23-10971-A

United States Court of Appeals

for the

Eleventh Circuit

USA,

Plaintiff-Appellee,

– v. –

BRIAN MOORE, JR.,

Claimant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia
Civil Case No. 1:21-cv-03847-TWT

APPELLANT'S REPLY BRIEF

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1. The Honorable Thomas W. Thrash, Jr.

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CORPORATE DISCLOSURE STATEMENT

I hereby certify that Claimant-Appellant has no parent corporation, and no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated September 27, 2023.

/s/ Daniel L. Alban
Counsel for Claimant-Appellant

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ARGUMENT

Claimant-Appellant Brian Moore, Jr. was wrongly denied attorney's fees under CAFRA even though he could not have prevailed any more fully than he did. He obtained a court order directing the government to return his seized cash and dismissing the government's forfeiture case with prejudice, which protected him from the government re-filing the forfeiture action against his cash. That satisfies the requirement that he obtain a judicially sanctioned change in his legal relationship with the government in order to substantially prevail under CAFRA's fee-shifting provision.

The government responds to Brian's opening brief with a scattershot array of arguments and concessions, beginning with an attempt to reduce the standard of review from *de novo* to abuse of discretion. But that makes no sense for reviewing a district court's statutory interpretation of a mandatory fee-shifting statute.

Next, the government suggests that CAFRA's fee-shifting provision should be read narrowly because it is a waiver of sovereign immunity. But 28 U.S.C. § 2465(b)(1)(A) unambiguously waives sovereign immunity

for attorney's fees in civil forfeiture cases, so that canon of statutory interpretation is irrelevant.

Third, the government concedes that Brian was not required to obtain a judgment "on the merits" in order to substantially prevail under 28 U.S.C. § 2465(b)(1)(A). Thus, not only is there no basis in the text or legislative history of § 2465(b) for requiring a court to address the substantive merits of a case to award fees to a substantially prevailing claimant, but *both parties agree* there is no such requirement. That resolves the first basis for this appeal—whether the district court erred in denying Brian's fees because it had not addressed the substantive merits of his case. However, the government attempts to temper this concession by contesting Brian's argument-in-the-alternative that a dismissal with prejudice is considered an adjudication on the merits. Yet the government offers only a series of non sequiturs in response. It is unsurprising that obtaining an adjudication on the merits is sometimes insufficient to obtain a fee award under *other* fee-shifting statutes, which impose additional requirements beyond prevailing-party status. And it only helps Claimant-Appellant's position that cases holding that a dismissal with prejudice is an adjudication on the merits did so in a

variety of contexts beyond fee-shifting, including in the highly relevant area of *res judicata*.

Fourth, the government misapplies the two-prong *Buckhannon* test by confusing the prongs with two examples the Supreme Court gives that satisfy the test. The resulting confusion leads to a parade of inapposite cases. And the lone district court case providing direct support for the government's position is so littered with serious legal errors that this Court should decline to afford it any persuasive weight.

Below, Claimant-Appellant responds to each of these in turn.

I. The Government Incorrectly States the Standard of Review for the Denial of Attorney's Fees Under CAFRA.

The government asserts that "[t]his court reviews the denial of a motion for attorney's fees and costs for abuse of discretion." Appellee's Br. 7. That is true for many fee-shifting statutes, which vest discretion in a district court, but CAFRA makes fee awards *mandatory* when a claimant substantially prevails. Accordingly, district courts have *no discretion* to deny fees when a claimant has substantially prevailed, and the underlying question of whether a claimant substantially prevailed is a question of statutory construction reviewed *de novo*.

That CAFRA's fee-award provision is mandatory is evident from its text: "Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States *shall* be liable for reasonable attorney fees and other litigation costs reasonably incurred by the claimant." 28 U.S.C. § 2465(b)(1)(A) (emphasis added). Ordinarily, "shall" is interpreted to impose a mandatory, non-discretionary duty.

