IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF ARKANSAS
WESTERN DIVISION

DR. CHARLES HOPSON, Ph.D. PLAINTIFF

vs. No. 4:11-cv-00608-BSM

MIKE BEEBE, Governor of the STATE OF ARKANSAS
in his individual and official capacity;
DR. TOM KIMBRELL, in his individual and official
capacities as Commission, Arkansas Department of Education;
DR. JERRY GUESS, in his official capacity as Superintendent
PULASKI COUNTY SPECIAL SCHOOL DISTRICT;
JOHN OR JANE DOE, NUMBERS 1 THROUGH 100,
in their official and individual capacities DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS OF SEPARATE DEFENDANTS DR. JERRY GUESS AND PULASKI COUNTY SPECIAL SCHOOL DISTRICT

Separate Defendants, Dr. Jerry Guess ("Guess") and Pulaski County Special School District ("District") (collectively, "PCSSD"), by their attorneys, Bequette & Billingsley, P.A., respectfully submit this Brief in Support of their Motion to Dismiss the Plaintiff's Amended and Substituted Complaint ("Amended Complaint"). For the reasons set forth herein, Plaintiff's claims against the PCSSD should be dismissed.

I.

APPLICABLE LAW

Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). The U.S. Supreme Court has held that a plaintiff must include allegations in the complaint that are sufficient to show that it is plausible, not merely conceivable, that the plaintiff will recover on the claims asserted in order to survive a motion filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plaintiff's claims against the PCSSD should be dismissed because they fail to state claims upon which relief can be granted.

II.

ARGUMENT

Plaintiff's Amended and Supplemental Complaint asserts four causes of action. First, Plaintiff asserts that Ark. Code Ann. § 6-20-1909 unconstitutionally impairs the performance of contractual obligations. *See* Amended Complaint at 35. Second, Plaintiff alleges that his property was unconstitutionally taken in violation of the United States Constitution and the Arkansas Constitution. *Id.* at 45. Third, Plaintiff contends that his employment contract was breached. *Id.* at 51. Fourth, Plaintiff brings claims for promissory estoppel and detrimental reliance based on the alleged assurances Plaintiff received from Defendant Dr. Tom Kimbrell. *Id.* at 55. None of these theories state a claim upon which relief may be granted as a matter of law.

A. PLAINTIFF'S IMPAIRMENT OF CONTRACT, UNCONSTITUTIONAL TAKING AND PROMISSORY ESTOPPEL CLAIMS SHOULD BE DISMISSED.

As to the impairment of contract, unconstitutional taking and promissory estoppel claims brought by Plaintiff, such claims, as pleaded, appear to be directed at the non-PCSSD defendants – Arkansas Governor Mike Beebe, in his individual and official capacities, and Dr. Tom Kimbrell, in his individual and official capacities. To the extent, however, that Plaintiff's Amended Complaint could be construed as asserting these claims against the PCSSD, the PCSSD hereby moves to incorporate by reference herein the Motion to Dismiss and Brief in Support filed by Separate

Defendants Beebe and Kimbrell pursuant to Fed. R. Civ. P. 10(c) ("a statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion").

In addition, in order for Plaintiff's claims for impairment of contract and an unconstitutional taking to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiff must establish that he had a legally protectable interest in his employment contract with the District. This Plaintiff cannot do, since on June 20, 2011, the Arkansas Department of Education ("ADE") advised Plaintiff that he was being required "to relinquish all administrative authority with respect to the Pulaski County Special School District pursuant to the authority contained in Ark. Code Ann. § 6-20-1909." *See* Amended Complaint, Ex. A.

The Eighth Circuit explained in *Johnson v. City of West Memphis*, 113 F.3d 842, 843 (8th Cir. 1997), that "[f]or a property interest to exist, the public employee must have a legitimate claim of entitlement to continue employment." The question of whether a plaintiff in a due process claim has a legitimate entitlement to continued employment is resolved by the law of the state where he was employed. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Under Arkansas law, once a school district is classified as being in fiscal distress, that district's superintendent may be required to relinquish his position at the ADE's discretion. *See* Ark. Code Ann. § 6-20-1909. As such, once the District was identified as being in fiscal distress, Plaintiff's employment was terminable at the will of the ADE.

B. THE IMPOSSIBILITY OF PERFORMANCE DEFENSE BARS PLAINTIFF'S CLAIMS AGAINST GUESS AND THE DISTRICT.

The Arkansas Court of Appeals' recent decision in *Smith v. Decatur Sch. Dist.*, 2011 Ark. App. 126 (February 16, 2011), is dispositive of all claims against the PCSSD. In *Smith*, the ADE took immediate fiscal control of the school district and required Smith, the school district's

superintendent, to relinquish all administrative authority with respect to the district. *See Smith* at 3. Smith filed suit against the district, alleging that the district had breached his employment contract. *Id.* The trial court granted summary judgment to the school district on the basis that it was impossible for the district to perform its contractual obligations to Smith after the ADE notified Smith that he would be required to relinquish all administrative authority with respect to the district. *Id.* at 5.

On appeal, the Arkansas Court of Appeals upheld the grant of summary judgment by the lower court based on the school district's argument that its performance under the employment contract with its former superintendent was made impossible by the actions the ADE took in reconstituting the school district. The Arkansas Court of Appeals explained that:

> [i]mpossibility is a common-law contract doctrine that excuses what would otherwise be a breach of contract. The law of impossibility has evolved into a broader and more equitable rule of impracticability. *Miller v. Mills Constr., Inc.*, 352 F.3d 1166 (8th Cir. 2003); WILLISTON ON CONTRACTS § 77.1 (4th ed. 2004). Impracticability of performance may excuse a party from performing contractual obligations. RESTATEMENT (SECOND) OF CONTRACTS § 261. Prevention of performance by a government order or regulation may qualify as an impracticability-of-performance defense. *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988); RESTATEMENT (SECOND) OF CONTRACTS § 264.
>
> . . .
>
> In this case, it is undisputed that ADE, acting through the State Board of Education, placed the district on its fiscally distressed list. It is also undisputed that ADE reconstituted the district and assumed fiscal control of the district.
>
> . . .
>
> Smith argues that section 6-20-1909 does not allow ADE, in reconstituting the district, to terminate, cancel, void, or otherwise breach contracts. However, section 6-20-1903, in defining "reconstitution," includes removal of a superintendent as one of

> ADE's options. We believe that it is implicit in the statutory scheme that ADE does have the authority to terminate superintendent's contracts. To accede to Smith's position would lead to an absurd result in that ADE would be placed in the anomalous position of, after having taken over the management of a district in fiscal distress, having to pay two individuals to act as superintendent of the district. We will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. (Citation omitted).
>
> . . .
>
> As such, the district had no choice but to comply with the ADE's order to remove Smith as superintendent and to cease paying him. Because the district established, as a matter of law, the defense of impossibility of performance, the circuit court correctly granted the district's summary judgment.

