UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski, Plaintiff, vs. JACKIE GARNER, Director of Illinois Department of Public Aid, Defendant.	)	Civil Action No. 01 C 9551 Judge Darrah

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR REMAND

I. INTRODUCTION

Eric Radaszewski, Plaintiff's son, suffers from brain cancer and has lost many mental and physical functions. Before he turned 21 years old, Eric, who lives with his parents, received 16 daily hours of in-home nursing funded by a Medicaid waiver allowing the Illinois Department of Public Aid ("IDPA") to provide such care to disabled persons under age 21. In February, 2000, IDPA determined that, after Eric turned 21, he would be entitled to an exceptional care rate of $4,593 per month under the Medicaid Home Services Waiver Program. Plaintiff alleges that this rate, which was capped at the cost of alternate care at a skilled nursing facility, is only sufficient to provide Eric with approximately five hours per day of in-home nursing. IDPA's payments for Eric's care were reduced on August 4, 2000, his 21st birthday.

On September 1, 2000, Plaintiff brought an action in the United States District Court for the Northern District of Illinois against IDPA's Director. Plaintiff complained that reduction of IDPA's funding violated the federal Medicaid statute, its implementing regulations and the

6

requirements of due process. Defendant argued that Plaintiff failed to state a cognizable federal cause of action in that the Medicaid Act did not create an entitlement to private duty nursing and Plaintiff's allegations of a violation of Illinois' State Medicaid Plan only asserted a state law claim. The District Court denied Plaintiff's motion for a preliminary injunction on November 6, 2000. The court concluded that it lacked subject matter jurisdiction because Plaintiff's claims did not state any violation of the federal Medicaid Act or of the United States Constitution. Plaintiff appealed this denial of injunctive relief to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals dismissed Plaintiff's federal action as moot on March 8, 2001. See Attachments to Memorandum in Support of Plaintiff's Motion for Remand ("Plaintiff's Attachments"), Exhibit F. This dismissal was based on the approval by the Health Care Financing Administration of the United States Department of Health and Human Services, on February 2, 2001, of an amendment to the Illinois State Medicaid Plan wholly eliminating private duty nursing care as a covered service.

Meanwhile, on December 1, 2000, Plaintiff brought the present action in the Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois. The case originally stated by Plaintiff's Complaint for Injunctive Relief was not removable to this Court because all four counts were based on state law. Plaintiff complained that (1) IDPA's limitation of private duty nursing services provided to adult Medicaid recipients constituted an invalid rule not adopted in accordance with rulemaking procedures specified in Illinois' Administrative Procedure Act, 5 ILCS 100/1-1 et seq. (Count I); (2) IDPA violated Illinois' Medicaid Plan by failing to provide Eric with the full amount of private duty nursing described in the Plan (Count II); (3) IDPA's refusal to cover all the private duty nursing sought for Eric violated 89 Illinois Administrative Code §140.435(b)(2) (Count III); and (4) Illinois' Medicaid Plan was a contract which IDPA

breached by failing to provide the full amount of private duty nursing included in that Plan to Eric (Count IV). On December 19, 2000, the Circuit Court entered a temporary restraining order, effective until further court order, requiring IDPA to reimburse the 16 hours per day of private duty nursing received by Eric before he turned 21.

On September 7, 2001, Defendant moved the Circuit Court to vacate the temporary restraining order and dismiss this case as moot. Defendant's motion was based on (1) the federal government's approval on February 2, 2001 of an amendment to Illinois' State Medicaid Plan removing coverage of private duty nursing service and (2) IDPA's promulgation, on September 1, 2001, of amendments to its administrative rules striking all text relating to coverage of private duty and in-home nursing services. 89 Illinois Admininistrative Code §§140.435, 140.436. See 25 Ill.Reg. 11880 (September 14, 2001). In response to Defendant's motion, on October 16, 2001, Plaintiff filed her Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order. See Plaintiff's Attachments, Exhibit G. Plaintiff maintained that, since the filing of her original Complaint, significant matters had occurred giving rise to additional claims requiring supplemental pleading and that these matters justified extension of the TRO. Although Plaintiff, in her proposed Supplemental Complaint for Injunctive Relief, realleged the four counts previously brought in her initial Complaint (Counts I-IV) and brought a new count alleging that IDPA had violated the Illinois Administrative Procedure Act in amending 89 Illinois Administrative Code §§140.435 and 140.436 (Count V), Plaintiff added two new counts alleging violations of federal law. Specifically, Plaintiff charged that (1) IDPA's failure to provide Eric the amount of in-home nursing she sought violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132, and one of its implementing regulations, 28 C.F.R. §35.130 (Count VI), and (2) IDPA's failure to provide the sought-for

amount of in-home nursing violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and one of its implementing regulations, 28 C.F.R. §41.51(d) (Count VII). See Plaintiff's Attachments, Exhibit A.