In contrast, many fee-shifting statutes use the term "may" to describe a court's authority to shift fees,[1] which makes the award of fees discretionary. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *Johnson v. Florida*, 348 F.3d 1334, 1350 (11th Cir. 2003) (similar).

Thus, in contrast to permissive fee-shifting statutes, the use of "shall" in § 2465(b)(1)(A) imposes a mandatory fee award whenever a claimant substantially prevails. Accordingly, this Circuit and several others have reviewed *de novo* a claimant's eligibility for CAFRA fees. *See, e.g.*, *United States v. Certain Real Prop.*, 579 F.3d 1315, 1319 (11th Cir.

[1] *E.g.*, 5 U.S.C. § 552(a)(4)(E)(i); 15 U.S.C. § 1117(a); 17 U.S.C. § 505; 33 U.S.C. § 1365(d).

2009) ("The proper standard for an award of attorney's fees is a question of law that we review *de novo*."); *accord United States v. $28,000.00 in U.S. Currency*, 802 F.3d 1100, 1105 (9th Cir. 2015); *United States v. Coffman*, 625 F.App'x 285, 287 (6th Cir. 2015); *United States v. Cap. Stack Fund, LLC*, 543 F.App'x 17, 19 (2d Cir. 2013); *United States v. Huynh*, 334 F.App'x 636, 638 (5th Cir. 2009).

The government, however, cites apparent outlier *United States v. $70,670.00 in U.S. Currency* in support of its position. *See* 929 F.3d 1293, 1300 (11th Cir. 2019) ("We [] 'review the denial of a motion for attorneys' fees and costs for abuse of discretion.'" (quoting *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012))). Beyond conflicting with the precedent cited above, there are three additional reasons why this language should have no precedential force.

First, it is unclear whether *$70,670.00* was discussing the standard of review for denial of fees under CAFRA. The claimants there argued fees should have been awarded on two grounds: first, that they "substantially prevail[ed]" under § 2465(b)(1) and thus were entitled to fees; second, "that the district court should have made the government responsible for their attorney's fees and costs as a condition of voluntary

dismissal under Rule 41(a)(2)." *$70,670.00*, 929 F.3d at 1303. This latter argument undoubtedly triggers abuse-of-discretion review, as Rule 41(a)(2) vests courts with discretion to dismiss an action at a plaintiff's request "on terms that the court considers proper." *See McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986) (discussing district courts' "broad equitable discretion under Rule 41(a)(2)").

Second, the case relied on by *$70,670.00* for the standard of review arose under a permissive fee-shifting statute, not CAFRA, further suggesting the court was merely stating the usual standard of review for discretionary fee-shifting decisions. *See Friends of the Everglades*, 678 F.3d at 1201 (applying 33 U.S.C. § 1365(d)).

Third, this Court very recently has cited *$70,670.00* for the standard of review for the *discretionary* "denial of a motion for attorney's fees and costs arising from [a voluntary dismissal under Rule 41(a)(2)]," not CAFRA. *Emergency Recovery, Inc. v. Hufnagle*, 77 F.4th 1317, 1324 (11th Cir. 2023).

Given that CAFRA's fee-shifting provision is mandatory, this Court should review this denial of fees *de novo*.[2]

II. Although Waivers of Sovereign Immunity Are Strictly Construed, That Interpretive Canon Has No Bearing Here.

The Government repeatedly emphasizes that "CAFRA's fee-shifting provision constitutes a waiver of sovereign immunity and [accordingly] must be construed strictly in favor of the sovereign." Appellee's Br. 10. Claimant-Appellant does not dispute that CAFRA waives sovereign immunity nor the existence of "th[e] canon of interpretation [that] requires an unmistakable statutory expression of congressional intent to waive the Government's immunity." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). But that canon is irrelevant here.

