiffs' Complaint

The Complaint does not simply allege a policy disagreement between the plaintiffs and the SBI, or a disagreement in the manner in which the SBI has exercised any legitimate discretion in making investment decisions, as the SBI disingenuously suggests. Rather, in Count I the Complaint alleges that the SBI is violating express investment restrictions in the Minnesota Statutes by investing in Israel's sovereign governmental bonds, which also violates the SBI's expressly mandated statutory duty to make only lawful investments. See Minn. Stat.§ 356A.05(b).

Counts II and III of the Complaint allege that the SBI is violating its express statutory fiduciary duties to invest lawfully and prudently by aiding and abetting Israel's international law violations. Contrary to the SBI's innaccurate characterization, the Plaintiffs do not seek a determination from this Court that the State of Israel is violating international law. To the contrary, Count II of the complaint specifically alleges that it is undisputed that Israel's conduct is in violation of Article 49 of the Fourth Geneva

[1] Israel Bonds are government obligations (sovereign debt bonds) issued by the State of Israel.

Convention. Such conduct has already been the subject of numerous United Nations Security Council Resolutions, a determination which is binding on the United States as a member nation of the United Nations and as a permanent member of the Security Council, by an advisory opinion of the International Court of Justice and as reflected in the public laws of the United States.

The ultimate question presented by Count II is whether the SBI's knowing, intentional or purposive material financial support of Israel's undisputed Article 49 violations through the purchase of Israel Bonds is itself unlawful in violation of the SBI's statutory fiduciary obligation to invest lawfully. If the SBI seeks to contest the underlying factual allegation that Israel is indisputably in violation of Article 49 (Complaint, ¶¶ 26-33), then it must do so through the presentation of competent evidence in support of its position in the context of a summary judgment motion or at trial. To do so in the context of this motion, however, is completely inappropriate.

Similarly with respect to Count III, plaintiffs are not asking the Court to determine the extent of Israel's culpability, but rather to determine whether the SBI has violated its own mandated statutory fiduciary duty to invest prudently, in light of Minnesota's potential liability exposure under the Alien Tort Statute (ATS), by knowingly providing material financial support to a foreign state enterprise that has been repeatedly cited by reputable international organizations and tribunals for its myriad and serial international law and human rights violations.

In short, the SBI's various arguments are, individually and collectively, without merit.

ARGUMENT

I. PLAINTIFFS HAVE STANDING

A. Taxpayer Standing

This case is not about a "mere difference of opinion", "policy disagreement" or disagreement with the "exercise of discretion." The plaintiffs have alleged that the SBI is breaking the law by investing taxpayer funded state retirement funds in Israel Bonds.[2]

Under Minnesota law, taxpayers have standing to bring an action challenging the unlawful disbursements of public money or illegal action on the part of public officials. *McKee v. Likins,* 261 N.W.2d 566, 571 (Minn. 1977) ("In contrast with the Federal courts, it generally has been recognized that a state or local taxpayer has sufficient interest to challenge illegal expenditures."); see also *Sayer v. Minnesota Department of Transportation,* 769 N.W.2d 305, 308 (Minn. 2009) ("An individual has standing as a

[2] The SBI also erroneously contends that Minnesota Statute 11A.24 myopically "relates to the economic decisions of the SBI, not international policy interests." In fact, in addition to Subd. 2, the statute is steeped in "international policy interests" as shown by its investment restrictions on companies doing business in or with Iran and the Sudan (Minn. Stat. §§ 11A.243 and 11A.244) and provisions designed to promote religious and ethnic affirmative action in Northern Ireland. (Minn. Stat. § 11A.241) The SBI's own internal administrative policies impose procedural restrictions on investments in companies domiciled in countries that have been cited by the State Department for workers and human rights violations, including Israel. See SBI 2010 Annual Report, pgs. 49-50, at http://www.sbi.state.mn.us/publications/2010AnnualReport.pdf.

taxpayer to maintain an action to restrain a state from spending money illegally.");
Citizens for Rule of Law v. Senate Committee on Rules & Administration, et al., 770 N.W.2d 169, 175 (Minn. App. 2009) (taxpayer standing existed where plaintiffs challenged specific legislative disbursement of money as wrongful under Constitution). . The Minnesota Supreme Court has specifically recognized standing of its citizens as taxpayers to maintain an action against the SBI to challenge the legality of the issuance and sale of bonds. *Rockne v. Olson*, 191 Minn. 310, 254 N.W. 5, 6-7 (1934).

