South Carolina
Department of Education
Together, we can.

June 2, 2009

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211

Re: South Carolina Association of School Administrators v. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina

Dear Mr. Shearouse:

Enclosed herewith for filing, please find an original and seven (7) copies of State Superintendent of Education Jim Rex's Reply and Proof of Service in the above–captioned matter. Please return one (1) date–stamped copy of the documents to my courier. Also enclosed, as directed by the Honorable Joseph F. Anderson, seven (7) copies of our federal filings.

If you have any questions regarding this matter, please contact me, or Karla Hawkins, at 803–734–8783.

Sincerely,

Shelly Bezanson Kelly
General Counsel

Enclosures

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators ..... Plaintiff,

v.

The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina ..... Defendants.

REPLY

Jim Rex, in his official capacity as State Superintendent of Education, submits this Reply to Governor Sanford's Answer and Brief in the above-captioned matter.

Preemption Argument

Governor Mark Sanford (hereinafter "Governor") argues that the American Recovery and Reinvestment Act (hereinafter "ARRA") gives a governor of a state absolute discretion as to whether to apply for State Fiscal Stabilization Funds (hereinafter "SFSF") which are provided for under Title XIV of the ARRA. Collateral with this argument, he maintains that the 2009–2010 Appropriation Act, which requires the Governor to apply for these funds, is preempted by the ARRA. He also argues that the

Supremacy Clause of the United States Constitution prohibits the South Carolina General Assembly from directing him to apply for these funds. In doing so the Governor relies heavily on Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256 (1985).

Lawrence County involved a federal appropriation through the Payment in Lieu of Taxes Act that provided funding for local governments for the loss of tax revenues resulting from the tax-immune status of federal lands. The Act included language that stated, "the local unit 'may use the payment for any governmental purpose.'" Id. at 259. South Dakota enacted a statute that directed the way that local governments were to distribute federal payments in lieu of taxes and stated that local governments needed to distribute those payments in the same manner as they distribute general revenue. Id. at 259. The United States Supreme Court held that the federal law pre-empted the South Dakota law. The Court held, "Even if Congress has not expressly pre-empted state law in a given area, a state statute may nevertheless be invalid under the Supremacy Clause if it conflicts with the federal law or 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" Id. at 260, citing Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 248 (1984). The Court directed the parties to look at the full purposes and objectives of Congress.

The Governor incorrectly advances the argument that the full purposes and objectives of the ARRA are to empower the governor of a state with the absolute

discretionary authority in areas in which he or she does not currently have authority under existing state law. The question raised is, was it the intent of the ARRA to give a governor more authority than that which is given by the State Constitution or does § 14005 of the ARRA give the Governor a ministerial act of carrying out the will of the State. It is the position of Superintendent Rex that §14005 does the latter.

The intent of the ARRA is clearly set forth in § 3 of the Act. The purposes of the ARRA are:

> (1) To preserve and create jobs and promote economic recovery.
>
> (2) To assist those most impacted by the recession.
>
> (3) To provide investments needed to increase economic efficiency by spurring technological advancements in science and health.
>
> (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic growth.
>
> (5) *To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases*.
>
> (Emphasis added).

Clearly, it was the intent of Congress for states to receive ARRA funds. If there is any doubt as to intent, Congress clarified its intent when it passed the Clyburn Amendment, which allows a state legislature to accept funds and distribute funds in the event that the governor of a state does not accept or use any funds under the ARRA. § 1607(b-c). Congress purposefully included this alternative "fallback" position in the

event a governor did not apply for the funds. In some states, this "fallback" position may be necessary; however, in South Carolina the authority to appropriate and spend funds falls squarely within the authority of the legislature and through the Appropriation Act, the Legislature may compel the actions of the Governor.

Some background about ARRA funding is necessary for illustration. SFSF funds are administered by the United States Department of Education. These funds are part of a federal allocation to states. The states received an allocation based upon specific criteria. The grants are to be made to the "Governor of each State." § 14001(d). However, it is well known that under state law, the "governor" does not receive funding. Those funds are sent to the Treasury and must be appropriated by the General Assembly before they can be used. S.C. Code Ann. § 2-65-20 (2005) states,

> The General Assembly shall appropriate all anticipated federal and other funds for the operations of state agencies in the appropriations act and must include any conditions on the expenditure of these funds as part of the appropriations act, consistent with federal laws and regulations.

Pursuant to ARRA, the use of these funds is mostly non-discretionary. The law requires that 81.8% of the funds first be used for elementary and secondary education "to restore, in each of fiscal years 2009, 2010, and 2011, the level of State support provided through such formulae to the greater of the fiscal year 2008 or fiscal year 2009 level." § 14002(a)(A)(i). The law also requires the restoration of higher education funding. § 14002(a)(A)(ii).

The General Assembly through the Appropriation Act appropriated the remaining 18.2% of the SFSF funds in areas that qualify under § 14002 (See application filed with Superintendent Rex's Answer). The "State Application" language addresses the mechanism in which to apply for the funds. It states, "The Governor of a *State desiring to receive an allocation* under section 14001 shall submit an application at such time, in which manner, and containing such information as the Secretary may reasonably require." § 14005. While this may not be the most artfully drafted language, the section addresses a *state's* desire. It could have simply stated the governor shall submit an application, if the intent was that the governor have complete discretion. Similar language is also used under the incentive grant section which states "The Governor of a *State seeking* a grant under section 14006 shall. . ." § 14005(c). (Emphasis added). The Governor's argument would have this Court overlook the words "state's desire" and "state seeking."