The sovereign immunity canon "is a tool for interpreting the law" that only should be resorted to when, after employing the "traditional tools of statutory construction," there remains some unresolved

[2] If the Court disagrees with Claimant-Appellant's assessment of the precedential force of this aspect of *$70,670.00*, he asks that the case be overruled *pro tanto* for the reasons stated above. And if the Court believes it can only review for abuse of discretion despite the mandatory language of 28 U.S.C. § 2465(b), Claimant-Appellant asks that this Court rule that the district court clearly erred by holding that Claimant-Appellant did not substantially prevail despite obtaining an order of dismissal with prejudice that ordered the full return of his seized cash.

ambiguity in the statute. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589–90 (2008) ("There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe."). As waivers of sovereign immunity go, Congress could not have been much clearer: "the United States shall be liable" for attorney's fees to a substantially prevailing civil forfeiture claimant. 28 U.S.C. § 2465(b)(1)(A); *see also United States v. Coffman*, 625 F.App'x 285, 287 (6th Cir. 2015) (rejecting application of the sovereign immunity canon because "the language of CAFRA's fee-shifting provision clearly covers attorney fees incurred in the civil forfeiture action").

The government never explains how this canon influences the interpretive analysis. Presumably, the government invoked the canon in hopes that the Court would put a thumb on the scales in its favor when applying *Buckhannon*. But that simply is not how interpretive canons work. "Congress unambiguously and unequivocally waived sovereign immunity for [awards of attorney's fees under CAFRA]. To construe the statute[] in the manner in which the government proposes would be to ignore the plain text of [§ 2465(b)(1)], something [a court is] not at liberty

to do." *Cf. In re DBSI, Inc.*, 869 F.3d 1004, 1013 (9th Cir. 2017) (typographical error corrected) (discussing 11 U.S.C. § 106(a)(1)).

Accordingly, the Government's invocation of the sovereign immunity canon should be disregarded.

III. As the Government Concedes, a Claimant Does Not Have to Prevail "On the Merits" to Be Eligible for a Fee Award Under CAFRA.

Nothing in the text or legislative history of 28 U.S.C. § 2465(b) suggests that claimants must prevail "on the merits" to be eligible for fee awards. The government now concedes no such requirement exists. Appellee's Br. 12. The district court plainly erred in imposing this non-existent requirement to deny Brian's fees, as explained in Part A.

Having conceded this crucial point, the government then takes issue with Claimant-Appellant's argument-in-the-alternative that a dismissal with prejudice is considered an adjudication on the merits. Appellee's Br. 12–19. Because both parties agree there is no substantive "on the merits" requirement, it is unnecessary for this Court to resolve the matter of whether a dismissal with prejudice constitutes an adjudication on the merits. However, to preserve his argument-in-the-

alternative, Claimant-Appellant responds in Part B to the government's arguments.

A. The government expressly concedes that Brian was not required to prevail "on the merits" to substantially prevail under CAFRA's fee-shifting provision.

The government expressly agrees with Claimant-Appellant's position on the district court's first error, conceding that Brian "was not required to prevail on the merits to substantially prevail under CAFRA's fee-shifting provision." Appellee's Br. 12 (stating "True" after summarizing Claimant-Appellant's position). The government further concedes that "[a]ll Moore needed was a judicially sanctioned change in the relationship between the parties." *Id.*

Claimant-Appellant agrees. Whether the district court considered the substantive merits of the case is irrelevant to a fee award under CAFRA. Appellant's Br. 14–24. CAFRA only requires that a claimant "substantially prevail" to be eligible for fees, and this case was dismissed *with prejudice* by a court order requiring that Brian's money be returned. Thus, there was a judicially sanctioned change in the legal relationship between the parties, and Brian was entitled to fees. *See infra* Part IV.B–C. The district court therefore erred in holding that a fee award was "not

statutorily mandated," and that Brian did not "substantially prevail[]" because "the merits of Moore's claim were never addressed by the Court." Doc. 38, at 4.