Not only is taxpayer standing an enduring part of Minnesota's common law, pursuant to Minn. Stat. § 356A.04, the SBI's fiduciary duties are owed to the covered pension plan beneficiaries, to the taxpayers and to the state. Furthermore, Minnesota's statutory provisions recognize that a breach of those fiduciary duties can be addressed by the remedies available at common law. See Minn. Stat. § 356A.09

The SBI concedes that fifteen of the twenty-three individually named plaintiffs are Minnesota citizens.[3] All fifteen, accordingly, have taxpayer standing. Moreover, five of the individual plaintiffs are plan beneficiaries of the funds invested by the SBI, providing yet another basis for standing pursuant to Minn. Stat. § 356A.09.

[3] They are 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 and David Boehnke.

B. Associational Standing

Two of the organizational co-plaintiffs, Minnesota Break the Bonds Campaign (MN BBC) and Women Against Military Madness - Middle East Committee, include Minnesotans as their members. Accordingly, since Minnesotans have both taxpayer and statutorily recognized standing to bring an action challenging the SBI's breach of its fiduciary duties by unlawfully disbursing public funds or engaging in illegal actions, both organizations have associational standing. See, e.g., *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493-498 (Minn. 1996); *Citizens for Rule of Law,* 770 N.W.2d at 175.

Additionally, even under the stricter "case-or-controversy" requirements for federal standing, 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). Minnesota courts routinely draw from U.S. Supreme Court decisions in deciding standing and other constitutional issues, and should draw from these as well since no compelling reason exists not to. See, e.g., *State by Humphrey,* 551 N.W.2d at 498 ("Our approach is consistent with federal cases which relax requirements for associational standing where the relief sought is equitable only."); *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 552 (Minn. 2003) ("When we

interpret a clause of our state constitution that is identical to a clause of the federal constitution, a decision of the United States Supreme Court is of inherently persuasive, but not necessarily compelling, force."). Indeed, the SBI has cited to three federal cases, including two U.S. Supreme Court decisions, to support its own argument against standing. Accordingly, because at least one plaintiff has both taxpayer standing and statutorily based standing as a plan beneficiary of the funds invested by the SBI, the Court should recognize the standing of all remaining plaintiffs.

C. Sufficient Personal Interest and Injury-in-Fact

Co-plaintiffs Bil'in Popular Committee Against the Wall and Settlements (Bil'in) and Boycott From Within (BFW) do not include members who are Minnesota Taxpayers. Co-plaintiffs Ronnie Barkan, Ofer Neiman, David Nir, Leehee Rothschild, Renen Raz, Dorothy Naor and Gal Lugassi are citizens of Israel. Co-plaintiff Newland F. Smith, III, is an Illinois resident. Although all of these co-plaintiffs should have standing based on the standing of their co-plaintiffs who are Minnesotans, they also have standing based on the sufficiency of their personal interest or "injury-in-fact."

"Standing is a general jurisprudential concept. It requires that a party must have sufficient personal interest in a legal dispute so that it is appropriate to allow that party to pursue litigation. [cites omitted] Standing exists, if, among other things, the party has suffered an injury-in-fact. [Cites omitted] To suffer an injury-in-fact, a party must allege 'a concrete and particularized invasion of a legally protected interest.'" *Krueger v. Zeman,*

781 N.W.2d 858, 861 (Minn. 2010) (emphasis added), citing *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.").

The residents of Bil'in have suffered considerable injury-in-fact. Forced onto the front lines of Israel's illegal settlement war being waged against the Palestinians, they are the direct victims of that illegal war, which is funded in part from the sale of Israel Bonds. When the SBI purchases Israel Bonds, it knows that a portion of the money earned by the Government of Israel from the sale of its governmental bonds will help to fund Israel's unlawful settlement activities that are victimizing Palestinian villagers throughout the West Bank of Palestine, including Bil'in. These unlawful activities include land expropriation backed up by a harsh, punitive and violent military occupation designed to stifle any form of legitimate resistance, including Bil'in's non-violent resistance.

The purchase of Israel Bonds by the SBI and other investors in Israel's illegal settlement enterprise has substantially contributed to the state sponsored theft of Palestinian land in violation of the Fourth Geneva Convention, and the oppression of the indigenous civilian population, including the killing of two Bil'in villagers, the incarceration of its residents and village leaders in military detention facilities and numerous arrests and injuries. This is what the SBI's purchase of Israel Bonds helps to fund. Because the residents of Bil'in have a mortal stake in seeing this funding stopped,

there is no risk that their presentation of the factual and legal issues in this case will not be vigorously and adequately pursued and seeking recourse and justice in the courts is consistent with their commitment to non-violent resistence.