Id. at 5-8.

The instant case is on all fours with the Arkansas Court of Appeals decision in *Smith*. Here, the ADE exercised its statutory right to assume fiscal control of the PCSSD and to require Plaintiff to relinquish all authority as superintendent of the District pursuant to Ark. Code Ann. § 6-20-1909. The PCSSD's performance under the terms of the employment contract between the District and Plaintiff was made impossible by the actions the ADE took in reconstituting the District.

C. PLAINTIFF'S CLAIMS AGAINST GUESS ARE BARRED BY PRINCIPLES OF QUALIFIED IMMUNITY.

1. Applicable Legal Standard.

The Eighth Circuit outlined the principles of qualified immunity in the case of *Schleck v. Ramsey County*, 939 F.2d 638, 641 (8th Cir. 1991):

> "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d

> 396 (1982). In order for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [s]he is doing violates that right . . . . [I]n light of pre-existing law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). The standard for determining whether this qualified immunity is applicable is objective reasonableness. "Whether an official may prevail in [her] qualified immunity defense depends upon the 'objective reasonableness of [her] conduct as measured by reference to clearly established law.' . . . No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984) (quoting *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738 (footnote deleted)). *See also Holloway v. Conger*, 896 F.2d 1131, 1136-37 (8th Cir. 1990).

Dr. Guess is entitled to qualified immunity because based on the arguments and authority cited herein, he did not violate any "clearly established constitutional or statutory rights" of Plaintiff. *Bonner v. Outlaw*, 552 F.3d 673 (8th Cir. 2009).

CONCLUSION

Based upon the foregoing argument and authority, Separate Defendants Dr. Jerry Guess and the Pulaski County Special School District respectfully request that their Motion to Dismiss Plaintiff's Amended and Supplemental Complaint be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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MIKE BEEBE, Governor of the State of Arkansas in his individual and official capacity;
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Dr. JERRY GUESS, in his official capacity as Superintendent Pulaski County Special School District; JOHN OR JANE DOE, NUMBERS 1 THROUGH 100, in their official and individual capacities **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Governor Mike Beebe, in his individual and official capacity, and Dr. Tom Kimbrell, in his official capacity, by and through their attorneys, Assistant Attorney General Scott P. Richardson and for their *Brief in Support of Motion to Dismiss*, state:

I. INTRODUCTION

This is an impairment of contracts and procedural due process claim. Plaintiff Dr. Charles Hopson claims that he was immune from dismissal as superintendent of a fiscally distressed district because he held an employment contract with the district. His Amended Complaint appears to concede that State law grants the Arkansas Department of Education the authority to remove the superintendent of a fiscally distressed district. He claims, however, that the 2003 law authorizing that action is an impairment of his 2010 contract with the district and

that his dismissal violated the procedural due process protections of the Fourteenth Amendment. For the reasons stated below, the Amended Complaint should be dismissed.

II. BACKGROUND

A. Arkansas's Fiscal Distress Statutes

As Plaintiff Hopson's Amended Complaint acknowledges, effective July 1, 2003, the Arkansas General Assembly passed the "Arkansas Fiscal Assessment and Accountability Program." Act 1467 of 2003 § 18, codified at Ark. Code Ann. § 6-20-1901, et seq. This law was adopted as part of a number of measures to require accountability and accounting of per-pupil expenditures and revenues in school districts in Arkansas. *Lake View School District No. 25 v. Huckabee*, 358 Ark. 137, 149-150, 189 S.W.3d 1, 9 (2004).[1] The law provides the Arkansas Department of Education ("ADE") the authority to identify a school district as in fiscal distress if one or more of a number of accounting, budgetary, or other fiscal conditions jeopardizes the fiscal integrity of the school district. Ark. Code Ann. § 6-20-1904 (listing indicators of fiscal distress). When the ADE identifies a school district as a district in fiscal distress, it then must provide written notice of the fiscal distress classification to the president of the school board of directors and the superintendent of the district. Ark. Code Ann. § 6-20-1905(a). A school district identified as fiscally distressed may appeal that decision to the State Board of Education ("State Board"). Ark. Code Ann. § 6-20-1905(b). If that appeal is taken by the district, the State Board must conduct a hearing on the appeal within sixty days of the receipt of the written notice of appeal. Ark. Code Ann. § 6-20-1905(c). The decision of the State Board is a final order that may be appealed by the school district to the "Pulaski County Circuit Court

[1] Because there are multiple decisions from the Arkansas Supreme Court in the *Lake View* case, this brief will refer to the opinions by year of decision. For example the 2004 opinion will be referred to as *Lake View 2004*. *See Fort Smith School District v. Beebe*, 2009 Ark. 333, 322 S.W.3d 1 (2009). (adopting this citation convention).

pursuant to the Arkansas Administrative Procedure Act." Ark. Code Ann. § 6-20-1905(f). The appeal rights to the State Board or beyond, however, do not operate as a stay of the ADE's "authority to take action to protect the fiscal integrity of any school district identified as in fiscal distress." Ark. Code Ann. § 6-20-1905(e). Unless, of course, the State Board or the Circuit Court reverses the identification of the school district as in fiscal distress.

When a district is identified as fiscally distress, the ADE is authorized by law to take a number of actions to address the conditions that put the fiscal integrity of the district in jeopardy. Ark. Code Ann. § 6-20-1908, 1909. The statutes grant the ADE the authority to reconstitute a fiscally distressed district and assume fiscal control of the district. *Smith v. Decatur Sch. Dist.*, 2011 Ark. App. 126. Specifically, the law allows ADE to remove the fiscally distressed school district's superintendent. Ark. Code Ann. § 6-20-1903(6); 6-20-1909.