On November 15, 2001, the Circuit Court (1) denied Defendant's Motion to Vacate TRO and Dismiss Case as Moot, (2) granted Plaintiff's Motion to Extend TRO, (3) granted Plaintiff leave to file her supplemental Complaint instanter, and (4) granted Defendant 21 days to answer Plaintiff's Supplemental Complaint. See Plaintiff's Attachments, Exhibit D.

On December 10, 2001, Defendant filed her Answer to Plaintiff's Supplemental Complaint for Injunctive Relief in Circuit Court. See Plaintiff's Attachments, Exhibit E. In addition to answering the numbered paragraphs of Plaintiff's Supplemental Complaint, Defendant asserted three defenses. Specifically, Defendant contended that (1) Counts I-IV of the Supplemental Complaint were moot, (2) Count VI was barred by the Eleventh Amendment to the United States Constitution, and (3) Plaintiff could not bring Count VI against IDPA's Director.

Because Plaintiff had amended her Complaint to add claims arising under federal laws, Defendant, pursuant to 28 U.S.C. §§1441 and 1446(b), filed a Notice of Removal with this Court and the Circuit Court on December 14, 2001. Plaintiff has now moved to remand this case to state court. Defendant opposes Plaintiff's Motion for Remand for the following reasons.

II. ARGUMENT

A. Defendant's Notice of Removal Was Timely Filed

28 U.S.C. §1446(b) provides that:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . ..

In the present case, though Defendant received copies of Plaintiff's Motion for Leave to File Supplemental Complaint and her Supplemental Complaint for Injunctive Relief on October 15, 2001, Defendant objected to Plaintiff's Motion and the state Circuit Court did not grant Plaintiff leave to file her Supplemental Complaint until November 15, 2001. See Plaintiff's Attachments, Exhibits C and D. Defendant filed her Notice of Removal on December 14, 2001, 29 days after the Circuit Court granted Plaintiff leave to amend her complaint and this case first became removable due to addition of two federal law claims. Nevertheless, Plaintiff argues that Defendant waited too long to remove this case because she did not file her notice of removal within 30 days of when she was served a copy of Plaintiff's amended pleading on October 15.

Plaintiff concedes that there is a split among district court decisions as to when the statutory 30-day period for removal begins to run after a case not initially removable subsequently becomes so through an amended pleading, but neglects to even cite, much less distinguish, a case decided by the Seventh Circuit Court of Appeals which has definitively resolved any uncertainty in this jurisdiction. In Sullivan v. Conway, 157 F.3d 1092 (7th Cir. 1998), the only appellate court case to decide this issue, plaintiff contended that defendants removed too late when they acted within thirty days after the state court granted a motion to amend the complaint to add federal claims but more than thirty days after plaintiff made the motion. Despite a dearth of appellate case law, the Seventh Circuit was "confident that [plaintiff] is wrong." 157 F.3d at 1094. The Court stated:

> Until the state judge granted the motion to amend, there was no basis for removal. Until then, the complaint did not state a federal claim. It might never state a claim, since the state judge might deny the motion. [28 U.S.C. §1446(b)] speaks of a motion or other paper that discloses that the case is or has become removable, not that it may sometime in the future become removable if something happens, in this case the granting of a motion by the state judge. When the motion was granted, the case first became removable, and it was promptly removed. It would be fantastic to suppose that the time for removing a case could run *before* the case

became removable . . ..

157 F.3d at 1094-95. See also Douklias v. Teacher's Insurance and Annuity Association, 35 F.Supp.2d 612, 615 (W.D. Tenn. 1999) (thirty-day period for filing notice of removal did not begin to run upon defendant's receipt of motion to amend complaint); Hibbs v. Consolidation Coal Company, 842 F.Supp. 215, 217 (N.D. W.Va. 1994) (thirty-day period for removing case from state court only began to run when state court granted plaintiff's motion to file amended complaint); Schoonover v. West American Insurance Company, 665 F.Supp. 511, 514 (S.D. Miss. 1987) (plaintiff's motion to amend complaint did not make case removable because state court retained jurisdiction to deny leave to amend).