No greater evidence exists as to the State of South Carolina's desire to receive these funds than in the 2009–2010 Appropriation Act. Part III of the Act requires the Governor to submit the application for the SFSF funds and requires the State Superintendent of Education to assist the Governor with the application. Superintendent Rex fulfilled his responsibilities in assisting the Governor through the completion of the required application.

Respectfully submitted:

By: _____

Shelly Bezanson Kelly, #15215
Karla McLawhorn Hawkins, #11756
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Attorneys for Co-Defendant Jim Rex
State Superintendent of Education

June _____, 2009
Columbia, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Association of School Administrators Plaintiff, vs. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina, Defendants.	C.A. No. 3:09-CV-01364-JFA **CO–DEFENDANT STATE SUPERINTENDENT OF EDUCATION JIM REX'S MOTION TO REMAND**

TO: JOHN W. FOSTER, ADAM H. CHARNES, RICHARD D. DIETZ, A. STEPHENS CLAY, AND WILLIAM R. POPLIN, JR., ATTORNEYS FOR CO-DEFENDANT, GOVERNOR MARK SANFORD; AND KENNETH L. CHILDS, WILLIAM F. HALLIGAN, JOHN M. REAGLE, KEITH R. POWELL, ATTORNEYS FOR PLAINTIFF SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS

YOU WILL PLEASE TAKE NOTICE that Co-Defendant Jim Rex, State Superintendent of Education of South Carolina, by and through his counsel of record hereby moves the Court, pursuant to Fed. R. Civ. 12(b)(1), 28 USC §§ 1446 and 1447(c) to remand this matter to the South Carolina Supreme Court. In accordance with the requirements of Local Civil Rule 7.04 DSC, a Memorandum of Law in support of this Motion is filed contemporaneously herewith.

SIGNATURE ON NEXT PAGE

Respectfully submitted:

SOUTH CAROLINA DEPARTMENT OF EDUCATION

By: s/ Shelly Bezanson Kelly

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State Superintendent of Education

May 29, 2009
Columbia, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Association of School Administrators Plaintiff, vs. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina, Defendants.	C.A. No. 3:09-CV-01364-JFA **MEMORANDUM OF LAW IN SUPPORT OF CO–DEFENDANT STATE SUPERINTENDENT OF EDUCATION JIM REX'S MOTION TO REMAND TO STATE COURT**

Co–Defendant Jim Rex, State Superintendent of Education of South Carolina (hereinafter "Co–Defendant Rex"), by and through his undersigned counsel of record, and pursuant to Local Civil Rule 7.04 DSC, submits this Memorandum of Law in Support of his Motion to Remand to State Court.

I. INTRODUCTION

On May 22, 2009, Plaintiff South Carolina Association of School Administrators (hereinafter "Plaintiff") filed a Petition for Original Jurisdiction and Complaint in the South Carolina Supreme Court against Co–Defendant Governor Mark Sanford (hereinafter "Co-Defendant Sanford") and Co–Defendant Rex in their official capacities. The Plaintiff seeks declaratory and injunctive relief, as well as a writ of mandamus requiring the Defendants to complete an application for State Fiscal Stabilization Funds

(hereinafter "SFSF" or "Funds") as provided by the American Recovery and Reinvestment Act (hereinafter "ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009). On May 26, 2009, Co–Defendant Rex filed his Return to Petition for Original Jurisdiction and Answer. On that same date, Co–Defendant Rex received notice that Co–Defendant Sanford, without Co–Defendant Rex's knowledge or consent, removed this matter to the South Carolina District Court, District of South Carolina. This motion is filed in opposition to Co–Defendant Sanford's removal. Co–Defendant Rex has moved to remand this matter to state court for lack of subject matter jurisdiction and pursuant to the statutory requirements of removal.

Plaintiff's Complaint and Co–Defendant Rex's Answer are attached hereto as Attachment A. Senate Bill 577 is attached hereto as Attachment B. Unpublished case law is attached hereto as Attachment C.

II. ARGUMENT

Remand of this action is appropriate as a result of Co–Defendant Sanford's failure to comply with the requirement to receive the consent of all defendants to this matter. 28 U.S.C. § 1446. Additionally, remand of an action to state court is appropriate if it appears at anytime prior to final judgment that the district court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). An order remanding a case to state court, with the exception of civil rights cases, is not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d). The party seeking removal has the burden of establishing federal jurisdiction. Mulcahey v. Columbia Organic Chemicals Co., Inc., 29 F.3d 148, 151 (4th Cir 1994); Dixon v. Coburg

Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004); Crawford v. C. Richard Dobson Builders, Inc., 597 F.Supp. 2d 605, 608 (D.S.C. 2009). District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A defendant or defendants may remove an action to a district court when the court has original jurisdiction. 28 U.S.C. § 1441(c).

Absent another jurisdictional ground, a defendant seeking to remove a case, in which State law creates plaintiff's cause of action, must establish two elements: "(1) that the plaintiff's right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial. If either of these two elements is lacking, removal is improper and the case should be remanded to state court." Dixon at 816. In determining whether an action presents a federal question, district courts must first discern whether federal or state law creates the cause of action. Mulcahey at 151. Courts must strictly construe removal jurisdiction because it raises significant federalism concerns. Mulcahey at 151. "If federal jurisdiction is doubtful, a remand is necessary." Id.