Boycott From Within and its Jewish-Israeli members who have joined this lawsuit as co-plaintiffs are also suffering from a concrete and particularized invasion of a legally protected interest, i.e. the very right to directly advocate to the SBI that it boycott the purchase of Israel bonds until Israel complies with international law and universal principles of human rights. Because the members of BFW are directly flouting a newly passed repressive anti-free speech law in Israel to participate in this lawsuit, there is no risk that their presentation of the factual and legal issues in this case will not be vigorously and adequately pursued. Seeking recourse and justice in the courts is consistent with their commitment to non-violent resistence and the vigorous exercise of their universal rights to free speech.

Co-plaintiff Newland F. Smith, III, is a deeply religious, academically accomplished and active Episcopalian whose Christian faith has compelled him to devote his life to participating in both religious and secular activities designed to bring about an end to the dire human rights situation in Palestine and to disrupt through non-violent means the invasion of the Palestinians' legally protected interests by the Government of Israel. These activities include education, public expressions of solidarity, visits to the besieged Palestinian territories, and church based advocacy, all of which demonstrate his

extraordinary personal interest in this case sufficient to ensure that there is no risk that his presentation of the factual and legal issues in this case will not be vigorously and adequately pursued.

II. THE SBI'S ISRAEL BOND INVESTMENTS VIOLATE MINNESOTA LAW

Contrary to the SBI's bold assertions that it is "specifically authorized" to invest in Israel Bonds and that "'international securities' clearly includes foreign government bonds," quite the opposite is true. (Emphasis added.) The plain and unambiguous language of Minnesota Statute §11A.24 does not permit the SBI to invest in Israel Bonds. In compliance with the maxim of *expressio unius est exclusio alterius*, the asset sub-category of "international securities" in Minn. Stat. § 11A.24, Subd. 6(a)(5) categorically excludes any foreign government bonds that are not specifically enumerated in Minn. Stat. §11A.24, Subd. 2 . Minn. Stat. § 11A.24 is susceptible to no other reasonable interpretation. When examined in accordance with this maxim, the statutory limitations are unambiguous, and the SBI's flawed interpretations are entirely misplaced. See, e.g., *Stoecker v. Moeglein*, 129 N.W.2d 793, 796 (Minn. 1964) ("Administrative practice even of long standing must yield to the plain meaning of a statute unless some contrary intention is indicated by legislative action or inaction.").

Statutory interpretation begins with the plain language of the statute. *KSTP-TV v. Ramsey County,* 806 N.W.2d 785, 788 (Minn. 2011). If the language is ambiguous because it is susceptible to more than one reasonable interpretation, the courts apply other

canons of construction to ascertain and effectuate the intent of the legislature. But if the statute is unambiguous on its face, the court should look no further than the plain language to determine the statute's meaning. *Id.* The courts do not turn to extrinsic evidence, including historical evidence, to interpret a statute unless it is, in the first instance, ambiguous. *Welfare of R.S. and L.S.,* 805 N.W.2d 44, 51 (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." *KSTP-TV v. Ramsey County,* 806 N.W.2d at 788. 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.[4] See, generally, *Anderson v. Twin City Rapid Transit Co.,* 250 Minn. 167, 175 (Minn. 1957). Because this maxim clearly 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. *Welfare of R.S. and L.S.,* 805 N.W.2d at 51.

The specifically enumerated subject of "governmental bonds" is expressed in only

[4] Minn. Stat. § 645.19 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."

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." They do not include Israel Bonds. Because the application of "**Government obligations**" cannot extend to any 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, notwithstanding the SBI's flawed interpretation to the contrary. Administrative interpretations must be rejected if they contravene plain statutory language. *Look v. Pact Charter School,* 763 N.W.2d 675, 680 (Minn. App. 2009).