As stated in Hopson's Amended Complaint, the ADE exercised its authority to identify the PCSSD as a district in fiscal distress on March 30, 2011. Amended Complaint, Exhibit A. Subsequently, the PCSSD appealed this designation to the State Board of Education. On May 16, 2011, the State Board conducted a hearing on the appeal, at the conclusion of which PCSSD was classified as being in fiscal distress. Id. No further appeal was taken. On or about June 20, 2011, the Commissioner of Education, Dr. Tom Kimbrell, required Hopson (along with the PCSSD Board of Directors) "to relinquish all administrative authority with respect to the [PCSSD]." Id., Amended Complaint ¶ 29.

III. ARGUMENT

"[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001).

A complaint must allege facts sufficient to state a claim as a matter of law and not merely legal conclusions. *Id*. While a complaint is not required to contain detailed factual allegations, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Fed. R. Civ. Pro. 8; *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1950 (2009). A complaint must state "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A. The Court is Without Diversity Jurisdiction to Hear this Case

Plaintiff Hopson alleges that jurisdiction in this case is based, in part, on diversity of citizenship as allowed by 28 U.S.C. § 1332. Diversity jurisdiction allows federal courts to exercise jurisdiction in suits between "citizens" of one state against "citizens" of another state. In order to invoke jurisdiction under § 1332, there must be complete diversity of citizenship. *Associated Ins. Management Corp. v. Arkansas General Agency, Inc*., 149 F.3d 794 (8th Cir. 1998). In his Amended Complaint, Hopson names as defendants, Governor Beebe in his official capacity, and Commissioner Kimbrell in his official capacity. This is, in effect, a claim against the State of Arkansas viz. its Governor and Commissioner of Education. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985). The State and its officials are "not persons." *Murphy v. Arkansas*, 127 F.3d 750 (8th Cir. 1997). "A state is not a citizen. . . . [I]t is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States." *Postal Telegraph Cable Co. v. State of Alabama*, 155 U.S. 482, 487, 15 S.Ct. 192 (1894) *see also* 13E Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 3602, p. 50 (2009)(stating that it is "well settled" that the same rule applies to claims against state officials in their official capacity).

Because the State is not a "citizen" there is no diversity jurisdiction against the State. *U.S.I. Properties Corp. v. M.D. Construction*, 230 F.3d 489 (1st Cir. 2000)(holding "diversity jurisdiction does not ever extend to the states").

Accordingly, this case is lacking complete diversity and cannot be maintained on the basis of diversity jurisdiction.

B. Plaintiffs' claims against the State Defendants are Barred by Sovereign Immunity

The Eleventh Amendment to the United States Constitution provides "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign states." U.S. Const. Amend. XI. In *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978), the United States Supreme Court stated:

> There can be no doubt, however, that suit against the state and its board of correction is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Morechester County Trust Co. v. Ralley*, 302 U.S. 292 (1937). Respondents do not contend that Alabama has consent to this suit, and it appears that no consent could be given under Article 1, Section 14, of the Alabama Constitution, which provides that: "the state of Alabama shall never be made a defendant in any court of law or equity."

Id. at 782, 98 S.Ct. at 3057-3058. The doctrine of sovereign immunity clearly applies in this case as well.

A suit in federal court by private parties seeking to impose liabilities which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974); *Quren v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139 (1979). The Eleventh Amendment, therefore, presents a jurisdictional bar to any suit which is in actuality directed against the state itself, whether the action is nominally instituted against the

state, a state agency or instrumentality, or a state official. *Edelman, supra*; *Pugh, supra*; *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304 (1982). The Eleventh Amendment also bars suits against state employees when, although not specifically named, the state is the real, substantial party in interest. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984). Where the suit is directed against a state official in his or her official capacity the Eleventh Amendment bars the suit if judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id*, 465 U.S. at 102 fn. 11, 104 S.Ct. at 911.

Here, Plaintiffs have purported to sue the Governor of Arkansas and the Commissioner of the Arkansas Department of Education ("ADE") in their official capacities. The State and its agencies are immune from Plaintiffs' claims. Suits against defendants in their "official" capacity are in reality suits against the offices held by those defendants and not against the officeholders. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985). As such, the official capacity defendants are immune from any claim for damages or injunctive relief under the 11th Amendment to the United States Constitution and Article V section 20 of the Arkansas Constitution. *Treasure Salvors*, 458 U.S. 670 (1982). Plaintiffs have not pleaded any basis for overcoming the sovereign immunity of the State, its agencies, or its officials. Their Amended Complaint should, therefore, be dismissed.

C. Plaintiffs' Complaint Fails to State a Claim upon which Relief May be Granted

Federal Rule of Civil Procedure 8(a) requires a plaintiff to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of this minimal standard "is to give the opposing party fair notice of the nature and basis or grounds for a claim,

and a general indication of the type of litigation involved." *Northern States Power v. Federal Transit Admin.*, 358 F.3d 1050, 1056-57 (8th Cir. 2004) *quoting Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979). At a minimum, a plaintiff must state the legal standard that forms the basis for her claim and identify the facts that give rise to liability under that claim. *Id., see also Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003) (requiring factual allegations that state a cause of action); *Eckert v. Titan Tire Corp.*, 514 F.3d 801 (8th Cir. 2008)(dismissing complaint for failing to identify legal basis of claim). Plaintiff Hopson has failed to satisfy this liberal pleading standard.

1. Plaintiff Hopson's Impairment of Contracts Claim Fails as a Matter of Law

Hopson's first claim rests on the Contract Clause of the United States Constitution that states "No State shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. Const. art. I, § 10. There is a three part test to determine whether a state law violates the Contract Clause:

> (1) The first inquiry is whether the state law has, in fact, operated as a substantial impairment on **pre-existing** contractual relationships. If there is no substantial impairment on contractual relationships, the law does not violate the Contract Clause. If, however, the law does constitute a substantial impairment, the second part of the test is addressed:
>
> (2) The State must have a significant and legitimate public purpose behind the regulation. If there is no significant and legitimate public purpose, the state law is unconstitutional under the Contract Clause. If a significant and legitimate public purpose has been identified, the third part of the test is applied:
>
> (3) This Court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Equipment Mfrs. Inst. v. Janklow, 300 F.3d 842 (8th Cir. 2002)(internal cites and quotes omitted)(emphasis added).

