

STATE OF MINNESOTA
IN THE COURT OF APPEALS

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 Eloff, Nick Eloff, 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,

Appellants,

vs.

Minnesota State Board of Investment,

Respondent.

**APPELLANTS' JOINT STATEMENT
OF THE CASE**

Appeal Case No. _____

District Court File No. '62-CV-11-10079
(Judge Margaret M. Marrinan)

Date of Judgment: April 9, 2012

1. Court or agency of case origination and name of judge or hearing officer who presided.

This case originated with the Ramsey County District Court, Second Judicial
District. Judge Margaret M. Marrinan presided..

2. Jurisdictional statement.

This is an appeal from an final judgment pursuant to the Minnesota Rules

of Appellate Procedure 103.03(a). The judgment disposed of all claims by and against all parties.

The time for appeal is 60 days from entry of judgment. Minn.R.App.P. 104.01, Subd. 1.

Judgment was entered on April 9, 2012.

3. State type of litigation and designate any statutes at issue.

This was a civil lawsuit brought jointly by the appellants for declaratory judgment and related affirmative relief. The lawsuit sought a declaration from the court that the Respondent, the Minnesota State Board of Investment (SBI), by investing in Israel Bonds, 1) exceeded its investment authority, 2) violated its statutory duty to invest plan assets lawfully, and 3) violated the prudent person standard. The lawsuit sought a final judgment directing the SBI to divest from all Israel Bonds. The statutes at issue include Minn. Stat. §§ 11A.24 and 356A.

4. Brief description of claims, defenses, issues litigated and result below.

The appellants are a diverse group of Minnesotans, Israelis, Palestinians, Christians, Jews, Minnesota state pension fund beneficiaries, educators and community organizers and organizations who share the common purpose of promoting equality, justice and human rights for the indigenous Palestinian population in both the State of Israel and the occupied Palestinian territories. Respondent Minnesota State Board of Investment has invested millions of Minnesota state retirement fund dollars in Israel Bonds. Israel Bonds are government obligations issued by the State of Israel. A portion of the money Israel obtains from the sale of Israel Bonds materially supports settlement activities in the occupied Palestinian territories that violate international law.

Appellant's filed their Complaint on December 12, 2011 after nearly a year of

unsuccessfully attempting to convince the respondent to divest from its portfolio of Israel Bonds on both legal and moral grounds. The complaint alleges three bases (“Counts”) for relief.

Count I of the Complaint alleges that the SBI has exceeded its statutory investment authority and invested state retirement funds unlawfully by investing in Israel Bonds. The categories of asset classes in which the SBI is permitted to invest state retirement funds is set forth in Minn. Stat. § 11A.24, Subdivisions 1-6. Subdivision 2 of Minn. Stat. § 11A.24 controls the types of investments in government obligations that the SBI is permitted to make. It does not authorize the SBI to invest in Israel Bonds.

Count II of the Complaint alleges that the SBI has violated its fiduciary obligations pursuant to Minn. Stat. §§ 356A to invest plan assets in a manner consistent with law. The Complaint alleges that Article 49 of the Fourth Geneva Convention, which prohibits an occupying power from transferring parts of its own civilian population into the territory it occupies, is the “law of the land” in the United States and binding on the State of Minnesota because it has been ratified pursuant to Clause 2 of Article VI of the Constitution. Accordingly, the Complaint alleges that the SBI is not investing plan assets in a manner consistent with law by aiding and abetting the State of Israel’s violation of Article 49 by investing in Israel Bonds with knowledge that the invested state retirement funds will, in part, be used by Israel for its illegal settlement activities.

Count III of the Complaint alleges that the SBI has violated the prudent person standard that it is required to exercise pursuant to Minn. Stat. § 356A in making its investment decisions by investing in Israel Bonds. The complaint alleges that the SBI is not only entangling public employee pension funds and SBI officials in Israel’s violations of customary international law,

but is also exposing the pension plan, the SBI, its agents, officers and directors and ultimately the taxpayers of Minnesota to liability and the costs of defending against potential claims that could be brought on the basis that the SBI has aided and abetted or otherwise provided unrestricted financial material support to an international law violator that has in fact used funds obtained in part from the sale of Israel Bonds to commit international law violations.