A. A Remand to State Court is Proper Because Co–Defendant Rex Did Not Consent to the Removal of this Action From State Court.

Co–Defendant Rex does not consent to the removal of this action to the United States District Court, District of South Carolina. Agreement of all defendants to removal is generally required under 28 U.S.C. § 1447. Courts have routinely held that all defendants in an action must join in a petition for removal. See, Chicago, Rock Island, & Pacific Railway Company v. Martin, 178 U.S. 245, 248 (1900) ("[I]t was well settled that a removal could not be effected unless

all the parties on the same side of the controversy united in the petition."); Ray v. O'Neal, 2009 WL 113415, *1 (D.S.C. 2009) ("The courts have consistently interpreted section 1446(a) to require all defendants in an action to join in or consent to the petition."); Mansfield v. Anesthesia Associates, 2007 WL 4531948, *2 (E.D.VA 2007) ("The failure of all defendants to comply with the rule of unanimity qualifies as a defect in the removal process that can form the basis of a motion to remand under 28 U.S.C. § 1447(c)); Payne ex re; Estate of Calzada v. Brake, 439 F.3d 198, 203 (4th Cir. 2006) ("Failure of all defendants to join in the removal petition does not implicate the court's subject matter jurisdiction. Rather, it is merely an error in the removal process. As a result, a plaintiff who fails to make a timely objection waives the objection.") Co-Defendant Rex timely filed his motion to remand based on the failure to receive the consent of all defendants.

Co–Defendant Sanford asserts in his removal filings that the court should treat Co–Defendant Rex as a plaintiff in this case and not a defendant. He asserts this as justification to avoid the necessity of having Co–Defendant Rex consent to removal as is required under § 1446. While Co–Defendant Rex agrees with portions of the request for relief in the Plaintiff's case, he is not a willing participant in this lawsuit and does not consent to removal to federal court.

Plaintiff's Complaint alleges that Co–Defendant Rex has "been empowered by the General Assembly to act in the name of the Governor to make the application for ARRA Stabilization Fund money allocated to the State and to take all ancillary steps necessary to perfect the application and the receipt of ARRA Stabilization Funds by the State for use

as appropriated in Part III of the State Budget." (Complaint ¶ 35). In other words, Plaintiff claims that Co–Defendant Rex has the authority to sign the SFSF application for the State. Co–Defendant Rex disagrees with this conclusion of law. Co–Defendant Rex never asserted that he has the right to stand in Co–Defendant Sanford's role, and does not believe that he has authority to substitute for Co–Defendant Sanford. Additionally, Co–Defendant Rex believes such a ruling would be harmful to the State of South Carolina in that the United States Department of Education may not accept South Carolina's application with his signature. As a result, any such ruling may result in South Carolina's ineligibility for these Funds which must be properly applied for by 4:30 P.M. on July 1, 2009. As Co–Defendant Rex does not agree with all the Plaintiff's assertions, he is a true Co–Defendant and his consent is required for removal of this action to federal court.

B. A Remand to State Court Is Proper Because the Controversy Involves State,Not Federal,Questions.

This case is properly in the South Carolina Supreme Court because the issues at hand are primarily state law and state constitutional issues. This case presents a question of where the separation of power lies in the State of South Carolina. It is settled law in matters where federal law creates the cause of action, subject matter jurisdiction exists. Mulcahey at 151; Dixon at 816. Additionally, the court must look at the complaint when determining whether a federal action exists.

> Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well-pleaded complaint." Franchise Tax Board, 463 U.S., at 9-10, 103 S.Ct., at 2846-2847. A defense that raises a federal question is inadequate to confer federal jurisdiction. Louisville &

> Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Since a defendant may remove a case only if the claim could have been brought in federal court, 28 U.S.C. § 1441(b), moreover, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint.

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, 106 S.Ct. 3233 (1986).

If state law creates the cause of action, federal question jurisdiction rests on whether the Plaintiff's demand "necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 28, 103 S.Ct. 2841, 2856 (1983); See Merrell Dow at 478 U.S. at 808–09, 813, 106 S.Ct. 3233 (1986); Mulcahey at 151. In the instant case, the resolution of state law is at issue.

Co–Defendant Sanford, in a press release, emphasized the predominance of the State issue in this matter:

> Our suit is fundamentally about the balance of power and separation of powers in our state, and whether or not the legislature is going to be allowed to erode the Executive Branch even further in South Carolina, Gov. Sanford said. Legislative dominance costs our state's citizens far too much for the way it breeds waste and duplication, and the last thing we need to be doing is exporting that dysfunctional system to other states, which is what will happen if our General Assembly is allowed to re-write federal law in this way.

http://www.scgovernor.com/news/releases/5-26-09.htm**.**

While Co-Defendant Sanford alleges in his Notice of Removal of Civil Action that this Court has original subject matter and supplemental jurisdiction, "the mere presence of a federal issue in a state cause of action does not automatically confer

federal–question jurisdiction." Merrell Dow, 478 U.S. at 813, 106 S.Ct. at 3234. As Supreme Court Justice Benjamin Cardozo enunciated in Gully v. First National Bank, 299 U.S. 109, 117–118, 57 S.Ct. 96, 99-100 (1936), in determining whether federal–question jurisdiction is appropriate, courts need "something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside."