If the law was adopted before the contract was entered, there is no impairment. *Lehigh Water Co. v. Corp. of Borough of Easton*, 121 U.S. 388, 7 S.Ct. 916 (1887). "It is equally clear that the law of the state to which the constitution refers in that clause must be one enacted after the making of the contract." *Id.* at 391 (emphasis added); *Chicago B & Q R Co. v. Cram*, 228 U.S. 70, 33 S.Ct. 437 (1913). In Arkansas, "[t]he laws which are in force at the time when, and the place where, a contract is made and to be performed, enter into and form part of it. This is only another mode of saying that parties are conclusively presumed to contract with reference to the existing law." *Petty v. Missouri & Arkansas Ry. Co.*, 205 Ark 990, 167 S.W.2d 895, 898 (1943) *quoting Robards v. Brown*, 40 Ark. 423 (1883) *see also Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934)(holding laws existing at time and place contract is executed "enter into and form a part of it, as if they were expressly referred to or incorporated in its terms").

Hopson alleges that he entered his contract with the Pulaski County Special School District ("PCSSD") beginning on July 1, 2010. Amended Complaint p. 7, ¶ 23. Hopson also alleges that the law that allegedly "impaired" this contract was adopted seven years earlier, in 2003. Amended Complaint p. 10, ¶ 36. The contract specifically provides that "[t]his Agreement shall be governed by the laws of the State of Arkansas." Ex. C. p. 12, ¶ 17 to Amended Complaint. As such, Hopson's Amended Complaint shows that his Contract was subject to the fiscal distress laws of the State of Arkansas, including the provision that allows the ADE to require the superintendent of a district in fiscal distress "to relinquish all administrative authority with respect to the school district" and to "[a]ppoint an individual in place of the superintendent to administratively operate the school district" or "[t]ake any other action allowed by law that is deemed necessary to assist a school district in removing criteria of fiscal distress."

Ark. Code Ann. § 6-20-1909. Therefore, Hopson's claim under the Contracts Clause is "fatally flawed in [its] legal premises and deigned to fail" and, therefore, should be dismissed.

2. Once PCSSD was Identified as a District in Fiscal Distress, Hopson was Terminable-at-will and Had No Property Interest in His Continued Employment

As an initial matter, it should be noted that Hopson's contract was not with the State or any State agency. His contract was with the school district, a political subdivision of the State that could only exercise the powers granted to the district by the State. *Dermott Special School Dist. v. Johnson*, 343 Ark. 90, 32 S.W.3d 477 (2000). Arkansas law clearly provided, long before Hopson contracted with the district, that once a school district is identified as in fiscal distress the superintendent is terminable at will by the ADE. Ark. Code Ann. § 6-20-1909. Hopson alleges that prior to taking the superintendent job he was aware that the PCSSD was at risk of being identified as in fiscal distress and that he knew this might cost him the job. Amended Complaint ¶ 12.

It should be noted as well, that the Arkansas Teacher Fair Dismissal Act does not apply to district superintendents. Ark. Code Ann. § 6-17-1502(1)("Teacher" means any person, exclusive of the superintendent).

a. Hopson Did Not Have a Constitutionally Protected Property Interest in His Employment Once the District was Identified as in Fiscal Distress

Hopson alleges that his employment contract with the PCSSD established a property right enforceable under the Fourteenth Amendment's guarantee of procedural due process. "A person must have a legitimate claim of entitlement to his or her employment to have a property interest in it." *Winegar v. Des Moines Independent Community School District*, 20 F.3d 895 (8th Cir. 1994). Whether a person has a constitutionally protected property interest depends on State law

and the terms of their employment. *Mulvenon v. Greenwood*, 643 F.3d 653 (8th Cir. 2011). Hopson alleges that the "for cause" clause in his contract created that property interest.

As noted above, Hopson took his contract subject to the law in existence in Arkansas at the time he signed the contract. At that time (and now) Arkansas law provided that once PCSSD was identified by the ADE as a district in fiscal distress, the department could immediately remove Hopson as superintendent. Hopson's claims here are directly answered by the Arkansas Court of Appeals' opinion in *Smith*:

> [Appellant] argues that section 6-20-1909 does not allow ADE, in reconstituting the district, to terminate, cancel, void, or otherwise breach contracts. However, section 6-20-1903, in defining "reconstitution," includes removal of a superintendent as one of ADE's options. We believe that it is implicit in the statutory scheme that ADE does have the authority to terminate superintendents' contracts. To accede to [Appellant's] position would lead to an absurd result in that ADE would be placed in the anomalous position of, after having taken over the management of a district in fiscal distress, having to pay two individuals to act as superintendent of that district. We will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent.

Smith, 2011 Ark. App. 126, 6. Moreover, nothing in the fiscal distress statutes provides superintendents an expectation of continued employment after their district is identified as fiscally distressed. State law specifically provides that a superintendent may be dismissed at any time after the fiscal distress identification. Accordingly, Hopson may have had an expectation of continued employment by the PCSSD prior to the fiscal distress classification, but once ADE identified the district as in fiscal distress and took over the management of the district, that expectation was no longer justified. Any "expectation of continued employment" Hopson had was lost on March 30, 2011, when the PCSSD was identified as a district in fiscal distress. As such, Hopson had no property right in his continued employment and he was terminable at the discretion of the ADE. Because of this, he had not procedural due process right in his continued employment once the district was determined to be fiscally distressed under his leadership.

b. Hopson was Provided All the Process that was Due

"An employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component." *Singleton v. Cecil*, 176 F.3d 419, 428 (8th Cir. 1999) *quoting McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)(en banc). Thus, an employee with a property right in employment is only entitled to "a hearing or some related form of due process" before his employment is terminated. *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (2001). Due process is satisfied if the employee receives notice, a pre-termination opportunity to respond, and post-termination administrative review. *Id.* Elaborate pre-termination process is not required especially when the employee is afforded meaningful post-termination procedures. *Id*.