The district court cases from various other jurisdictions cited by Plaintiff in support of her assertion that the time for removal of this case began running when she served Defendant with a copy of her Motion for Leave to File Supplemental Complaint are flatly contrary to the Seventh Circuit's dispositive holding in Sullivan. Furthermore, as the court acknowledged in Webster v. Sunnyside Corporation, 836 F.Supp. 629, 630 (S.D. Iowa, 1993), Plaintiff's position represents the "view of a minority of the published trial court decisions addressing the language of [28 U.S.C. §1446(b)]." The decision in Bezy v. Floyd County Plan Commission, 199 F.R.D. 308, 314 (S.D. Ind., 2001), actually supports Defendant on the issue of removability, in that the court refused to consider an amended complaint adding federal constitutional claims to state law allegations to be a removable pleading under §1446(b) until the state court granted plaintiff's motion to amend. Butts v. Hansen, 650 F.Supp. 996 (D. Minn. 1987), is readily distinguishable from the present case because it concerned the filing of a motion for a temporary restraining order, not a motion for leave to amend a complaint. In Butts, plaintiffs' filing of a TRO motion prior to the filing of their initial complaint alerted defendants to federal claims and rendered the

case imediately removable, but in the case at bar Plaintiff filed an initial complaint stating only state law claims and obtained a TRO solely on the basis of those state law claims. Although Plaintiff afterwards simultaneousdly moved for an extension of the TRO as well as for leave to file a supplemental complaint adding federal claims, her request to extend the TRO was itself based on her new claims. See Plaintiff's Attachments, Exhibit G, Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order, ¶4. Before the Circuit Court granted Plaintiff leave to supplement her complaint, there was no certainty either that there would be federal claims added to this case or that the TRO would be extended on the basis of these new claims. Thus, under 28 U.S.C. §1446(b), Defendant was not required to remove this case until after the Circuit Court granted Plaintiff leave to supplement her complaint.

In this case, Plaintiff's motion to supplement her complaint did not automatically amend that complaint. Under Illinois law, Plaintiff was not entitled to amend her complaint as of right. See 735 ILCS 5/2-616(a). In fact, Defendant opposed Plaintiff's motion to amend and the matter was briefed by both parties. The Circuit Court granted Plaintiff's motion to amend on November 15, 2001 and Defendant filed her Notice of Removal on December 14, 2001, within the 30-day period prescribed by 28 U.S.C. §1446(b). Indeed, under the holding in Sullivan, this case was not removable until the Circuit Court finally granted leave to amend and the filing of a removal notice before that time would actually have been *premature*.

B. The Eleventh Amendment Does Not Bar Removal of This Case to Federal Court

Although Counts VI and VII of Plaintiff's Supplemental Complaint allege violations of federal law, Counts I-V allege violations of state law. Plaintiff argues that this Court must remand this entire case to state court because, under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), the Eleventh Amendment to the

United States Constitution prohibits this Court from entertaining her state law claims. The Removal Act, however, provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. §1441(b). Also federal district courts "have supplemental jurisdiction over all other claims that are so related to claims in the action within [their] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). Clearly, the joining of state law claims with federal law claims cannot prevent removal of a case from state to federal court. City of Chicago v. International College of Surgeons, 522 U.S. 156, 165, 118 S.Ct. 523, 530, 139 L.Ed.2d 525 (1997).

Furthermore, when, as here, a case is brought against a state party defendant, a plaintiff cannot render federal law claims unremovable by joining them with state law claims, even though federal court adjudication of the state law claims might be subject to the Eleventh Amendment. In Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998), the Supreme Court abrogated the holding in Frances J. v. Wright, 19 F.3d 337, 340 (7th Cir. 1994), that an action containing claims barred by the Eleventh Amendment cannot, in whole or in part, be removed from state court. In Schacht, the Supreme Court unanimously held that the presence in an otherwise removable case of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction that would otherwise exist. 524 U.S. at 386-391; 118 S.Ct. at 2051-2053. Even one claim "arising under" federal law was sufficient to satisfy the requirement that the case be within the original removal jurisdiction of a district court. 524 U.S. at 386; 118 S.Ct. at 2051. The court rejected the argument that any claim