It is a question of state law whether, under South Carolina law, the General Assembly has the authority to require South Carolina's governor to apply for funds through legislative action. The South Carolina Constitution sets forth the responsibilities of each branch of government. S.C. Const. Art. III, § 1 and Art. IV. While the legislative branch is charged with the responsibility of creating laws, the Constitution provides, "[t]he Governor shall take care that the laws be faithfully executed." S.C. Const. Art. IV, § 15.

Part 3 of the 2009–10 Appropriation Act provides:

> SECTION 1. Pursuant to Title XVI of the American Recovery and Reinvestment Act of 2009 (ARRA), the Governor has certified that (1) the State will request and use funds provided by the ARRA, and (2) the funds will be used to create jobs and promote economic growth. As a result of the Governor's action, the General Assembly recognizes $694,060,272 of federal funds pursuant to the State Fiscal Stabilization Fund established by Title XIV of the ARRA and that these funds are authorized for appropriation pursuant to the provisions of this Part. In order to fund the appropriations provided by this Part, the Governor and the State Superintendent of Education shall take all action necessary and required by the ARRA and the U.S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation

> pursuant to this section. The action required by this Part includes but is not limited to: (1) within five days of the effective date of this Part, the Governor shall submit an application to the United State's Secretary of Education to obtain phase one State Fiscal Stabilization Funds, and (2) within thirty days of phase two State Fiscal Stabilization Funds becoming available or thirty days following the effective date of this act, whichever is later, the Governor shall submit an application to the United State's Secretary of Education to obtain phase two State Fiscal Stabilization Funds. The State Superintendent of Education shall take all action necessary and provide any information needed to assist the Governor in fulfilling his obligation to apply for State Fiscal Stabilization funds pursuant to this Section.

This law clearly requires that Co–Defendant Sanford apply for the Funds within five days of its effective date.

Co–Defendant Sanford cannot establish that 1) Plaintiff's right to relief depends on a question of federal law, and 2) that the question of federal law is substantial. "If either of these two elements is lacking, removal is improper and the case should be remanded to state court." Dixon at 816. There is no private right of action under the ARRA. "[I]f a federal law does not provide a private right of action, a state law action based on its violation does not raise a "substantial" federal question." Mulcahey at 152.

Alleged discretion within the ARRA does not create a substantial federal question. A careful reading of the ARRA indicates that Co–Defendant Sanford does not have discretion to reject ARRA funding where the General Assembly has directed otherwise, and the submission of the SFSF application does not rest solely with him.

To qualify for these funds, the State must meet certain maintenance of effort requirements, which under South Carolina state law, only our General Assembly can advance. First, the State must "in each of fiscal years 2009, 2010, and 2011, maintain

State support for elementary and secondary education at least at the level of such support in fiscal year 2006." ARRA § 14005(d)(1)(A). The legislature, not the Governor, determines the level of funding for public education. If the State does not meet maintenance of effort, the State may qualify for a waiver if elementary, secondary, and postsecondary education receive the same or greater portion of funding as in the previous year. ARRA § 14012. The legislature, not the Governor, determines the level of funding and would ensure that the percentages are maintained for waiver eligibility.

Pursuant to South Carolina law, only the General Assembly has the authority to appropriate the funds to ensure that the State meets either the maintenance of effort or the waiver criteria. S.C. Code Ann. § 2-7-60 (2005).

> The General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill. In writing the appropriations bill, it attempts as best it can to predict the needs of the various departments of state government.

McLeod v. McInnis, 295 S.E.2d 633, 637 (S.C. 1982). Co–Defendant Sanford does not have a role in the appropriations process, except for his authority to veto, which he exercised with regard to the 2009–10 Appropriation Act. The General Assembly overrode Co–Defendant Sanford's veto on May 20, 2009. Therefore, Co–Defendant Sanford has no discretion in addressing this requirement of the law.

Additionally, the Governor does not have discretion to use the funds for debt reduction. Use of 81.8% of the funds is completely non-discretionary. ARRA §

14002(a)(1) provides, "the Governor shall use 81.8% of the State's allocation under section 14001(d) for the support of elementary, secondary, and postsecondary education and, as applicable, early childhood education programs and services." Section 14002 of the ARRA provides that the K-12 portion of the Funds shall flow through the State's primary elementary and secondary funding formulae and Funds shall be used to restore lost funding for higher education. Co–Defendant Sanford has no discretion on how these funds flow.

The plain reading of the application language in the ARRA also indicates that a governor's application is on behalf of a state, and not a discretionary act that only a governor holds. ARRA § 14005(a) addresses the application for the SFSF and provides that a "Governor of a *State desiring* to receive an allocation under section 14001 shall submit an application. . .." (Emphasis added) The General Assembly clearly indicated the State's desire to receive the allocation on behalf of the State through the passage of Part 3 of the 2009–2010 Appropriation Act. This section of the ARRA does not create a discretionary act of a state's governor; instead it established who must make the application on *behalf* of the State.