The Fourteenth Amendment does not guarantee that the employment decisions made at due process hearings will be correct or well-advised, only that the employee will have an opportunity to make his side of the story known. *Singleton*, 176 F.3d 426. Thus the axiom that the federal courts are not "super-personnel" departments reviewing the wisdom of the multitude of personnel decisions made daily by public agencies. *Id.*; *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

Here it cannot be disputed that prior to Hopson's termination, the fiscal distress classification was appealed to the State Board of Education. At that time, a hearing was held and the PCSSD and its then-superintendent were allowed to argue against the fiscal distress classification and present whatever information they believed demonstrated that the ADE should not have classified the district as in fiscal distress. Hopson was well aware what that classification meant as to his job status. Amended Complaint p. 6-7; *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000)(noting the "common maxim, familiar to all minds, that ignorance of the

law will not excuse any person, either civilly or criminally"); *City of Farmington v. Smith*, 366 Ark. 473, 480, 237 S.W.3d 1, 6 (2006)("We have long recognized that every person is presumed to know the law."). Arkansas officials are assumed to be familiar with and understand the laws that give them their authority to act. *Williams v. Arkansas State Board of Physical Therapy*, 353 Ark. 778, 120 S.W.3d 581 (2003). Accordingly, Hopson had a full and fair opportunity to be heard by the State Board (and to appeal that decision to the judicial branch, which he declined to do) to try to maintain his alleged property interest in his continued employment. Therefore, his Amended Complaint fails to demonstrate any violation of the Procedural Due Process clause of the Fourteenth Amendment, and it should be dismissed.

D. Governor Beebe is Entitled to Qualified Immunity in His Individual Capacity

Public officials sued in their individual capacities are shielded from damage liability so long as their conduct does not violate "clearly established" federal statutory or constitutional rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity applies if 1) the plaintiff has failed to demonstrate a constitutional violation by the defendants or 2) the federal right asserted was not "clearly established" at the time of the alleged violation. *Manzano v. South Dakota Dep't of Social Servs*., 60 F.3d 505, 509 (8th Cir. 1995)*; Siegert v. Gilley*, 500 U.S. 226 (1991); *Thomas v. Hungerford*, 23 F.3d 1450, 1452 (8th Cir. 1994). A right is "clearly established" for qualified immunity purposes if the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right; in other words, given the facts that the officer is confronted with the unlawfulness of the defendant's conduct must be apparent in light of pre-existing law. *Swenson v. Trickey*, 995 F.2d 132, 133-34 (8th Cir. 1993), *cert. denied*, 126 L.Ed.2d 468.

As to Governor Beebe, Hopson claims only that the Governor participated in the decision to relieve Hopson of his administrative authority. Amended Complaint ¶ 39. As explained above, this action (relieving the superintendent of a fiscally distressed district of his position) is specifically authorized by law. "[A]n officer who acts in reliance on a duly-enacted statute is ordinarily entitled to qualified immunity, unless the statute is 'obviously' unconstitutional." *Coates v. Powell*, 639 F.3d 471 (8th Cir. 2011). Moreover, Hopson cannot claim, in light of the fiscal distress laws of the State, that he had a clearly established right to continued employment as superintendent of a fiscally distressed school district. As explained above, Hopson has failed to plead any federal claims. As such, Governor Beebe is entitled to qualified immunity.

E. The Court Should Decline to Exercise Pendant Jurisdiction over the Remainder of Hopson's Claims

The remainder of Hopson's claims are state law claims that can only be maintained if the Court finds that the Complaint demonstrates a violation of federal law. *Franklin v. Zain*, 152 F.3d 783 (8th Cir. 1998). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Johnson v. City of Shorewood*, 360 F.3d 810, 819 (8th Cir. 2004) quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988). The policy in the Eighth Circuit is "to exercise judicial restraint and avoid state law issues wherever possible." *Gregoire v. Class*, 236 F.3d 413, 420 (8th Cir. 2000).

As demonstrated above, Hopson's Amended Complaint fails to allege any federal cause of action. If the Court determines that Hopson's federal claims should be dismissed (which it should), then the Court should also dismiss Hopson's purported State law claims.

F. Hopson's State Law Claims Fail as a Matter of Law

1. The State is Immune from Hopson's State Law Claims

Article 5, Section 20 of the Arkansas Constitution states that "[t]he State of Arkansas shall never be made a defendant in any of her courts." The Arkansas Supreme Court has consistently interpreted this provision as a grant of sovereign immunity which deprives a court of jurisdiction where suit is brought against the State. *See, e.g., Cross v. Arkansas Livestock and Poultry Comm'n*, 328 Ark. 255, 259-60, 943 S.W.2d 230, 232-33 (1997). Where a suit is brought against a state agency or officer for matters in which the agency or officer represents the State, the action is, in effect, one against the State and is prohibited by Article 5, Section 20. Sovereign immunity bars both claims for damages to be paid out of the State Treasury and actions attempting to control discretionary decisions of executive and legislative branch officials. *Id. See also Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771, 773-74 (1990). Hopson's Complaint is plainly brought against the Governor and the Commissioner of Education regarding matters allegedly done in furtherance of their official duties, thus Hopson's claims for relief are barred by sovereign immunity. *Arkansas Public Defender Comm'n v. Burnett,* 340 Ark. 233, 12 S.W.3d 191 (2000) (writ of certiorari was necessary to prohibit the trial court from requiring the Commission to pay fees in violation of the sovereign immunity of the State). The State and its officials are immune from claims under the Arkansas Civil Rights Act. Ark. Code Ann. § 16-123-104; *Simons v. Marshall*, 369 Ark. 447, 255 S.W.3d 838 (2007). The State and its officials are also immune from suit for breach of contract claims. *Arkansas Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000).