barred by the Eleventh Amendment could destroy removal jurisdiction over all claims. 524 U.S. at 388; 118 S.Ct. at 2052. Rather, where original jurisdiction rests upon the Removal Act's grant of "arising under" jurisdiction, a federal district court must analyze the applicability of the Eleventh Amendment to each claim, not to the case as a whole, and must assume that the presence of a potential Eleventh Amendment bar with respect to one claim has not eliminated removal jurisdiction over the case. 524 U.S. at 389-90; 118 S.Ct. at 2053. If a State validly asserts an Eleventh Amendment bar to a certain claim, a federal court cannot hear that claim, but that circumstance does not destroy removal jurisdiction over the remaining claims in the case and the court can proceed to hear those other claims. 524 U.S. at 392-93; 118 S.Ct. at 2054. See Lapides v. Board of Regents of the University System of Georgia, 251 F.3d 1372, 1378 (district court instructed to hear non-barred claims under 42 U.S.C. §1983 and remand claims under Georgia Tort Claims Act to state court); The Detroit Edison Company v. Michigan Department of Environmental Quality, 29 F.Supp.2d 786, 792 (E.D. Mich. 1998) (both federal and state law claims for declaratory and injunctive relief against state department were properly removed from state court); Kagan v. Kopowski, 10 F.Supp.2d 756 (E.D. Ky. 1998) (in action brought against state court judges alleging violations of both federal and state constitutions, court adjudicated federal claims and remanded state claims to state court).

C. Defendant's Actions in State Court Do Not Bar Removal of This Case to Federal Court

On December 10, 2001, Defendant filed her Answer to Plaintiff's Supplemental Complaint for Injunctive Relief in state court. See Plaintiff's Attachments, Exhibit E. By filing this Answer, however, Defendant did not waive her right to remove this case to federal court. Since the right to remove a suit from state court to federal court is a statutory right, 28 U.S.C. §1441, a defendant has an absolute right to have a suit removed when the requirements of the

removal statute are met. White v. Wellington, 627 F.2d 582, 586 (2d Cir. 1980). Only a clear and unequivocal waiver will defeat a party's statutory right to remove a case to federal court. Grubb v. Donegal Mutual Insurance Company, 935 F.2d 57, 59 (4th Cir. 1991); Regis Associates v. Rank Hotels (Management) Limited, 894 F.2d 193, 195 (6th Cir. 1990); Beighley v. Federal Deposit Insurance Corporation, 868 F.2d 776, 782 (5th Cir. 1989). Such a waiver should only be found in "extreme situations." Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989). Generally, the right to remove a case to federal court is not lost by any state court action short of proceeding to an adjudication on the merits. Hingst v. Providian National Bank, 124 F.Supp.2d 449, 452 (S.D.Tex. 2000); Fain v. Biltmore Securities, Inc., 166 F.R.D. 39, 40 (M.D. Ala. 1996).

Specifically, taking part in preliminary action, such as pleading, does not constitute a waiver of removal rights. Baker v. National Boulevard Bank of Chicago, 399 F.Supp. 1021, 1022 (N.D. Ill. 1975). See Hernandez-Lopez v. Commonwealth of Puerto Rico, 30 F.Supp.2d 205, 209 (D. Puerto Rico 1998) (defendants did not waive right to remove by submitting answer); Estevez-Gonzalez v. Kraft, Inc., 606 F.Supp. 127, 129 (S.D. Fla. 1985) (defendants did not waive right to remove by filing answer in state court); Carpenter v. Illinois Central Gulf Railroad Company, 524 F.Supp. 249, 251 (M.D. La. 1981) (answer filed in state court did not exhibit intent to submit to state court jurisdiction). Indeed, the Federal Rules of Civil Procedure contemplate filing an answer in state court before removal to federal court. See Fed.R.Civ.Proc. 81(c) ("Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days . . .")

It does not matter in the present case that Defendant's Answer to Plaintiff's Supplemental Complaint for Injunctive Relief contains three defenses which Plaintiff characterizes as