Moreover, reading Minn. Stat. § 11A.24, Subd. 2 in any manner that permits the SBI to invest in governmental bonds other than the sovereign governmental entities specifically listed, i.e. U.S., Canadian and U.S. government sponsored organizations of

which the U.S. is a member, would lend itself to absurd results. For example, if the SBI's investments under Subd. 2 were not limited to the four specifically enumerated categories, while the purchase of Canadian Bonds and the bonds of United States government sponsored organizations of which the United States is a member are required to be paid back to the SBI in U.S. Dollars, the governmental bonds of other non-listed foreign countries could be re-paid in any currency, including Zimbabwean Dollars, North Korean Won, Sudanese Pounds, Iranian Rials or even Somali Shillings. Reading Subd. 2 in such a manner is impermissible because it yields absurd results. See, generally, *Park Towers Limited Partnership v. County of Hennepin*, 498 N.W.2d 450, 454 (Minn. 1993).[5]

Even if Minn. Stat. § 11A.24, Subd. 6(a)(5) was arguably ambiguous on the subject of governmental bonds, which it is not, the canons of construction employed to resolve any such ambiguity would also lead to the conclusion that the SBI has violated the law by purchasing Israel Bonds. Principal among them is the rule that a specific statute governs over a general statute (See *Roehrdanz v. Brill*, 682 N.W.2d 626, 631 (Minn. 2004)) and the related canon of *ejusdem generis,* codified at Minn. Stat. § 645.08(3).

Thus, if Minn. Stat. § 11A.24, Subd. 2, limits governmental bond investments to the entities specifically enumerated in Subd. 2, then Subd. 6(a)(5), even accepting the SBI's expansive view, would be equally constrained. Not only is this a more preferable

[5] By making no argument that Minn. Stat. § 11A.24, Subd. 2, allows it to purchase Israel Bonds, the SBI has implicitly conceded that Subd. 2 cannot be used as a statutory basis to justify its Israel Bond investments.

result, it is the law. See *Ehlert v. Graue*, 195 N.W.2d 823, 826 (Minn.1972) ("[W]here two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision."); *Cisar v. Slyter*, —N.W.2d—, 2012 WL 118239 (Minn.App., Jan. 17, 2012) (same).

Additionally, under the canon of *ejusdem generis*, codified at Minn. Stat. § 645.08, Subd. 3, when the same statute contains both specific and general provisions, the specific provisions prevail. See *Custom Ag Service of Montevideo, Inc., v. Commissioner of Revenue*, 728 N.W.2d 910, 917 (Minn.2007). Thus, the correct way to interpret Subd. 6(a)(5) is to limit it to the specific asset categories listed in the four immediately preceding clauses. Accordingly, the SBI may invest in "international securities" but only if they are "(1) venture capital investment businesses . . .; (2) real estate ownership interests . . .; (3) regional and mutual funds through bank sponsored collective funds . . .; and (4) resource investments . . ., none of which include governmental bonds. See, e.g., *Lefto v. Hoggsbreath Enters., Inc*., 581 N.W.2d 855, 856 (Minn.1998) (applying principle of *ejusdem generis*, as codified in Minn. Stat. § 645.08, Subd. 3, to require that "[g]eneral words are construed to be restricted in their meaning by preceding particular words"); *Goplen v. Olmsted County Support and Recovery Unit*, 610 N.W.2d 686, 689 (Minn.App.2000) ("Under the doctrine of *ejusdem generis*, the general wording of a statute must be interpreted to include only matters of the same kind or class as those

specifically enumerated."). The SBI's awkward attempts to redefine "international securities" run counter to these time honored canons of construction.

When an agency asks the court to accept its administrative interpretation of a statute, the agency should show that it took a hard look at the issues and engaged in a reasonable degree of reflection. That requires far more than the presentation of a potpourri of off-point generalized dictionary definitions and unrelated statutory provisions. The record of reflection that the SBI presents here is effectively non-existent. See, e.g., *Claim for Benefits by Meuleners*, 725 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 which suggest . . . the decision lacks articulated standards and reflective findings.'"). Minn. Stat. § 645.08 cautions against word and phrase constructions that are repugnant to the context of the statute, even for words and phrases that have acquired a technical meaning. It is doubtful that the general words "international securities" have acquired any technical meaning that necessarily include "governmental bonds," but regardless of any such technical status, the SBI's attempt to argue that the use of the words "international securities," regardless of how they have been positioned in Minn. Stat. §11A.24, includes "governmental bonds" is an interpretation which is repugnant to the context of the statute.

The language of Subd. 6(a)(5) can only be harmonized with Subd. 2 if it does <u>not</u> include "governmental bonds." It is worth repeating that each section of a statute should

be 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). The legislature has demonstrated its ability to include "governmental bonds" under the category of "**Government obligations"** and nowhere else and it has demonstrated its ability not to include it under the category of "**Other investments."** See *Look v. Pact Charter School,* 763 N.W.2d at 679. The SBI's attempt to implicitly include governmental bonds under the asset class of "**Other investments"** thus creates a conflicting interpretation contrary to legislative intent.