When a suit would have "the effect of tapping the state treasury" to satisfy any judgment rendered, it is barred by sovereign immunity. *Office of Child Support Enforcement v. Mitchell*,

330 Ark. 338, 347, 954 S.W.2d 907, 911 (1997) *citing Magnolia Sch. Bd. infra*. Hopson in this case is seeking money damages, attorney's fees and costs, and judicial reversal of discretionary decisions of State officials. But, any order requiring the State to pay damages, or attorney's fees and costs is tantamount to a suit against the state, and violates Art. V, Section 20 of the Arkansas Constitution. *Lake View School Dist. No. 25 v. Huckabee*, 359 Ark. 49, 194 S.W.3d 193 (2004); *Magnolia School Board No. 14 v. Arkansas State Board of Education*, 303 Ark. 666, 799 S.W.2d 791 (1990). Similarly, executive branch officials are immune from claims attempting to control their discretionary decision-making authority. *Travelers Cas. & Sur. v. Ark. St. Highway Commn.*, 353 Ark. 721, 120 S.W.3d 50 (2003). Accordingly, Plaintiff's claims against Governor Beebe and Commissioner Kimbrell in their official capacities are barred as a matter of Arkansas law. *Fegans v. Norris*, 351 Ark. 200, 89 S.W.3d 919 (2002).

2. Official Capacity State Defendants are Entitled to Qualified Immunity as to Hopson's State Law Claims

The doctrine of qualified immunity in Arkansas courts is akin to its federal counterpart. Ark. Code Ann. § 19-10-305; *Fegans*, 351 Ark. 200, 89 S.W.3d 919 (2002). A state official is immune from suit for alleged state law violations if his actions did not violate clearly established principles of law of which a reasonable person would have knowledge." *Id.* at 924. Hopson appears to direct at Governor Beebe, individually, at most a breach of contract claim. The only factual allegation about the Governor is that Dr. Kimbrell "made the decision [to dismiss Hopson] in consultation with Defendant Mike Beebe, Governor of Arkansas, who apparently thus had a direct hand in the breach of Plaintiff's employment contract." Amended Complaint p. 8-9.

As noted above, state law specifically provides that the superintendent of a school district in fiscal distress may be removed by the ADE at any time. When state officials take actions

specifically authorized by state law, they are entitled to qualified immunity from suit. *Fegans, supra*. Hopson seems to allege that an employment contract between a school district and a superintendent can override the clear law of the State. Hopson cites no authority for this proposition because there is none. Qualified immunity exists for the very purpose of allowing state officials to act pursuant to state law. Accordingly, Hopson's Amended Complaint should be dismissed.

3. Hopson Has Failed to Plead an Entitlement to the Equitable Remedy of Promissory Estoppel

Hopson alleges that in June of 2010 Defendant "Kimbrell assured him [that the State would not take over the PCSSD]. He stated that the Department of Education was without resources sufficient to undertake the running of the Pulaski County Special School District. Kimbrell explained that he should not be concerned to take this job."[2] Amended Complaint p. 14.

The Arkansas Supreme Court has described promissory estoppel as follows:

> The black-letter law on promissory estoppel is found in the Restatement (Second) of Contracts: A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
>
> We have held that the party asserting estoppel must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference, and nothing can be supplied by intendment. Further, we have stated that a party asserting estoppel must prove that in good faith he relied on some act or failure to act by the other party and, in reliance on that act, suffered some detriment. Whether there was actual reliance and whether it was reasonable is a question for the trier of fact.

[2] These claims are false. Defendant Kimbrell provided no such assurances to Hopson. For purposes of this motion only, however, Defendants assume these false allegations are true.

K.C. Properties of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC, 373 Ark. 14, 280 S.W.3d 1 (2008)(internal citations omitted) *quoting* Restatement (Second) of Contracts § 90. Estoppel is not readily available against the State. *Foote's Dixie Dandy, Inc. v. McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). It is an equitable doctrine governed by fairness. *Id.* Where the party asserting estoppel has not dealt fairly with the State agency, the doctrine is unavailable. *EnviroClean, Inc. v. Arkansas Pollution Control and Ecology Com'n*, 314 Ark. 98, 107, 858 S.W.2d 116, 121 (1993). Equitable estoppel requires that an innocent person be misled to their detriment, such that it would be inequitable to allow the person to be estopped to change their original position. *Owners Association of Foxcroft Woods, Inc. v. Foxglen Associates*, 346 Ark. 354, 367, 57 S.W.3d 187, 196 (2001). In order to find that estoppel applies, the Court must be satisfied that 1) the party to be estopped knew the true facts; 2) the party to be estopped intended that its misrepresentation be acted on; 3) the party asserting estoppel was ignorant of the true facts; and 4) that the party asserting estoppel relied on the misrepresentation and was injured by the reliance. *Cisco v. King*, 90Ark. App. 307, 319, 205 S.W.3d 808, 816 (2005).

Here, Hopson alleges that he was aware of the fiscal problems of PCSSD and that fiscal distress and State assumption of control of the district was a definite possibility. His awareness of these facts defeats his request for estoppel. *Burdine v. Dow Chemical Co.*, 923 F.2d 633 (8th Cir. 1991). Hopson also fails to allege an affirmative misrepresentation by Dr. Kimbrell. Hopson alleges only that Kimbrell "assured" him that the State would not immediately assume control of the PCSSD. This allegation falls far short of the affirmative misrepresentation required to maintain an estoppel claim against the State. *Arkansas Dept. of Human Services v. Estate of Lewis*, 325 Ark. 20, 922 S.W.2d 712 (1996). Moreover, as the Amended Complaint acknowledges, the district was not identified as in fiscal distress until March 30, 2011; nine

months after this alleged conversation occurred. During that time, Hopson had the opportunity to not only repair the conditions leading to the fiscal distress determination, but also to learn all of the true facts of the PCSSD's fiscal problems existing as of July, 2010, and the actions taken in the district (including by Hopson himself) that lead to the fiscal distress identification nine months later and State assumption of control of the district two months after that. Accordingly, Hopson's Amended Complaint fails to demonstrate any entitlement to promissory estoppel and should be dismissed.

VI. CONCLUSION

Therefore, Defendants Governor Mike Beebe, in his official and individual capacities, and Dr. Tom Kimbrell, in his official capacity only, request that Plaintiffs' Amended Complaint be dismissed, and that they be granted all other relief to which they are entitled.

Respectfully submitted,

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Attorney for State Defendants: Governor Mike Beebe, in his official and individual capacity, and Dr. Tom Kimbrell in his official capacity only.