The question of whether the South Carolina General Assembly can accept funds under the terms of the ARRA, specifically § 1607(b) ("the Clyburn Amendment") also needs to be analyzed under State law, not federal law. While the ARRA sets forth the mechanism for drawing down the Funds, it is the constitution and laws of the State of South Carolina that establish the rights and responsibilities of the Governor and the

General Assembly. The court must consider South Carolina's unique governmental structure in determining whether the General Assembly has the authority to accept these funds. "[T]here is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly." State v. Hodges, 349 S.C. 232, 562 S.E.2d 623, 630 (2002). The Governor of South Carolina's duty is to carry out the laws of the State. S.C. Const. Art. IV, § 15. House Majority Whip James Clyburn, in introducing this amendment, recognized that the Co–Defendant Sanford may not accept these funds. The bill was amended to provide an alternative to the "technical" requirement that a governor apply.

Section 1607(a) requires a governor to certify for the funds "[n]ot later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this act; and (2) the funds will be used to create jobs and promote economic growth." ARRA § 1607(a). Co–Defendant Sanford issued this certification on April 3, 2009; the same document indicates it is by no means an application for the SFSF. The Governor has therefore not certified as to the SFSF, which activates the provisions of the Clyburn Amendment. Because of his failure to apply for the Funds, the South Carolina General Assembly passed a concurrent resolution, Senate Bill 577 (see attached), on May 14, 2009, to accept the Funds under § 1607(b). The General Assembly,

through the Appropriation Act, appropriated those funds. Pursuant to § 1607(c), [a]fter the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion." The General Assembly chose to appropriate through its annual Appropriation Act, and chose to legislate that the Co–Defendant Sanford complete an application pursuant to its authority granted in § 1607.

The SFSF section of the ARRA provides specific directives and conditions for receiving funds as mentioned above. There is little discretion given to Co–Defendant Sanford as to how to qualify or how to spend the Funds. In fact, the qualification is first predicated on whether certain fiscal requirements are met, something only the General Assembly can ensure in South Carolina, and data provided by the State Superintendent of Education. The language, throughout the ARRA, states that "The Governor of a *State desiring* to receive an allocation . . . " § 14005(a) and "The Governor of a *State seeking* a grant . . . ″ § 14005(c). (Emphasis added).

The question the court must answer is who has authority to determine that the "state" desires to receive an allocation. One must look at state law to determine which branch of government has the authority to speak for the "state" in this instance. The Governor of South Carolina has no independent authority under South Carolina law to appropriate or budget funding. All funds must be appropriated by the General Assembly. Thus, even if Co–Defendant Sanford applied for the Funds in a timely manner, the laws

of South Carolina require that those Funds be appropriated by the South Carolina General Assembly before the Funds are spent. This is a question of state law. There is no substantial federal question.

III. CONCLUSION

Because this case has no substantial federal question and because removal was done without consent of all defendants, Co–Defendant Rex requests that the Court remand this matter to state court.

SIGNATURE ON NEXT PAGE

Respectfully submitted:

SOUTH CAROLINA DEPARTMENT OF EDUCATION

By: s/ Shelly Bezanson Kelly

Shelly Bezanson Kelly, Fed. ID #10125
Karla McLawhorn Hawkins, Fed. ID #7059

Barbara A. Drayton, Fed. ID #7066
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Attorneys for Co-Defendant Jim Rex
State Superintendent of Education

May 29, 2009
Columbia, South Carolina

ATTACHMENT A

SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS

COMPLAINT

(Not available in Word format - see PDF Version)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators ..... Plaintiff,

v.

The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina ..... Defendants.

ANSWER

Co-Defendant Jim Rex, State Superintendent of Education (hereinafter "Superintendent Rex"), hereby responds to the Complaint of Plaintiff, the South Carolina Association of School Administrators, in accordance with the numbered paragraphs thereof, as follows:

General Allegations

1. Superintendent Rex admits paragraph 1.

2. Superintendent Rex admits paragraph 2.

3. Superintendent Rex admits paragraph 3.

4. Superintendent Rex admits paragraph 4.

5. Superintendent Rex admits paragraph 5.

6. Superintendent Rex admits paragraph 6.

7. Superintendent Rex admits paragraph 7.

8. Superintendent Rex admits paragraph 8.

9. Superintendent Rex admits paragraph 9.

10. Superintendent Rex admits paragraph 10.

11. Superintendent Rex admits paragraph 11 as an accurate statement of the American Recovery and Reinvestment Act of 2009 (hereinafter "ARRA"); however, Superintendent Rex asserts that § 14012 of the ARRA includes a waiver provision for a state's failure to meet the maintenance of effort provision in § 14005. Superintendent Rex prepared the waiver document and submitted such to the Defendant Governor Sanford and to the best of his knowledge and belief South Carolina qualifies for the maintenance of effort waiver.

12. Superintendent Rex admits paragraph 12.

13. Superintendent Rex admits paragraph 13.

14. Superintendent Rex admits paragraph 14.

15. Superintendent Rex admits paragraph 15. Superintendent Rex submitted a copy of the completed application to the Governor via facsimile on May 23, 2009, and via hand delivery on May 26, 2009 (Attachment). Superintendent Rex and his staff at the South Carolina Department of Education worked with members of the General Assembly and its staff, the Office of State Budget,

and the Commission on Higher Education in assembling the required documentation for the application.

16. Superintendent Rex admits paragraph 16.

17. Superintendent Rex admits paragraph 17.

FOR A FIRST CLAIM
Declaratory Judgment and Appropriate Relief

18. Superintendent Rex incorporates by reference herein his responses to paragraphs 1 through 17 of the Complaint.

19. Superintendent Rex admits paragraph 19.

20. Superintendent Rex admits paragraph 20.

21. Superintendent Rex admits paragraph 21.

22. Superintendent Rex agrees with Plaintiff's statement of the law in paragraph 22.

23. Superintendent Rex agrees with Plaintiff's statement of the law in paragraph 23.

24. Admitted in part and denied in part. Superintendent Rex admits Plaintiff seeks a declaratory judgment; however, he is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 24, and therefore denies same.