A statute is to be read and construed as a whole "to give effect to all of its provisions; 'no word, phrase or sentence should be deemed superfluous, void or insignificant.'" *Amaral v. St. Cloud Hospital*, 598 N.W.2d 379, 384 (Minn. 1999). The SBI's unreasonable interpretation of the generalized wording in Minn. Stat. § 11A.24, Subd. 6(a)(5) to justify its Israel Bonds investments renders the more specific provisions of Minn. Stat. § 11A.24, Subd. 2, superfluous and insignificant. Any agency interpretation of Minn. Stat. § 11A.24**,** Subd. 6(a)(5) that allows the SBI to purchase Israel Bonds also yields absurd results. It would allow the SBI to purchase the governmental bonds of any sovereign rogue entity in the world unconstrained by any of the restrictions listed in Subd. 6(b). The SBI's absurd interpretation of Subd. 6 would allow it to purchase 100% of the market value of the entire sovereign bond fund of violence ravaged Syria to help prop up the Assad regime, to do so as the sole bond fund investor, and to receive repayment of

principal and interest entirely in distressed Syrian Pounds, Iranian Rials or North Korean Won.

Fortunately, the Court need not defer to the SBI's interpretation because the legal question here turns on the meaning of words. *St. Otto's Home v. Minn. Dept of Human Services,* 437 N.W.2d 35, 39-40 (Minn. 1989). But if any deference to any reasonable interpretation is due, the SBI's interpretation of Minn. Stat. § 11A.24**,** Subd. 6(a)(5) does not qualify. The SBI's interpretation contravenes the plain language of the statute, it violates the most basic principles and canons of statutory construction and it renders absurd a statute that has otherwise been skillfully drawn. See, generally, *Claim for Benefits by Meuleners*, 725 N.W.2d at 124.

III. COUNTS II AND III ARE JUSTICIABLE

A. The Court's Power Includes the Power to Enjoin the SBI from Aiding and Abetting An Undisputed Violation of Article 49 of the Fourth Geneva Convention.

In Count II, the plaintiffs have not asked the court to decide whether Israel has violated the Fourth Geneva Convention. They have instead alleged that Israel's continuing violations of Article 49 of the Fourth Geneva Convention are undisputed, which must be accepted as true for purposes of this motion. Thus, the "political question" and "act of state" doctrine would only become possible subjects of inquiry if the plaintiffs are unable to factually prove, at trial or in summary judgment proceedings, that Israel's continuing violations of Article 49 were reasonably undisputed. A motion brought

pursuant to Rule 12.02(e) is not the proper vehicle for such a determination.[6]

The question here is whether the Complaint sufficiently states a cause of action that the SBI has violated its fiduciary duty, codified at Minn. Stat.§ 356A.05(b), to only invest "in a manner consistent with law." Accepting as true that Israel is violating Article 49 of the Fourth Geneva Convention, does the Complaint sufficiently state in Count II a cause of action that the SBI is exceeding its investment authority by aiding and abetting that violation?

The Minnesota Supreme Court has long held that the lawfulness of the SBI's fiscal decisions are subject to court review and do not constitute "political questions." *See Rockne*, 191 Minn. at 313, 254 N.W. at 7 (Minn. 1934) ("[W]hen litigation properly presents a question whether proposed administrative action of an executive or administrative official is within the law, constitutional or statutory, both the subjects of inquiry and the duty of decision are at once and automatically removed from the field of executive to that of judicial action and duty.").

Moreover, the Minnesota Supreme Court has long held that it not only has the power but the duty to enforce treaties. See, e.g., *Minnesota Canal & Power Co. V. Pratt,*

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[6] The SBI has chosen not to convert its Rule 12.02(e) motion into a summary judgment motion by factually contesting that Israel's continuing Article 49 violations are undisputed and it has made no argument to the contrary. If it had, the plaintiffs are prepared to show that Israel's Article 49 violations cannot reasonably be disputed. Count II of the Complaint does not ask this Court to decide whether Israel is an undisputed Article 49 violator but proceeds from the overwhelming presumption and allegation that it is.

