

**EXHIBIT "D"**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

<b>XUEJUN MAKHSOUS</b> , individually and	)	
for New Life of Crivitz LP,	)	
	)	No.: 18-cv-587
Plaintiff,	)	
	)	
v.	)	
	)	
<b>LINDA SEEMEYER</b> , in his official capacity	)	Judge: Griesbach
as Secretary of the Wisconsin Department of	)	
Health Services,	)	
Defendant.	)	

**REPLY MOTION FOR RELIEF FROM JUDGMENT OF DISMISSAL**

Plaintiff Xuejun Makhsous (“Zoe”), by the undersigned attorney, respectfully submits this Reply to the Defendant’s Brief in Opposition to Motion for Relief from Judgment, and states as follows:

1. In their Brief, the DHS asserts that the case must be dismissed for failure to satisfy the *Ex Parte Young* requirement that there be an ongoing constitutional harm in order to state a claim for injunctive relief. However, the pleadings and submissions to this Court make clear that Zoe is suffering prospective constitutional injuries that are not one-time but ongoing.

2. The DHS is still prospectively debiting Zoe’s bank account based on sanctions they imposed *instanter* without due process, and the DHS is requiring Zoe to disclose on applications for new facilities in Elkhorn and Crivitz that she was denied a license in the past, which the DHS can use as negative evidence against her.

3. Zoe is not asking for money damages – she is asking for the DHS to end its unconstitutional treatment of her. She asks that they stop taking her money and that they not draw any negative inferences against her in the future, because their previous sanctioning process against her was constitutionally infirm and discriminatory. To use common parlance, Zoe is not saying “Here is what happened in the past and I want money damages.” Rather, she is saying, “What happened in the past was unconstitutional and has prospective effects, so I want to cut off those effects in the future.”

4. The DHS is correct that the Eleventh Amendment bars an action for damages against the State, and bars a claim grounded in a one-time constitutional violation. But this Court has held that allegations with respect to *ongoing payments* are sufficient to state a claim for prospective relief. In the case of *Ceria M. Travis Academy v. Evers*, 2018 WL 4098587 \*5 (E.D. Wis. July 28, 2016), this court explained that a complaint failed to state a claim under *Ex Parte Young* because it dealt only with a one time claim against the State for money (an alleged reimbursement owed by the State to the school) versus a series of ongoing future payments: “Ceria makes no allegations with respect to any future payments, and as such the allegations here cannot properly be described as ongoing.” In the case at bar, Zoe has made allegations about the ongoing future, and furthermore, she is not even asking (as in *Ceria*) for the State to pay her money, but rather asking for the State to stop taking her money. She is not asking for a penny from the State: her claim is for injunctive and declaratory relief only.

5. The DHS wrongly assumes that any mention of past wrongs will run afoul of *Ex Parte Young* and vitiate Plaintiff's claim for prospective relief. But we are not living in a science-fiction movie where the past stays the past and never affects the present. For example, if a person's bank account was debited every month for 36 months because he gave an unpopular speech in the public square in front of the Capital, the imposition of the fine would be an unconstitutional state action for events in the past, so while the incident would be in the past, it would still give rise to standing to sue long after the fine was first imposed. There is no way to avoid talking about the past, but that does not make every lawsuit moot. The test is whether the plaintiff is seeking prospective relief, and that is precisely what Zoe is asking.

The pleading standard here is minimal. The Western District recently said, quoting *Ex Parte Young*: "The requirement, however, is not that exacting. Instead, all that is required is 'that the state officer by virtue of his office has some connection with the enforcement of the action.'" *Boyden v. Conlin*, 2018 WL 2191733 \*7 (W.D. Wis. May 11, 2018). "Some connection" is a low threshold. Here, Zoe merely had to assert that the state actor (in this case Ms. Seemeyer as head of DHS) has some connection to the enforcement of the relief sought. Well, that is easily done. Seemeyer is the head of the department, and they are imposing a fine on Zoe after denying her due process and discriminating against her, and they stand ready to use this constitutionally infirm punishment as grounds to reject Zoe's further applications. That satisfies "some connection" to the DHS.

6. DHS should not be allowed to say out of the left side of their mouth that this matter deals purely with past harms, while the right side of their mouth takes money from Zoe's bank account and uses their fines-without-due-process as evidence that could affect her future business ventures.

7. All that DHS has to do is put their money where their mouth is, so to speak. If they agree to stop debiting Zoe's bank account and stop using her past license removal in weighing whether she can get a license in the future, then Zoe will walk away. True, DHS has cost her all of her life savings, but she will still walk away and rebuild her life. However, if they insist on digging up the past and bringing it forward into the future, then the harm must be *prospective*, and she has a case against them.

8. Plaintiff Zoe invites this Court to order a settlement agreement between the parties that ends any prospective sanctions or adverse consequences against Zoe. If the DHS refuses such an agreement, that will just go to prove that they want to continue with prospective harm, in which case the lawsuit must go forward.

Respectfully submitted,

/s/ Doug Litowitz

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Certificate of Service

I certify that on the 3<sup>rd</sup> day of September, I electronically filed this Motion for Relief from Judgment of Dismissal with the Clerk of the Court using the CM/ECF system.

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*/s/ Doug Litowitz*