FOR A SECOND CLAIM
Writ of Mandamus

25. Superintendent Rex incorporates by reference herein his responses to paragraphs 18 through 24 of the complaint.

26. Superintendent Rex concurs with this prayer of relief expressed in paragraph 26 and joins in asking the Court and agrees with Plaintiff's statement of the

law with regard to the rights of the courts to compel ministerial acts by the Governor.

27. Superintendent Rex agrees with Plaintiff's statement of the law in paragraph 27.

28. Superintendent Rex agrees with Plaintiff's statement of the law in paragraph 28.

29. Superintendent Rex agrees with Plaintiff's statement of the law in paragraph 29.

30. Superintendent Rex admits paragraph 30. Superintendent Rex submitted a copy of the completed application to the Governor via facsimile on May 23, 2009, and via hand delivery on May 26, 2009. Superintendent Rex and his staff at the South Carolina Department of Education worked with members of the General Assembly and its staff, the Office of State Budget, and the Commission on Higher Education in assembling the required document for the application.

31. Superintendent Rex is without knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph 31, and therefore denies same.

32. Superintendent Rex is without knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph 32, and therefore denies same.

33. Superintendent Rex concurs with this prayer of relief expressed in paragraph 33.

FOR A THIRD CLAIM
Further Declaratory Relief

34. Superintendent Rex incorporates by reference herein his responses to paragraphs 25 through 33 of the complaint.

35. Admitted in part and denied in part. Superintendent Rex admits only that he is ready to take all ancillary steps necessary to perfect the application and receive funds, and will make the application if the Court declares that he has a right to do so. In addition, the application, as prepared by the United States Education Department, allows for the application to be signed by "Governor or Authorized Representative of the Governor." (Part 1: Application Cover Sheet; OMB Form Number 1810-0690). Superintendent Rex stands ready to "take all actions necessary. . . to assist the Governor" as required by the Appropriations Act, up to and including signing the application as an "authorized representative of the Governor" if the Court so declares. The remaining allegations of paragraph 35 are denied.

36. Superintendent Rex is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph 36, and therefore denies same.

For An Affirmative Defense

37. Section 1607 of the ARRA provides for two separate methods for states to draw down ARRA funds.

38. Section 1607(a) allows for certification by the Governor. It states, "Not later than 45 days after the date of enactment of this Act, for funds provided any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth."

39. Section 1607(b) provides for acceptance by the State legislature if the governor fails to accept funds. That section states, "If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State."

40. In his certification letter dated April 3, 2009, Governor Sanford certified he would accept funds per § 1607, but stated "this letter in no way represents an application for State Fiscal Stabilization Funds."

41. In other public statements, the Governor has stated he will not apply for SFSF funds if the Legislature does not use the funds to reduce State debt.

42. The Legislature's final budget did not include debt reduction.

43. On May 14, 2009, the South Carolina General Assembly passed Senate Bill 577, a concurrent resolution, which states in pertinent part:

> Be it resolved by the Senate, the House of Representatives concurring:
>
> That the South Carolina General Assembly, pursuant to HR-1 of 2009, the American Recovery and Reinvestment Act of 2009,

> accepts the use of federal stimulus funds provided to this State if the Governor of South Carolina within the required forty-five day period fails to certify that he will request and use these funds for this State and to create jobs and promote economic growth.
>
> Be it further resolved that the South Carolina General Assembly further declares that the manner of distribution of these funds shall be as stipulated in this resolution.
>
> Be it further resolved that a copy of this resolution be forwarded to the United States Senate, the United States House of Representatives, and to each member of the South Carolina Congressional Delegation.

44. Superintendent Rex asserts that § 1607(b) of the ARRA is not inconsistent with § 1607(a) but the sections must be read in total with the ARRA.

45. The ARRA does not provide discretionary authority with the Governor of South Carolina where under State law such discretionary authority does not exist.

46. Section 14005 of the ARRA, which addresses the State Application for the Fiscal Stabilization Funds, states, "The Governor of a State desiring to receive the allocation under § 14001 shall submit an application at such time and in such manner, and containing such information as the Secretary may reasonably require."

47. Section 14005 of the ARRA does not create discretionary authority of the Governor, it simply provides that the Governor shall provide the administrative or ministerial function of applying for the funds, while

acknowledging that the "State" has the authority to decide to draw down funds, in a manner established by state law.

48. Sections 1607 and 14005 of the ARRA do not change state law but should be read within the context of the division of authority as set forth in state law.

49. Section 1607(b) allows the General Assembly to accept funds in cases where the Governor fails to apply.

50. Section 1607(b) is consistent with State and federal constitutional law.

51. Superintendent Rex pleads that the Court declare that Senate Bill 577 provides the authority for State Fiscal Stabilization Funds to flow to South Carolina.

52. All allegations herein not admitted are therefore denied.

PRAYER FOR RELIEF

WHEREFORE, Superintendent Rex request the Court to declare that he as Superintendent of Education has complied with the law in providing the completed application to Governor Sanford and that the Court order such other and further relief as is just and proper.