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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/s/ Scott P. Richardson
SCOTT P. RICHARDSON

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF ARKANSAS
WESTERN DIVISION

DR. CHARLES HOPSON, Ph.D. PLAINTIFF

vs. No. 4:11-cv-00608-BSM

MIKE BEEBE, Governor of the STATE OF ARKANSAS
in his individual and official capacity;
DR. TOM KIMBRELL, in his individual and official
capacities as Commission, Arkansas Department of Education;
DR. JERRY GUESS, in his official capacity as Superintendent
PULASKI COUNTY SPECIAL SCHOOL DISTRICT;
JOHN OR JANE DOE, NUMBERS 1 THROUGH 100,
in their official and individual capacities DEFENDANTS

ANSWER AND MOTION TO DISMISS OF SEPARATE DEFENDANTS DR. JERRY GUESS AND PULASKI COUNTY SPECIAL SCHOOL DISTRICT

Separate Defendants, Dr. Jerry Guess ("Guess") and Pulaski County Special School District ("District") (collectively, "PCSSD"), by their attorneys, Bequette & Billingsley, P.A., for their Answer and Motion to Dismiss the Plaintiff's Amended and Substituted Complaint ("Amended Complaint"), allege and state:

1. PCSSD admits that Plaintiff seeks relief under the Constitutions of the United States and the State of Arkansas. PCSSD otherwise denies the allegations set forth in paragraphs 1 and 2 of the Amended Complaint.

2. PCSSD admits that Plaintiff seeks relief under common law principles of breach of contract, detrimental reliance and estoppel. PCSSD otherwise denies the allegations set forth in paragraphs 3 and 4 of the Complaint.

3. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 5 of the Amended Complaint.

4. PCSSD admits that Plaintiff is the former superintendent of the District. PCSSD denies the remaining allegations set forth in paragraph 5 of the Amended Complaint.

5. PCSSD admits that Defendant Mike Beebe is the Governor of the State of Arkansas. PCSSD denies the remaining allegations set forth in paragraph 6 of the Amended Complaint.

6. PCSSD admits the allegations set forth in paragraph 7 of the Amended Complaint.

7. PCSSD admits the allegations set forth in paragraph 8 of the Amended Complaint.

8. PCSSD is without sufficient information to admit or deny the allegations set forth in paragraph 9 of the Amended Complaint, and therefore denies same.

9. PCSSD is without sufficient information to admit the allegations set forth in paragraph 10 of the Amended Complaint, and therefore denies same.

10. PCSSD admits that the named defendants are residents of Pulaski County, Arkansas, and/or have their principal places of business in Pulaski County, Arkansas. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 11 of the Amended Complaint, and therefore deny same.

11. Except where previously admitted herein, Defendants deny the allegations set forth in paragraph 12 of the Amended Complaint.

12. PCSSD admits that Plaintiff alleges that jurisdiction herein is predicated on 28 U.S.C. § 1331 and § 1332, 43 U.S.C. § 1983, and 28 U.S.C. § 1367. PCSSD otherwise denies the allegations set forth in paragraphs 13, 14, 15, 16 and 17, including all subparagraphs contained therein.

13. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 18 of the Amended Complaint.

14. PCSSD admits that Plaintiff is an educator. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 19 of the Amended Complaint, and therefore denies same.

15. PCSSD admits that Plaintiff was offered the position of superintendent of the District in 2010. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 20 of the Amended Complaint, and therefore denies same.

16. PCSSD is without sufficient information to admit or deny the allegations set forth in the first paragraph 21 of the Amended Complaint, the second paragraph 21 of the Amended Complaint, and paragraph 22 of the Amended Complaint.

17. PCSSD admits the existence of the document referred to in paragraphs 23 and 24 of the Amended Complaint, which speaks for itself. PCSSD otherwise denies the allegations set forth in paragraphs 23 and 24 of the Amended Complaint.

18. PCSSD admits that the Plaintiff's salary was increased in or about January 2011. PCSSD denies the remaining allegations set forth in paragraph 25 of the Amended Complaint.

19. PCSSD is without sufficient information to admit or deny the allegations set forth in paragraph 26 of the Amended Complaint, and therefore denies same.

20. PCSSD is without sufficient information to admit or deny the allegations set forth in paragraphs 27 and 28 of the Amended Complaint, and therefore denies same.

21. PCSSD admits that on or about June 20, 2011, Plaintiff was advised that he was required to relinquish all administrative authority with respect to the District pursuant to Ark. Code Ann. § 6-20-1909. PCSSD denies the remaining allegations set forth in paragraph 29 of the Amended Complaint.

22. PCSSD admits the existence of the document referred to in paragraph 30 of the Amended Complaint. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 30 of the Amended Complaint, and therefore denies same.

23. PCSSD denies the allegations set forth in paragraph 31 of the Amended Complaint.

24. PCSSD denies the allegations set forth in paragraph 32 of the Amended Complaint.

25. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 33 of the Amended Complaint.

26. PCSSD admits the existence of the document referred to in paragraphs 34 and 35 of the Amended Complaint, which speaks for itself. PCSSD denies the remaining allegations set forth in paragraphs 34 and 35 of the Amended Complaint.

27. PCSSD admits the existence of the Arkansas statute referred to in paragraphs 36, 37 and 38 of the Amended Complaint, which speaks for itself. PCSSD denies the remaining allegations set forth in paragraphs 36, 37 and 38 of the Amended Complaint.

28. PCSSD is without sufficient information to admit or deny the allegations set forth in paragraph 39 of the Amended Complaint, and therefore denies same.

29. PCSSD admits the existence of the Arkansas statute referred to in paragraph 40 of the Amended Complaint. PCSSD denies the remaining allegations set forth in paragraph 40 of the Amended Complaint.

30. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 41 of the Amended Complaint.

31. The allegations set forth in paragraphs 42, 43 and 44 of the Amended Complaint constitute assertions of law within the province of the court. PCSSD otherwise denies the allegations set forth in paragraphs 42, 43 and 44 of the Amended Complaint.

32. PCSSD denies the allegations set forth in paragraph 45 of the Amended Complaint.

33. PCSSD denies the allegations set forth in paragraph 46 of the Amended Complaint.

34. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 47 of the Amended Complaint.