"affirmative," i.e., (1) that Counts I-IV were moot, (2) that Count VI was barred by the Eleventh Amendment of the United States Constitution and (3) that Count VI could not be brought against IDPA's Director. A defendant's mere filing in state court of a pleading raising a defense which might be conclusive on the merits is insufficient to find a waiver of the right of removal to federal court; rather there must be further action on defendant's part resulting in a decision on the merits of the defense to waive the right to remove. Bedell v. H.R.C. Limited, 522 F.Supp. 732, 738 (E.D. Ky. 1981). See Brown v. Sasser, 128 F.Supp.2d 1345, 1347 (M.D. Ala. 2000) (defendants did not waive right to removal by filing answer with affirmative defenses in state court); The Federal Deposit Insurance Corp. v. Greenhouse Realty Associates, 829 F.Supp. 507, 511 (D. N.H. 1993) (FDIC did not waive right to remove action by asserting defenses in answer to counterclaims because action was defensive and no decision on merits was actively sought); Miami Herald Publishing Company, Division of Knight-Ridder Newspapers, Inc. v. Ferre,. 606 F.Supp. 122, 124 (S.D. Fla. 1984) (defendants did not waive right to remove action by filing answer and affirmative defense in state court prior to filing timely removal petition). Here Defendant, though she asserted defenses in her state court answer, neither sought affirmative relief thereby nor afterwards took affirmative action resulting in an adjudication on the merits. Instead, four days after filing her answer in state court, Defendant took timely action to remove this case to federal court. Defendant had an absolute statutory right to remove this case and no waiver of this right can be implied from the mere act of filing an answer in state court.

Plaintiff's cases are innaposite to the present case and the dicta for which they are cited do not substantiate that the filing of an answer in state court waives removal rights. Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1990), does not deal with the question of whether a case must be removed prior to filing an answer in

state court, since defendants in that case filed their answer in federal court. 524 U.S. at 384; 118 S.Ct. at 2050. Any suggestion in St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 291, 58 S.Ct. 586, 591 (1938), that a case must be removed before answering is merely dicta in a case holding only that plaintiff could not destroy federal court jurisdiction by amending its complaint after removal to reduce the amount in controversy. In Texas Wool & Mohair Marketing Ass'n v. Standard Acc. Ins. Co., 175 F.2d 835, 838 (5th Cir. 1949), the court stated that if the third party defendant in a supposed diversity case "had any right of removal, it waived the same by its answer, but we think that it did not have any such right."

D. Defendant's Opposition to Plaintiff's Federal Claims in State Court Does Not Bar Removal of This Case to Federal Court

Plaintiff contends that this case canot be removed to federal court because Defendant advanced arguments on the merits in state court with regard to her federal claims. Although Defendant filed a state court motion to dismiss Plaintiff's original Complaint for mootness, this motion was directed only at state law claims (Counts I-IV) and was filed before Plaintiff moved to supplement her Complaint by adding two federal law claims (Counts VI-VII). Acts taken by a defendant before removability becomes apparent cannot render a case unremovable. California Republican Party v. Mercier, 652 F.Supp. 928, 932 n. 3 (C.D. Cal. 1986). See Pease v. Medtronic, Inc., 6 F.Supp.2d 1354, 1359 (S.D. Fla. 1998) (defendant did not waive right to remove action by filing motion to dismiss in state court at time when allegations in complaint did not support removal); Richstone v. Chubb Colonial Life Insurance, 988 F.Supp. 401 403 (S.D. N.Y. 1997) (defendant did not waive right to remove case to federal court by filing motion to dismiss where there was no reason to know at time that action was removable). Plaintiff objects that Defendant continued to seek dismissal of her state law claims after she moved to supplement

her Complaint by adding federal claims, but those federal claims were not actually added to this case until the Circuit Court granted Plaintiff leave to amend on November 15, 2001, the same date it denied Defendant's Motion to Dismiss. See Plaintiff's Attachments, Exhibit D.

The only state court merits arguments Defendant advanced in regard to Plaintiff's federal claims were made solely in response to Plaintiff's Motion for Leave to File Supplemental Complaint and to Extend Temporary Restraining Order. See Plaintiff's Attachments, Exhibit C, ¶¶12-16. Plaintiff's Motion countered Defendant's earlier motion to vacate the previously entered TRO and to dismiss this case for mootness. Plaintiff sought to add three new claims, two of which were federal law claims, and then argued that the temporary restraining order should be extended on the basis of these new claims. See Plaintiff's Attachments, Exhibit G, ¶4. In response, Defendant briefly argued that a private party could not bring an ADA claim against a State defendant and that neither the ADA nor the Rehabilitation act required IDPA to provide Eric with private duty nursing. These arguments were advanced in order to show that Plaintiff had not demonstrated a sufficient likelihood of success on the merits of her new claims to warrant extending the TRO.