The SBI moved to dismiss the complaint. It argued that 1) the appellants lacked standing, 2) the language of Minn. Stat. § 11A.24 allows the SBI to purchase Israel Bonds because they are included in the general category of “international securities” in Minn. Stat. § 11A.24, Subd.. 6 (a)(5), and 3) under federal case law (that addresses the jurisdiction of Article III federal courts), there is no justiciable controversy based on the political question and act of state doctrines. Finally, the SBI argued that Counts II and III should be dismissed because “mere investment” is insufficient to prove aiding and abetting liability.

The appellants opposed the motion for dismissal while also moving for summary judgment as to Count I, arguing that the unambiguous provisions of Minn. Stat. § 11A.24 do not permit the SBI to purchase Israel Bonds and, if the provisions of the statute were ambiguous, that various principles of statutory construction would prevent any interpretation permitting the SBI to invest in Israel Bonds.

As to the issue of standing, the appellants argued that under Minnesota law the Minnesota resident appellants had taxpayer standing to bring an action challenging the unlawful disbursements of public money or illegal action on the part of public employees, that those appellants who were public pension plan beneficiaries had standing to challenge the SBI’s exercise of its fiduciary responsibilities, that the organizational appellants had associational

standing based on the standing of their members, and that the non-Minnesota individual appellants had alleged sufficient “injury-in-fact”, had extraordinary personal interests in the case or had associational standing based on the standing of at least one other co-appellant.

As to justiciability, the appellants relied on state precedent to argue that the lawfulness of the SBI’s fiscal decisions are subject to court review and do not constitute “political questions.” The appellants further argued that the Minnesota Supreme Court has long held that it not only has the power but the duty to enforce treaties. Thus, if the United States has ratified the Fourth Geneva Convention and the SBI is guilty of violating it under the law of accomplice liability, Minnesota’s courts are obligated to put a stop to the violation and to further declare that the SBI has violated its fiduciary duty to invest prudently. Referencing federal case law, the appellants argued that the court is not called upon to judge the conduct of foreign relations by the United States government, but rather the conduct of a state agency and that 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 the Fourth Geneva Convention. Additionally, the appellants argued that the prohibition against war crimes mandated under the Fourth Geneva Convention are *jus cogens* violations which are exempt from the “act of state” doctrine.

Finally, the appellants argued that under existing aiding and abetting standards, the complaint more than adequately pleads facts showing that the SBI was not “merely a purchaser of bonds”, but acted knowingly in providing substantial assistance to Israel’s illegal activities sufficient to satisfy the requirements of the Restatement (Second) of Torts, § 876(b), the prevailing civil standard in Minnesota for imposing vicarious liability, which is also among the “well settled theories of vicarious liability under federal common law.”

On April 9, 2012, the District Court judge adopted all of the SBI's arguments, and indeed issued an order that was virtually identical to the proposed Findings of Fact, Conclusions of Law and Order for Judgment drafted by SBI, dismissing Appellants' Complaint and denying Appellants' motion for summary judgment.

5. Issues proposed to be raised on appeal.

A. Whether the appellants have standing to bring the claims alleged in the complaint when they include pension beneficiaries who have a direct stake in the SBI's investments, Minnesota taxpayers, and others who are injured by the SBI's actions ?

B. Whether the SBI is permitted under Minnesota law to invest state pension and retirement funds in Israel Bonds where the plain language of the applicable statute permits investment in narrow categories of foreign bonds, and does not include Israel Bonds?

C. Whether the political question and act of state doctrines prevent the court from adjudicating Counts II and III of the complaint?

D. Whether Counts II and III of the complaint state claims upon which relief can be granted?

6. Related appeals.

None.

7. Contents of Record.

Is a transcript required? No. (A transcript of the argument on the parties' cross-motions

has already been prepared and made part of the record, although it is not essential to the appeal.

There was no evidentiary hearing.)

8. Is oral argument requested? Yes

9. Identify the type of brief to be filed.

Formal Brief under Rule 128.02.

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

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