Respectfully submitted:

By: _____
Shelly Bezanson Kelly
Karla McLawhorn Hawkins
Barbara A. Drayton
Wendy Bergfeldt Cartledge

South Carolina Department of Education
1429 Senate Street, Suite 1015
Columbia, SC 29201
(803) 734-8783

Attorneys for Co-Defendant Jim Rex
State Superintendent of Education

May _____, 2009
Columbia, South Carolina

ATTACHMENT B

South Carolina General Assembly
118th Session, 2009-2010

Download This Bill in Microsoft Word format

~~Indicates Matter Stricken~~
Indicates New Matter

S. 577

STATUS INFORMATION

Concurrent Resolution
Sponsors: Senators Leatherman, Land, Setzler, Malloy, McGill, O'Dell, Reese, Nicholson, Williams, Elliott and Knotts
Document Path: l:\s-financ\drafting\hkl\007arra.dag.hkl.docx

Introduced in the Senate on March 12, 2009
Introduced in the House on May 14, 2009
Adopted by the General Assembly on May 14, 2009

Summary: American Recovery and Reinvestment Act

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/12/2009	Senate	Introduced SJ-6
3/12/2009	Senate	Referred to Committee on **Finance** SJ-6
3/18/2009	Senate	Committee report: Favorable with amendment **Finance** SJ-3
5/13/2009	Senate	Adopted, sent to House SJ-81
5/14/2009	House	Introduced, adopted, returned with concurrence HJ-55
5/14/2009	House	Motion to reconsider tabled HJ-61

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VERSIONS OF THIS BILL

3/12/2009
3/18/2009

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

COMMITTEE REPORT

March 18, 2009

S. 577

Introduced by Senators Leatherman, Land, Setzler, Malloy, McGill, O'Dell, Reese, Nicholson, Williams, Elliott and Knotts

S. Printed 3/18/09--S.

Read the first time March 12, 2009.

THE COMMITTEE ON FINANCE

To whom was referred a Concurrent Resolution (S. 577) to provide that pursuant to HR-1 of 2009, the American Recovery and Reinvestment Act of 2009, the General Assembly accepts the use of federal stimulus funds provided, etc., respectfully

REPORT:

That they have duly and carefully considered the same and recommend that the same do pass:

HUGH K. LEATHERMAN, SR. for Committee.

A CONCURRENT RESOLUTION

TO PROVIDE THAT PURSUANT TO HR-1 OF 2009, THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, THE GENERAL ASSEMBLY ACCEPTS THE USE OF FEDERAL STIMULUS FUNDS PROVIDED TO THIS STATE IN THIS ACT IF THE GOVERNOR OF SOUTH CAROLINA, WITHIN THE REQUIRED FORTY-FIVE DAY PERIOD, FAILS TO CERTIFY THAT HE WILL REQUEST AND USE THESE FUNDS FOR THIS STATE AND THE AGENCIES AND ENTITIES THEREOF IN THE MANNER PROVIDED IN THE FEDERAL ACT, AND TO PROVIDE FOR THE MANNER OF DISTRIBUTION OF THESE FUNDS.

Whereas, in Section 1607 of HR-1 of 2009, the American Recovery and Reinvestment Act of 2009, the Congress of the United States has provided as follows:

"(a) CERTIFICATION BY GOVERNOR. - Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.

(b) ACCEPTANCE BY STATE LEGISLATURE. - If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.

(c) DISTRIBUTION. - After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion."; and

Whereas, pursuant to subsection (b) of the above provision, the South Carolina General Assembly accepts for use all or any applicable portion of the funds provided to the State of South Carolina or any agency thereof, if the Governor of South Carolina pursuant to subsection (a) above fails to certify not later than forty-five days after enactment of HR-1 of 2009, that he will on behalf of this State request the funds provided in HR-1 of 2009; and

Whereas, pursuant to subsection (c) above, the South Carolina General Assembly declares the distribution of these funds to state agencies, entities, and any other political subdivision of this State, including those distributed to local governments through the State of South Carolina, shall be provided by formula or as directed by the General Assembly; and

Whereas, to enhance the General Assembly's ability to utilize these funds to create the most jobs and promote as much economic growth as possible, the General Assembly shall create a joint review committee to provide recommendations to both the General Assembly and the executive branch regarding the most efficient policy for the receipt, appropriation, expenditure, and reporting of these funds. Now, therefore,

Be it resolved by the Senate, the House of Representatives concurring:

That the South Carolina General Assembly, pursuant to HR-1 of 2009, the American Recovery and Reinvestment Act of 2009, accepts the use of federal stimulus funds provided to this State if the Governor of South Carolina within the required forty-five day

period fails to certify that he will request and use these funds for this State and to create jobs and promote economic growth.

Be it further resolved that the South Carolina General Assembly further declares that the manner of distribution of these funds shall be as stipulated in this resolution.

Be it further resolved that a copy of this resolution be forwarded to the United States Senate, the United States House of Representatives, and to each member of the South Carolina Congressional Delegation.