A preliminary action, such as opposing a preliminary injunction, does not waive removal rights. Baker v. National Boulevard Bank of Chicago, 399 F.Supp. 1021, 1022 (N.D. Ill. 1975). In Rothner v. City of Chicago, 879 F.2d 1402, 1418-19 (7th Cir. 1989), defendant's opposition to entry of a temporary restraining order in state court did not waive its right to remove the case to federal court, even though the case was removable on the face of the complaint and defendant could have removed the case prior to opposing the TRO motion. See also Rose v. Giamatti, 721 F.Supp. 906, 922-23 (S.D. Ohio, 1989) (defendants did not waive right to remove case to federal court by contesting plaintiff's entitlement to temporary restraining order); Baker v. National

Boulevard Bank of Chicago, 399 F.Supp. at 1022 (party did not waive right to remove action by filing state court motion to vacate preliminary injunction). The present case case was not yet removable when Defendant contested Plaintiff's motion to extend the TRO. It was not until November 15, 2001, when the state court granted plaintiff leave to file her Supplemental Complaint and simultaneously extended the TRO, that this case first became removable. In contesting extension of the TRO, Defendant could not have waived her removal rights by opposing Plaintiff's federal claims in state court at a time when this case was not even removable to federal court.

Later, when Defendant filed its Answer to Plaintiff's Supplemental Complaint, she raised the Eleventh Amendment to the United States Constitution as a state court defense barring Count VI, the federal ADA claim (but not Count VII, the federal Rehabilitation Act claim). See Plaintiff's Attachments, Exhibit E, p. 1. The Eleventh Amendment was a potentially available defense to the federal claims brought by Plaintiff in state court. See Alden v. Maine, 527 U.S. 706, 754, 119 S.Ct. 2240, 2266, 144 L.Ed.2d 636 (1999) (Eleventh Amendment is applicable in state courts). Plaintiff cites no authority for her contention that raising the Eleventh Amendment as a defense in a state court answer waives removal rights. Although Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 391, 118 S.Ct. 2047, 2053, 141 L.Ed.2d 364 (1998), held that a State's invocation of the Eleventh Amendment in regard to a particular claim after removal did not destroy removal jurisdiction over the entire case, this holding does not ipso facto mean that raising the Eleventh Amendment prior to removal renders a case unremovable. Defendants in Office of Hawai'ian Affairs v. Department of Education, 951 F.Supp. 1484, 1491 (D. Hawaii, 1996), raised an Eleventh Amendment defense in their state court answer. This, however, did not prevent the court from holding that it had removal jurisdiction as long as there was at least

one federal claim not barred by the Eleventh Amendment. 951 F.Supp. at 1490. Since, as previously discussed in Part II-C of this Memorandum, the mere filing in state court of an answer containing affirmative defenses does not waive statutory removal rights and the Eleventh Amendment is an available state court defense, Defendant's raising in Circuit Court of a potential Eleventh Amendment defense to one of Plaintiff's claims cannot bar her from removing this case to federal court. Moreover, the applicability of the Eleventh Amendment to Plaintiff's Count VI ADA claim is itself a federal law issue which can and, most appropriately, should be resolved here in federal court.

III. CONCLUSION

Therefore, for the reasons stated in this Memorandum, Defendant respectfully requests this Court to deny Plaintiff's Motion for Remand

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,

Plaintiff,

vs.

JACKIE GARNER, Director of Illinois Department of Public Aid,

Defendant.

Civil Action
No. 01 C 9551
Judge Darrah

NOTICE OF FILING

To: Eliot Abarbanel
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350 S. Schmale Rd., Suite 150
Carol Stream, IL
FAX#: 630-690-2279

PLEASE TAKE NOTICE that on February 20, 2001, DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR REMAND was filed with the Clerk of the U.S. District Court for the Northern District of Illinois, Eastern Division, at the U.S. Courthouse, 219 S. Dearborn St., Chicago, Illinois.

JAMES E. RYAN
Attorney General of Illinois

By:

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn under oath, deposes that copies of this Notice and attached Memorandum were served upon the above-named at his stated address by depositing same, postage prepaid, in the U.S. mail chute at 160 N. LaSalle St., Chicago, IL on February 20, 2002 and by transmitting same by facsimile to the above FAX number before 4 P.M. on that date.

SUBSCRIBED and SWORN to
before me on February 20, 2000.

NOTARY PUBLIC

"OFFICIAL SEAL"
Ollie G. Banks
Notary Public, State of Illinois
My Commission Expires June 9, 2002

6