101 Minn.197, 231-33, 112 N.W. 395, 405-06 (Minn. 1907) ("The United States may thus be a party to a treaty which prohibits its citizens or the states from doing some designated thing. Being the supreme law of the land, the treaty is obligatory upon all the courts and people of the nation. Its prohibitions recognize no state lines. Every citizen of the United States is under a duty to observe and respect the law of the treaty. The petitioner is proceeding to construct dams and reservoirs which it is claimed will result in a violation of the Webster-Ashburton Treaty. If this result would follow the construction of such works, we are very clear that the courts of the state should not authorize any proceeding which would result in a violation of the treaty."); see also *Amaya v. Standard Oil & Gas Co.,* 158 F.2d 554, 556 ("A treaty must be regarded as a part of the law of the state as much as are the state's own statutes and it may override the power of the state even in respect of the great body of private relations which usually fall within the control of the state."); *Froland v. Yamaha Motor Company, Ltd.,* 296 F.Supp.2d 1004, 1007 (D.Minn. 2003) ("A ratified treaty or convention preempts inconsistent state laws.").

B. The "Political Question" and "Act of State" Doctrines Have No Application.

Because the United States has ratified the Fourth Geneva Convention, state courts are obligated under the Supremacy Clause to uphold it. If the SBI, or any other state agency, is guilty of violating the Convention under the law of accomplice liability, the Courts are obliged to put a stop to it. Neither the "political question" doctrine nor the "act of state" doctrine prevent the Court from putting a stop to any aiding and abetting

violation by the SBI of the *jus cogens* norms embodied in the Fourth Geneva Convention.

"Political question" is a prudential bar to subject matter jurisdiction based on separation of powers (*Baker v. Carr,* 369 U.S. 186, 209-11 (1962)) and is only meant to apply in "those controversies which revolve 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). Here, there is no executive or legislative branch policy choice or value determination involved in the question of whether the SBI has aided and abetted a violation of Article 49 of the Fourth Geneva Convention by funding Israel's illegal settlement activities. This case does not call on the Court to judge the conduct of foreign relations by the United States government. It calls on the Court only to judge the conduct of a state agency. Moreover, other than repeatedly voicing objections to it, the United States government is neither directly nor indirectly involved in Israel's unlawful settlement enterprise and has taken steps to ensure that its foreign aid is not used to support it. Nor does the mere fact that the Court must examine some aspect of international law in the context of this case sufficient, by itself, to transform this justiciable dispute into a "political question." The application of treaty law does not automatically raise a nonjusticiable question. *Sarei v. Rio Tinto,* —F.3d—, 2011 WL 5041927, *15 (9th Cir., Oct. 25, 2011) ("This is not a case like *Corrie* [*v. Caterpillar, Inc.,* 503 F.3d 974, 982 (9th Cir. 2007)] in which the United States government financed the

conduct plaintiffs sought to challenge.").

The "act of state" doctrine similarly has no application here. The doctrine applies when U.S. courts, in order to decide a case, "must declare invalid the official act" of another government in its own territory. *W.S. Kirkpatrick & Co. V. Environmental Tectonics Corp.,* 493 U.S. 400, 405 (1990). The prohibitions against war crimes mandated under the Fourth Geneva Convention, however, are *jus cogens* norms which are exempt from the doctrine, since they constitute norms "from which no derogation is permitted." See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) ("As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also known as a 'peremptory norm' of international law, 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'"); *Sarei v. Rio Tinto*, supra, at *23-24 ("The prohibition against war crimes [defined primarily by the Geneva Conventions] is a specific, universal, and obligatory internationally accepted norm.").

C. The Court's Power Includes the Power to Declare that the SBI is in Breach of its Fiduciary Duty to Invest Prudently

In Count III, the plaintiffs allege that the SBI has violated its statutory fiduciary duty to invest prudently. Minn. Stat. § 356A.04, Subd.2 sets forth the "prudent person standard" that the SBI must follow in making its investment decisions, including the requirement to act "in good faith" and to "exercise that degree of judgment and care,

under the circumstances then prevailing, that persons of prudence, discretion, and intelligence would exercise in the management of their own affairs."

Minn. Stat. § 356A.12 gives the Court jurisdiction over a challenge of a fiduciary action or inaction. Counts II and III are both challenges to the SBI's actions as a fiduciary. While Count II challenges 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 exposing the SBI (and the taxpayers) to the unnecessary and undue financial risk of litigation and liability under the ATS by aiding and abetting Israel's myriad human rights and international law violations through investment in Israel Bonds.

The "prudent person standard" which directs the SBI's fiduciary investment decisions is essentially the same standard that is used under federal ERISA. See 29 U.S.C. § 1104(a)(1)(B) ("[A] fiduciary shall discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"). 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's portfolio. See,

e.g., *Ford Motor Company ERISA Litigation,* 590 F.Supp.2d 883, 892-93 (E.D. Mich., 2008).

