

GOLDSTEIN & CAMPBELL
ATTORNEYS AT LAW
474 Willamette, Suite 303
Eugene, Oregon 97401
(503) 484-4435

James M. Campbell
Michael B. Goldstein

M E M O R A N D U M

To: Followers of the Oregon southern Africa divestment suit and selected elected officials

From: *CJC* James M. Campbell, of attorneys for students, the plaintiffs/appellants/cross-respondents

Re: Status of appeal, Associated Students v. Oregon Investment Council, Oregon Court of Appeals No. A 34872

Date: 27 September 1985

In 1977 the Oregon State Board of Higher Education resolved to divest its investments in firms doing substantial business in southern Africa. The resolution was not implemented and has been in litigation since 1978, with the students defending divestment against the state's central investment council and, through a legal quirk, against the board of higher education.

In December 1984 a judge of the Lane County Circuit Court ruled that fiduciaries must consider social factors in making investment decisions but that divestment violates the prudent investor standard. Both sides appealed.

The students proposed some 32 pages of corrections to the transcript. The court reporter did not agree to all of the proposals and the transcript was not officially settled until 30 July 1985.

The Oregon Attorney General issued an opinion in June 1985 reading Oregon law to require specific authorization by the board of higher education -- and perhaps also by the Attorney General -- to use student fees to employ counsel to litigate against state action. 45 Op. Or. Att'y Gen. ____ (No. 8172, 10 June 1985). The board's staff has blocked the students' appropriation of funds for this litigation, which has substantially impeded but has not halted the efforts of plaintiffs' counsel.

The Oregon ACLU requested permission to file an amicus brief, but the Court of Appeals denied the request without comment. The National Council of Churches, American Committee on Africa, National Conference of Black Lawyers and Trans-Africa submitted an amicus brief on 25 September 1985. The court has not yet decided whether to accept their submission.

The students' opening brief and abstract of the trial court record was filed on 17 September 1985. The next event scheduled is the filing of the defendants/respondents/cross-appellants' brief in seven weeks, that is, by 5 November

1985. Then follow reply briefs at three-week intervals. This schedule may be adjusted by the court.

The student's brief (50 pages plus 195 pages abstracting the record, 21 pages of appendices and 16 pages of indices) argues that the trial court erred in six assigned particulars:

1. The Oregon State Board of Higher Education, not the state itself, is trustee of the higher education endowments. The trial court erred in ruling that the state is the trustee.
2. The board's divestment resolution expressly directs the investment managers to act prudently. The trial court erred in ruling that the resolution requires total divestment rather than divestment only to the extent prudent.
3. When the student beneficiaries of the endowments are suing to defend their trustees' divestment decision, the burden of persuasion is on the parties attacking the trustees, and the court should only inquire whether the trustees abused their discretion, not whether the court would choose divestment if the court were responsible for investing the endowments. The trial court erred in placing the burden of persuasion on the students and in exceeding the proper scope of judicial review.
4. Prudent investors must focus on the future, not on the past, in making investment decisions. But the future is so uncertain that courts should reverse investment predictions only for self-dealing, fraud, or other conduct amounting to abuse of discretion. The trial court failed to find abuse of discretion and experts testified that investments in South Africa were risky. The trial court erred in finding divestment imprudent because "There has not been sufficient time to show that the good recent performance of South Africa Free (SAF) portfolios will persist over time."
5. Trustees may avoid apartheid, which along with only Nuremberg violations and genocide is an international crime under competent international instruments. The trial court erred in failing to rule that fiduciaries may avoid illegality, that apartheid is illegal, and that fiduciaries may avoid investing in firms operating under apartheid.
6. The defendants' own experts testified that divestment would not be as intrusive in changing South Africa as the "Sullivan Principles" are. The same experts testified that adopting the Sullivan Principles is not an unconstitutional state intrusion into foreign relations. The trial court erred in failing to rule that the divestment resolution is not an unconstitutional intrusion.

For more information, you may contact Goldstein & Campbell.