Because CAFRA imposes no substantive "on the merits" prerequisite for a fee award—as both parties agree and the text and legislative history of the statute confirms—this Court should find the district court erred in imposing such a requirement.

B. Even if a ruling on the merits were required under CAFRA, that is satisfied when there is a dismissal with prejudice.

In his opening brief, Claimant-Appellant offered an argument-in-the-alternative that even if a ruling "on the merits" were required, a dismissal with prejudice is considered an adjudication on the merits. Appellant's Br. 24–25. The government contests this first with a false equivalency and then with false distinctions, as explained below.

First, the government repeatedly conflates two distinct concepts: whether there has been *an adjudication on the merits* versus whether a party is *eligible for a fee award*. Appellee's Br. 13–15, 18. Some fee-shifting statutes impose additional requirements beyond merely prevailing. CAFRA is not such a statute. Thus, it does not matter that

other statutes require consideration of merits factors such as whether a party's legal position was frivolous or "substantially justified." A party may obtain an adjudication on the merits under those statutes and still be ineligible for fees. Not so under CAFRA.

Second, the government attempts to create a false distinction by claiming that cases determining a dismissal with prejudice is an adjudication on the merits for one purpose, such as *res judicata* or appealability, have no bearing on whether it is an adjudication on the merits for purposes of a fee-shifting award. But the government offers no basis for this distinction, and the variety of contexts in which courts reach the same conclusion only underscores the universal application of the principle. Moreover, that a party benefits from *res judicata* is the very sort of judicially-sanctioned change in the legal status of the parties contemplated by *Buckhannon* for determining prevailing party status. Thus, a holding that a dismissal with prejudice is an adjudication on the merits for purposes of *res judicata* is directly relevant to prevailing party status in the fee-award context.

1. *The government wrongly conflates eligibility for fees with whether there has been an adjudication on the merits.*

The government introduces further confusion by wrongly conflating *eligibility* for fees with an adjudication on the merits by repeatedly pointing to various other fee-shifting statutes—such as Section 1988 and the Equal Access to Justice Act (EAJA)—that apply different standards and requirements for awarding fees, often on a discretionary basis. Appellee's Br. 13–15, 18. But this argument is a non sequitur that confuses two distinct legal concepts. Whether a party is actually entitled to fees under a given fee-shifting statute is a separate determination from whether there has been an adjudication on the merits. That some fee-shifting statutes require more than prevailing party status—such as that an agency's position was not substantially justified (EAJA) or that a civil rights plaintiff's action was frivolous, unreasonable, or without foundation (§ 1988)—has no bearing on whether the same standard applies for determining whether there has been an adjudication on the merits.

CAFRA's fee-shifting provision does not require the claimant to make any additional showing beyond substantially prevailing. To the extent that obtaining an adjudication on the merits satisfies that

standard—such as by obtaining a dismissal with prejudice—that alone resolves claimant's fee eligibility under CAFRA. But the government offers no examples where a court determined that there was a different standard for whether a dismissal with prejudice is an *adjudication on the merits* because of different requirements in the fee-shifting statute.

For example, *Dean v. Riser*, relied on heavily by the government, expressly acknowledges the difference between these two determinations. 240 F.3d 505, 509 (5th Cir. 2001). *Dean* first recognizes that prior circuit decisions have adopted "a consistent stance" that a dismissal with prejudice "*is tantamount to a judgment on the merits*." *Id.* (emphasis added)*;* Appellant's Br. 25. But, recognizing that Section 1988 imposes additional requirements for fee eligibility beyond merely prevailing, *Dean* held that obtaining such a judgment on the merits, by itself, *does not* entitle a civil-rights defendant to Section 1988 fees. *Id.* at 509. *Dean* stresses that this holding was based on the unique policies underlying fee-shifting in civil-rights litigation. *Id.* at 509–11.[3]