The question here then is whether Count III of the Complaint sufficiently states a cause of action that the SBI has violated its fiduciary duty, codified at Minn. Stat.§ 356A.04(b), by investing in such an unduly risky manner that it violates the prudent person standard. Accepting as true the allegations of the Complaint that Israel has been implicated in myriad war crimes, human rights violations and international law violations as determined by reputable international human rights organizations, that the monies the SBI has invested in Israel Bonds are used to augment funds that Israel uses to fund activities that violate international law and that the SBI knows that its investment funds are used by Israel in this manner, does the Complaint sufficiently state in Count III a cause of action for breach of fiduciary duty on the basis that the SBI has unduly exposed its agents, officers and employees to liability under the ATS, liability which would ultimately be shifted onto the shoulders of the taxpayers? The plaintiffs would argue that prudence requires the SBI not to invest in so risky an enterprise as illegal settlements and other human rights violations, and that no prudent fiduciary, reasonably aware of the needs and risk tolerance of the plan's beneficiaries, would invest any plan assets in Israel Bonds.

Other than its erroneous arguments that Counts II and III are barred by the "political question" and "act of state" doctrines, the SBI is left with only one remaining

argument: that the allegations that it is providing material financial support for Israel's illegal and oppressive activities through the purchase of Israel Bonds are not enough to support a claim for aiding and abetting. On that score, the SBI is equally wrong.

IV. COUNTS II AND III SUFFICIENTLY ALLEGE THAT THE SBI IS AIDING AND ABETTING ISRAEL'S VIOLATIONS OF INTERNATIONAL LAW.

The SBI has provided limited authority with a lack of analysis on a subject that has garnered a great deal of modern judicial attention. Essentially, the SBI argues that it cannot have the requisite *mens rea* because it "is merely a purchaser of bonds" and the act of purchasing Israel Bonds is an insufficient *actus reus*. Considering only the factual allegations set forth in the complaint and accepting those facts as true, however, the complaint more than adequately alleges facts showing that the SBI has aided and abetted Israel's international law violations by deciding to invest in Israel Bonds and by refusing to divest.

A. *Mens Rea*

The courts have not settled on the most appropriate *mens rea* standard for aiding and abetting war crimes and other customary international law violations. There is currently a split of authority. Two years after the U.S. Court of Appeals for the Second Circuit issued its decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 247 (2nd Cir. 2009), *cert. denied,* 131 S.Ct. 79 (2010), which adopted the more heightened scienter standard that requires the claimant to show that "the defendant

provided substantial assistance with the purpose of facilitating the alleged offenses", the D.C. Circuit issued its own decision rejecting that standard and instead held that the "knowledge" standard for "aiding and abetting" under federal common law, 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"), is the appropriate standard. *Doe v. Exxon Mobile Corp.,* 654 F.3d 11, 39 (D.C.Cir., July 8, 2011). This is also the civil standard used in Minnesota state courts which has been adopted from the Restatement (Second) of Torts, § 876(b). See, e.g., *Mathews v. Eichorn Motors, Inc.*, 800 N.W.2d 823, 830 (Minn. App. 2011).

The Ninth Circuit recently recognized this dispute in *Sarei v. Rio Tinto,* supra, at *25, but stated that it "need not resolve this dispute as to *mens rea* in order to conclude that customary international law gives rise to a cause of action for aiding and abetting a war crime under the ATS." Instead, the Court held that "*purposive* action in furtherance of a war crime constitutes aiding and abetting that crime" and "[a]llegations of such *purposive* action are therefore cognizable under the ATS." (Emphasis added.) Circuit Judge Pregerson, who concurred in part and dissented in part, disagreed with the majority's decision "to acknowledge only a *mens rea* standard of 'purposive action in furtherance of a war crime,' reserving for another day a decision as to whether merely knowledge is sufficient." In arguing that the knowledge standard reflects universal customary international law, Judge Pregerson expressed his belief that "we can hold with

confidence that knowledge that one is assisting unlawful activity is the applicable *mens rea* standard for aiding and abetting liability for war crimes . . . ." *Id.* at 31-32.[7]

Regardless of the final resolution of the appropriate *mens rea* standard, the plaintiffs have alleged sufficient facts showing a heightened level of knowledge by the SBI bordering on the intentional or reckless, which is more than sufficient to satisfy the Minnesota standard adopted from the Restatement (Second) of Torts, § 876(b), and the most recent standards entertained by the federal courts. *Inter alia,* the Complaint alleges the following:

a) That 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) That on November 29, 2011, the plaintiffs served the instant Complaint on the SBI which includes extensive reference to Israel's myriad and numerous international law violations and explains how investment in Israel Bonds helps to fund those violations.

c) That the International Committee of the Red Cross, the International Court of Justice and the United Nations Security Council have all determined that

[7] A petition for a writ of certiorari is now pending in the Supreme Court from the *Sarei v. Rio Tinto* decision. See 80 BNA USLW 3335 (Nov. 23, 2011) (No. 11-649).