35. PCSSD denies the allegations set forth in paragraph 48 of the Amended Complaint.

36. PCSSD admits the existence of the document referred to in paragraphs 49, 50 and 51 of the Amended Complaint, which speaks for itself. PCSSD otherwise denies the allegations set forth in paragraphs 49, 50 and 51 of the Amended Complaint.

37. The Amended Complaint does not contain a paragraph number 52.

38. PCSSD denies the allegations set forth in paragraph 53 of the Amended Complaint.

39. Except where previously admitted herein, PCSSD denies the allegations set forth in paragraph 54 of the Amended Complaint.

40. PCSSD denies the allegations set forth in paragraph 55 of the Amended Complaint.

41. PCSSD admits that Plaintiff was offered the job of superintendent of the District in 2010 while Plaintiff was still employed in and a resident of Oregon. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 56 of the Amended Complaint.

42. PCSSD is without sufficient information to admit or deny the allegations set forth in paragraph 57, 58 and 59 of the Amended Complaint.

43. PCSSD admits that Plaintiff accepted the superintendent position with the District and moved to Little Rock, Arkansas. PCSSD is without sufficient information to admit or deny the remaining allegations set forth in paragraph 60 of the Amended Complaint, and therefore denies same.

44. PCSSD denies the allegations set forth in paragraphs 61 and 62 of the Amended Complaint.

45. PCSSD denies the allegations set forth in paragraphs 63, 64, the first paragraph 66, the second paragraph 66, 67, 68 and 69 of the Amended Complaint.

46. PCSSD denies the allegations set forth in the "wherefore" paragraph of the Amended Complaint.

47. Except where previously admitted herein, PCSSD denies each and every allegation set forth in the Amended Complaint.

48. PCSSD reserves the right to plead further by way of amended answer, counterclaim, cross-claim and/or third party claim pending discovery in this litigation.

JURY TRIAL DEMAND

49. PCSSD requests trial by jury of all issues triable by a jury.

AFFIRMATIVE DEFENSES

50. PCSSD affirmatively states that the Amended Complaint is barred pursuant to Fed. R. Civ. P. 12(b).

51. PCSSD affirmatively pleads all defenses available pursuant to Fed. R. Civ. P. 8.

52. PCSSD affirmatively states that Plaintiff's claims are barred by principles of statutory and governmental immunity.

53. PCSSD affirmatively pleads that Plaintiff has not taken appropriate steps to mitigate any alleged damage and therefore is entitled to no damages whatsoever.

54. PCSSD affirmatively pleads as a defense the applicable statute of limitations.

55. PCSSD affirmatively states that Plaintiff's claims for equitable relief are barred as a matter of law.

56. PCSSD affirmatively states that all actions taken by them with regard to Plaintiff were in good faith.

57. PCSSD affirmatively states that Plaintiff's claims are barred for failure to comply with the requirements of the Arkansas Civil Rights Act.

58. Plaintiff's action or inactions preclude assertion of Plaintiff's present claims. PCSSD affirmatively states that this action is frivolous, unreasonable, and groundless, and accordingly, PCSSD is entitled to reasonable attorney's fees and other costs associated with the defense of this action.

59. PCSSD asserts that they acted reasonably and in compliance with the law at all times relevant hereto.

60. PCSSD asserts that they maintain and enforce a policy prohibiting discrimination including, without limitation, a method of raising complaints of discrimination and of remediating such complaints in compliance with applicable law, and that Plaintiff unreasonably failed to use such policy and procedures.

61. PCSSD affirmatively pleads the affirmative defense of laches.

62. PCSSD affirmatively states that Plaintiff's claims and the remedies sought are barred by the doctrine of unclean hands.

63. PCSSD affirmatively states that Plaintiff and the remedies sought are barred by the principle of estoppel.

64. PCSSD affirmatively states that any alleged violations of law attributed to any employee of the Pulaski County Special School District were committed, if at all, outside the scope of that employee's employment with the District.

65. PCSSD affirmatively states that they did not authorize any unlawful acts of which Plaintiff complains.

66. PCSSD affirmatively states that Plaintiff's action is barred by his failure to initiate and exhaust applicable internal complaint procedures and remedies.

67. PCSSD affirmatively states that Plaintiff's claims and requested relief are barred by his unreasonable failure to take advantage of available preventative or corrective opportunities or to avoid harm otherwise.

68. PCSSD affirmatively states that Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted.

MOTION TO DISMISS

69. For the reasons set forth in the PCSSD's Brief in Support of its Motion to Dismiss, which is filed concurrently herewith, Plaintiff's Amended and Substituted Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

WHEREFORE, PCSSD prays that Plaintiff's Amended Complaint be dismissed and that Plaintiff take nothing thereby; for PCSSD's attorney's fees and costs incurred herein; and for all other relief to which PCSSD may be entitled.

Respectfully submitted,

/s/ Jay Bequette
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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Dr. CHARLES HOPSON Ph.D. **PLAINTIFF**

v. **NO. 4:11CV00608 DPM**

MIKE BEEBE, Governor of the State of Arkansas in his individual and official capacity;
Dr. TOM KIMBRELL, in his individual and official capacities as Commissioner, Arkansas Department of Education;
Dr. JERRY GUESS, in his official capacity as Superintendent Pulaski County Special School District; JOHN OR JANE DOE, NUMBERS 1 THROUGH 100, in their official and individual capacities **DEFENDANTS**

MOTION TO DISMISS

Comes now Governor Mike Beebe, in his individual and official capacity, and Dr. Tom Kimbrell, in his official capacity, by and through their attorneys, Assistant Attorney General Scott P. Richardson and for their *Brief in Support of Motion to Dismiss*, state:

1. Plaintiff Charles Hopson has filed this lawsuit challenging the Arkansas Department of Education's (ADE) discretionary authority to dismiss the superintendent of a school district in fiscal distress.

2. For the reasons stated in the brief in support of this motion, Plaintiff's Amended Complaint should be dismissed.

Wherefore, Defendants Governor Mike Beebe, in his official and individual capacities, and Dr. Tom Kimbrell, in his official capacity only, request that Plaintiffs' Amended Complaint be dismissed, and that they be granted all other relief to which they are entitled.

Respectfully submitted,

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Attorney for State Defendants: Governor Mike Beebe, in his official and individual capacity, and Dr. Tom Kimbrell in his official capacity only.

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

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