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[3] Nonetheless, the government attempts to import *Dean*'s holding, suggesting that it should be able to freely dismiss civil-forfeiture cases without penalty when "it would be the prudent thing to do." Appellee's Br. 17 (citing 240 F.3d at 509, 511). But no court has ever imported Section 1988's unique doctrines to CAFRA and the government offers no

The government also attempts to distinguish *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005), on the grounds that the dismissal with prejudice in that case only qualified as a judgment on the merits because the fee-award provision required a finding that the suit was frivolous, which necessarily concerns the merits. Appellee's Br. 14. The government misreads *Claiborne*. The Seventh Circuit did not rely on the fact that there was a determination that the suit was frivolous. Rather, "the language of the district court's judgment ma[de] it clear that a decision on the merits ha[d] been rendered: Claiborne's claims were dismissed *with prejudice*." 414 F.3d at 719. That is likewise true here. *See* Doc. 32, at 3. Moreover, the reasoning of *Claiborne* and the language of 42 U.S.C. § 3613(c) make clear that the frivolity of the case is an *additional* requirement to the requirement that the party prevail. Under that statute, "[a] prevailing party defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or

justification for doing so. This position finds no basis in the text or legislative history of § 2465(b), nor any other authority. Indeed, the very purpose of § 2465(b) was to *make whole* property owners who successfully defended against a civil-forfeiture action initiated by the government, often by raising civil-rights defenses to abusive seizure and forfeiture practices. *See* Appellant's Br. 16–17.

embarrass the defendant." *Claiborne*, 414 F.3d at 719–20 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2 (1983)). In other words, the determination that a suit was frivolous necessarily comes *after* the determination that the defendant prevailed. The government thus reads the statute at issue in *Claiborne* backwards.

2. *The government draws a false dichotomy based on the "purpose" of a determination that a dismissal with prejudice is an adjudication on the merits.*

The government draws a false dichotomy in claiming that some cases holding that a dismissal with prejudice is an adjudication on the merits have no bearing on this case because those determinations arose in other contexts, such as *res judicata* or appealability, and not fee-shifting. But whether a party has prevailed for *res judicata* purposes is highly relevant to whether they are a prevailing party for fee-shifting purposes. And the fact that courts have held dismissals with prejudice operate as adjudications on the merits in a variety of contexts only provides support for Claimant-Appellant.

The government disputes Claimant-Appellant's reliance on *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), because that case "analyzed the meaning of dismissal with prejudice for purposes

of claim preclusion, not in the context of attorney's fees." Appellee's Br. 17. But the fact that a dismissal with prejudice is considered "on the merits" for purposes of *res judicata* only serves to underscore that the dismissal order here—which expressly recognizes its preclusive effect—operates as a change in the legal relationship between the parties under *Buckhannon*. Thus, the Supreme Court making this determination in the *res judicata* context is highly relevant to fee awards.

The government also claims that *Semtek*'s discussion of the linguistic drift in the phrase "judgment on the merits" implies that "in some cases a judgment on the merits will mean adjudication on the substantive merits of the case and in other instances it will not." *Id.* at 17–18 (citing *Semtek*, 531 U.S. at 502). But Claimant-Appellant never suggested that dismissal with prejudice is the *only* way to obtain an adjudication on the merits—just that it is one way to do so. And nowhere in *Buckhannon* does the Court specify that it was referring only to a court passing on the "substantive" merits of a claim.[4]

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[4] Moreover, *Buckhannon* was decided mere months after *Semtek*, so it can hardly be said that Chief Justice Rehnquist was unaware of this ambiguity—if he only meant "substantive merits," he most likely would have said so.

The government likewise disputes the relevance of *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976), arguing that this case concerned appealability, not attorney's fees, and "nothing in *LeCompte* supports [Claimant-Appellant's] effort" to reason by analogy. Appellee's Br. 18. To be clear, Claimant-Appellant makes no claim that *LeCompte* decided the precise issue here. But if a dismissal with prejudice is treated as a judgment on the merits for purposes of claim preclusion and appealability, it should likewise be treated as such for purposes of fee-shifting unless there is some good reason otherwise. The government offers none. The Court should thus apply the reasoning of *Semtek* and *LeCompte* to the present situation.