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This web page was last updated on May 15, 2009 at 9:37 AM

ATTACHMENT C

WESTLAW CASES (2)

(Not available in Word format - see PDF Version)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Association of School Administrators Plaintiff, vs. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina, Defendants.	C.A. No. 3:09-CV-01364-JFA **CO–DEFENDANT STATE SUPERINTENDENT OF EDUCATION JIM REX'S ANSWERS TO 26.01 INTERROGATORIES**

Co-Defendant Jim Rex, individually and in his official capacity as State Superintendent of Education of South Carolina (hereinafter "Co-Defendant Rex"), hereby submits his responses to Local Civil Rule 26.01 DSC Interrogatories, as follows:

A. State the full name, address and telephone number of all persons or legal entities who may have a subrogation interest in each claim and state the basis and extent of said interest.

Answer: There are no persons or legal entities who may have a subrogation interest in this matter.

B. As to each claim, state whether it should be tried jury or nonjury and why.

Answer: The Plaintiff seeks declaratory and other relief; therefore, this is a non–jury matter.

C. State whether the party submitting these responses is a publicly owned company and separately identify: (1) each publicly owned company of which it is a

parent, subsidiary, partner, or affiliate; (2) each publicly owned company which owns ten percent or more of the outstanding shares or other indicia of ownership of the party; and (3) each publicly owned company in which the party owns ten percent or more of the outstanding shares.

Answer: Co-Defendant Rex is not a publicly owned company.

D. State the basis for asserting the claim in the division in which it was filed (or the basis of any challenge to the appropriateness of the division).

Answer: Co-Defendant Rex challenges the appropriateness of Co–Defendant Governor Mark Sanford removing this action to federal court as it is a state court matter. On May 29, 2009, Co-Defendant Rex filed a Motion to Remand and Memorandum of Law in support of his motion.

E. Is the action related in whole or in part to any other matter filed in this District, whether civil or criminal? If so, provide: (1) a short caption and the full case number of the related action; (2) an explanation of how the matters are related; and (3) a statement of the status of the related action. Counsel should disclose any cases which may be related regardless of whether they are still pending. Whether cases are related such that they should be assigned to a single judge will be determined by the Clerk of Court based on a determination of whether the cases: arise from the same or identical transactions, happenings, or events; involve the identical parties or property; or for any other reason would entail substantial duplication of labor if heard by different judges.

Answer: This action is partly related to Sanford v. McMaster, 3:09–CV–01322–JFA and Edwards v. The State of South Carolina, 3:09–CV–01385–JFA in that the cases raise the issue of separation of power in the State of South Carolina. The cases are pending before the Honorable Joseph F. Anderson, Jr., United States District Court Judge.

F. [Defendants only]. If the defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleadings reflecting the correct identification.

Answer: Co-Defendant Rex is properly identified.

G. [Defendants only]. If you contend that some other person or legal entity is, in whole or in part, liable to you or the party asserting a claim against you in this matter, identify such person or entity and describe the basis of said liability.

Answer: Co-Defendant Rex does not contend that some other person or legal entity is liable.

SOUTH CAROLINA DEPARTMENT OF EDUCATION

By: s/ Shelly Bezanson Kelly

Shelly Bezanson Kelly, Fed. ID #10125
Karla McLawhorn Hawkins, Fed. ID #7059

Barbara A. Drayton, Fed. ID #7066
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Attorneys for Co-Defendant Jim Rex
State Superintendent of Education

May 29, 2009
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators ..... Petitioner,

v.

The Honorable Mark Sanford, in his official capacity
as the Governor of the State of South Carolina, and
The Honorable Jim Rex, in his official capacity as the
State Superintendent of Education of South Carolina ..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he/she has hand served the forgoing REPLY pursuant to Rule 229, SCACR and Rule 4(d)(5), SCRCP, upon:

South Carolina Association of School Administrators
Childs and Halligan, PA
The Tower at 1301 Gervais Street, Suite 900
Columbia, SC 29201

John W. Foster, Esquire
Kilpatrick, Stockton LLC
1201 Hampton Street, #3-A,
Columbia, SC 29201

The Honorable Henry McMaster
Attorney General, State of South Carolina
1000 Assembly Street, Room 319
Columbia, SC 29201

As shown in the attached affidavits.

This ___ day of June, 2009.

SC Department of Education
1429 Senate Street
Columbia, SC 29201
(803) 734-8783

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

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The Honorable Jim Rex, in his official capacity as the
State Superintendent of Education of South Carolina ..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that he/she has served the forgoing RETURN FOR ORIGINAL JURISDICTION and ANSWER pursuant to Rule 229, SCACR and Rule 4(d)(5), SCRCP, upon:

John W. Foster, Esquire
Kilpatrick, Stockton LLC
1201 Hampton Street, #3-A,
Columbia, SC 29201

This ___ day of June, 2009.

SC Department of Education
1429 Senate Street
Columbia, SC 29201
(803) 734-8783

THE STATE OF SOUTH CAROLINA
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South Carolina Association of School Administrators
Childs and Halligan, PA
The Tower at 1301 Gervais Street, Suite 900
Columbia, SC 29211

This ___ day of June, 2009.

SC Department of Education
1429 Senate Street
Columbia, SC 29201
(803) 734-8783

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators ..... Petitioner,

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The undersigned hereby certifies that he/she has served the forgoing RETURN FOR ORIGINAL JURISDICTION and ANSWER pursuant to Rule 229, SCACR and Rule 4(d)(5), SCRCP, upon:

The Honorable Henry McMaster
Attorney General, State of South Carolina
1000 Assembly Street, Room 319
Columbia, SC 29201

This ___ day of June, 2009.

SC Department of Education
1429 Senate Street
Columbia, SC 29201
(803) 734-8783