Israel has violated and is violating Article 49 of the Fourth Geneva Convention. (¶¶ 28-30)

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

e) That proceeds from the sale of Israel Bonds are used to support and promote illegal settlement activities which violate international law and human rights, that 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, that Israel's settlement activities are inconsistent with U.S. foreign policy and U.S. public laws and that 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)

f) That 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 and refusing to divest them from its portfolio. (¶¶ 14, 17-25, 32-33, 41)

B. *Actus Reus*

If the SBI knows that the millions of dollars it has given to the Government of Israel in violation of state law for the purpose of showing political and financial solidarity will be used in part to fund that government's involvement in war crimes, is this sufficient to support a claim of aiding and abetting?

The plaintiffs agree with the defendant's contention that "simply doing business with a state or individual" does not create liability. But that does not constitute the allegations in this case. See *Doe v. Nestle,* 748 F.Supp.2d 1057, 1098-99 (C.D. Cal. 2010) ("[M]erely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law."), citing *In Re South African Apartheid Litig.,* 617 F.Supp.2d 228, 269 (S.D.N.Y. 2009) (emphasis added). In *Doe v. Nestle,* the U.S. District Court for the Central District of California found the plaintiffs allegations that the defendants provided money to farmers for the purpose of obtaining cocoa and to ensure a future cocoa supply was insufficient to show that the defendants aided and abetted the farmers' use of slave labor and forced child labor. *Id.* at 1099-1103.

In this case, it is alleged that 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 U.S. and Canadian bonds (¶ 20),[8] that Israel openly sells its government bonds to supporters to raise money for illegal settlement purposes (¶ 32) (which is qualitatively different than a prospectus for a private restaurant chain, 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 (¶¶ 27-40) (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

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[8] Although the Court may properly consider on a motion to dismiss matters subject to judicial notice, judicial notice of adjudicative facts must comply with Evidence Rule 201. Plaintiffs object to the SBI's apparent request, at page 2 of its Memorandum, to take judicial notice of the alleged adjudicative fact that the SBI holds investments in the government bonds of several foreign countries, other than those specified in Minn. Stat. § 11A.24, subd. 2. The only source referenced by the SBI for this contention is its current quarterly asset report posted on the internet. However, the information contained in the quarterly report is not the type of information that is "generally known" and the numerous acronyms used in the posted document for investment instruments do not lend themselves to "ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The asset report, which was issued more than a month after the Complaint was filed, does not reveal when these other so-called foreign "government bonds" were purchased or whether the bonds are governmental, corporate or the product of a government sponsored, in whole or in part, non-governmental corporate entity, like Amtrak or Freddie Mac. Plaintiffs further question the motives behind the SBI's dubiously relevant attempt to herald other potential violations of the statutory investment restrictions as some form of defense.

unlawful settlement activities (¶¶ 32, 36, 41), that a portion of the money has been used for such war crimes to the injury of the local indigenous population (¶¶ 28-41) and that repayment of the monies may not be guaranteed by the United States for this very reason (¶ 31). This constitutes knowing and substantial assistance sufficient to satisfy the requirements of the Restatement (Second) of Torts, § 876(b), the prevailing civil standard in Minnesota, which is also among the "well settled theories of vicarious liability under federal common law." *Sarei v. Rio Tinto*, supra, at *30 (concurring opinion of Judge Reinhardt). ("This standard provides that for a defendant to incur liability, '(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."), citing *Halberstam v. Welch,* 705 F.2d 472, 477 (D.C. Cir. 1983).

CONCLUSION

The plain language of Minn. Stat. § 11A.24 does not permit the SBI to invest even a dollar of state retirement funds in Israel's sovereign governmental bonds, much less millions of dollars. The Complaint more than adequately pleads facts showing that by doing so the SBI has aided and abetted Israel's *jus cogens* international law violations and violated its fiduciary duties not to invest in an unduly risky manner and to invest lawfully.

For the foregoing reasons, the SBI's Motion to Dismiss the Complaint should be denied.

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Respectfully Submitted,

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