IV. The Dismissal Order Here Satisfies the *Buckhannon* Test, Which Requires (1) Judicial, Rather Than Ministerial, Action That (2) Alters the Legal Relations of the Parties to the Benefit of the Party Seeking Fees.

As explained in the Opening Brief, for there to be a "prevailing party" eligible for an award of attorney's fees under *Buckhannon*, there must be a "material alteration of the legal relationship of the parties" that is marked by "judicial *imprimatur*." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016) (quoting *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989), then *Buckhannon*

Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 606 (2001)). The judicial imprimatur prong is satisfied when there is a non-ministerial exercise of the judicial power—that is, an exercise of the court's judgment or discretion. And the material alteration prong is satisfied whenever (1) that exercise of power alters the parties' rights, duties, privileges, or immunities, and (2) that alteration benefits the party moving for attorney's fees. These requirements are satisfied here.

First, Claimant-Appellant explains how the government misapplies the *Buckhannon* test by confusing its two prongs with two examples offered by the Supreme Court that satisfy the test.

Next, Claimant-Appellant applies *Buckhannon*'s actual first prong to these facts, explaining that Rule 41(a)(2) dismissals always satisfy the judicial imprimatur prong because such dismissals issue "only by court order, on terms that the court considers proper." Fed.R.Civ.P. 41(a)(2).

Finally, Claimant-Appellant shows how *Buckhannon*'s material alteration prong has been satisfied twice over because the district court's order both imposed a legal duty on the government to return the seized currency to Brian and also conferred a legal immunity to Brian against subsequent litigation over the same claim (*res judicata*).

A. The government misapplies the *Buckhannon* test, wrongly conflating its two prongs with two illustrative examples that satisfy the test.

The government errs in applying the two-prong *Buckhannon* test, arguing that Claimant-Appellant does not qualify as a prevailing party under *Buckhannon* because "[t]here was no ruling on the merits of [his] claim, nor did [he] prevail with the required judicial imprimatur." Appellee's Br. 11. Under this skewed view, "[a]djudication on the merits is then one of the *prerequisite* inquiries outlined by the Supreme Court in *Buckhannon*." *Id.* at 12 (emphasis added). But that is simply not what *Buckhannon* says.

The Court in *Buckhannon* began its construction of its two-pronged test by canvassing its prior decisions. In doing so, it identified two specific—but not exclusive—situations which authorize a district court to award attorney's fees: "judgments on the merits" and "settlement agreements enforced through a consent decree." *Buckhannon*, 532 U.S. at 603–04 (citing *Farrar v. Hobby*, 506 U.S. 103 (1992), and *Maher v. Gagne*, 448 U.S. 122 (1980), among others). From "[t]hese decisions, taken together," the Court constructed the first prong of the test: that there

must be some "material alteration of the legal relationship of the parties." *Id.* at 604 (quoting *Tex. State Tchrs. Ass'n*, 489 U.S. at 792–93).

The Court then held that "the 'catalyst theory' falls on the other side of the line from these *examples*." *Id.* at 605 (emphasis added). This was because "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change"—thus establishing the second prong of the test. *Id.*

The government confuses the two illustrative examples offered in *Buckhannon* with the two-prong test itself. A proper reading of *Buckhannon* shows that the list of situations where a party prevails is not limited to the two scenarios discussed by the Court, and that the way that future courts identify additional scenarios in that list is by applying the two-pronged test.

To clear up the waters muddied by the government's brief: Claimant-Appellant is arguing that dismissals with prejudice like the one in this case satisfy the two actual prongs of *Buckhannon, see infra* Part IV.B–C, or, alternatively, that a dismissal with prejudice is an

adjudication on the merits, thus fitting into one of the examples the *Buckhannon* Court said satisfied its test, *see supra* Part III.B.

B. Rule 41(a)(2) dismissals like the one here satisfy the judicial imprimatur prong per se because they are a non-ministerial exercise of the judicial power.

Buckhannon's judicial-imprimatur prong is satisfied when a material alteration in the legal relationship between the parties bears the requisite judicial sanction. That happens whenever that alteration is the result of a non-ministerial exercise of judicial power. This prong is thus satisfied by the Rule 41(a)(2) dismissal here.

First, this understanding is consistent with the two illustrative examples given in *Buckhannon*. American courts have long recognized the distinction between "judicial" acts—those that "involve[] the exercise of discretion and judgment"—and acts that are "ministerial." *E.g.*, *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 359 (1879); *Perkins v. U.S. Fid. & Guar. Co.*, 433 F.2d 1303, 1305 (5th Cir. 1970) (quoting *Rainey v. Ridgeway*, 43 So. 843, 844 (Ala. 1907)); *see also* Appellant's Br. 34–35. A court necessarily exercises judgment when it hears and decides a case. And while a consent decree bears much resemblance to a private contract, it is nonetheless a "judicial act" because a court retains discretion "to

reject [or modify] agreed-upon terms as not in furtherance of statutory objectives." *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 651 (1961).

Second, this understanding accords with the Supreme Court's choice of words in *Buckhannon*. In its most typical usage, "imprimatur" refers to "sanction" or "approval." *Imprimatur*, Merriam-Webster.com. When a court exercises "judgment or discretion" over whether a certain change in legal relation between the parties goes into effect, it necessarily places its "sanction" or "approval" on that change. Rule 41(a)(2) dismissals are thus non-ministerial exercises of the judicial power: "[d]istrict courts can and do refuse to grant motions for Rule 41(a)(2) dismissal," and they also "may add conditions to the dismissal, even without the parties' consent." Appellant's Br. 31. Accordingly, Rule 41(a)(2) dismissals bear judicial imprimatur. By contrast, ministerial acts—such as a dismissal under Rule 41(a)(1), *see* Appellant's Br. 34—do not bear judicial imprimatur because they "d[o] not entail any determination, oversight or involvement by the court, aside from the perfunctory act of entering judgment to terminate the case." *Bridgeport Music, Inc. v. London Music, U.K.*, 345 F.Supp.2d 836, 839 (M.D. Tenn. 2004)), *aff'd*, 226 F.App'x 491 (6th Cir. 2007); *cf. Buckhannon*, 523 U.S.

at 604 n.7 ("Private settlements do not entail the judicial approval and oversight involved in consent decrees.").

Contrary to the government's assertion, *see* Appellee's Br. 22, it does not matter that the change in the legal relationship was *initiated* by one of the parties—indeed, in the case of both a plaintiff securing a judgment on the substantive merits and a court-ordered consent decree, a court cannot act without the initial action of one or both of the parties. *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) ("Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right." (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)) (cleaned up)). What matters is whether the court possesses the *ability* to say no to the parties' suggestions, not whether it in fact does so in a particular case. And here, Rule 41(a)(2) plainly vested such authority in the district court, and the court exercised judicial power in approving the government's motion.

C. The district court's order to dismiss the case with prejudice altered the legal relationship in a manner that favored Brian.

Buckhannon's material-alteration prong is satisfied whenever the non-ministerial exercise of judicial power (1) results in a change in the parties' rights, duties, privileges, or immunities[5] (2) that benefits the party moving for fees. *Cf. Royal Palm Props., LLC v. Pink Palm Props., LLC*, 38 F.4th 1372, 1379–80 (11th Cir. 2022) (finding no material alteration where jury found against both plaintiff's claim and defendant's counter-claim). Such a material alteration in legal relationship happened here when Brian's case was dismissed with prejudice by the district court's order directing his money be returned.

The district court's order altered—and expressly stated that it altered—the legal relationship between Brian and the government in two ways. First, it created a legal duty for the government to return the seized money to Brian, while giving Brian the correlative legal right to have his money returned. Doc. 32, at 2 ("[T]he dismissal of this action will result

[5] *Cf.* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 28–30 (1913) (laying out a framework for "[t]he strictly fundamental legal relations"); *see also Khan v. United States*, 928 F.3d 1264, 1277 (11th Cir. 2019) (using Hohfeld's framework to analyze ineffective assistance of counsel).

in the return of the Defendant Currency to Claimant, which is the relief sought by Claimant."). Second, the order conferred upon Brian an immunity from "subsequent litigation over the same issues"—i.e., *res judicata*—thereby preventing other courts from further altering the legal relationship between Brian and the government with respect to Brian's seized money. Doc. 32, at 2; *see also Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1307 (11th Cir. 2021) (Newsom, J., concurring in the judgment) (explaining that he would find that a defendant prevails whenever a court order "confers . . . [the] narrow legal right against having to re-litigate the exact same issue in the exact same court"). These two alterations of the legal relationship between the parties are clearly in Brian's favor—they are the precise alterations Brian sought by bringing his claim in the first place. *Cf. CRST*, 578 U.S. at 431 (holding a party has prevailed whenever it fulfills its "primary objective"). Accordingly, Brian has substantially prevailed in this litigation.

This analysis helps distinguish the cases cited by the government. Take *Dionne v. Floormasters Enterprises, Inc.*, where the defendant voluntarily tendered the full amount of backpay its employee claimed to be owed and then moved to dismiss the case with prejudice. 667 F.3d

1199, 1201 (11th Cir. 2012); Appellee's Br. 20–21. In that case, the plaintiff did not "prevail" in the *Buckhannon* sense because the only change in the parties' legal relations effected by the court's order was that it conferred an immunity to the *defendant* against having this claim be brought again—the material alteration in the legal relationship did not benefit the *plaintiff*.

Similarly distinguishable is *United States v. Evans*, where the district court denied Evans's Fed.R.Crim.P. 41(g) motion as moot because the government had already begun the process of returning the seized funds to the claimant. Order Den. Def.'s Claims 1, *United States v. Evans*, No. 5:08-CR-00242-RDP-HNJ (N.D. Ala. Jan. 14, 2013), ECF No. 928, *aff'd*, 561 F.App'x 877 (11th Cir. 2014); Appellee's Br. 19–20. In that case, the district court's order created no material alteration: the order denying Evans's motion as moot had no preclusive effect, *see* 18A Wright & Miller, Fed. Prac. & Proc. § 4436 (3d ed. 2023 update) (stating that mootness typically "does not preclude a second action on the same claim if the justiciability problem can be overcome"), and a moot case by definition is one in which the court cannot alter the legal relations of the parties based

on the issue presented. Thus, no rights, duties, privileges, or immunities were created or altered by the *Evans* court's order.

Decisions of other circuits cited by the government also fail to support its argument. *Dean* did not apply the *Buckhannon* test and, as discussed above, was specifically tailored to policies unique to civil-rights litigation. *See* Section III.B *supra*. The government cited *Cantrell*, *Bridgeport Music*, and *Alpha Medical* for the proposition that a district court has "discretion" to deny the award of costs or fees to a defendant even if the case is dismissed with prejudice. Appellee's Br. 23–24. But that is only true when the source of authority to award costs or fees vests such discretion in the court—which is true in each of those cases, but not here. *See Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 457 (10th Cir. 1995) (en banc) (applying Fed.R.Civ.P. 54(d)); *Bridgeport Music*, 226 F.App'x at 492 (applying 17 U.S.C. § 505); *United States v. Alpha Med., Inc.*, 102 F.App'x 8, 10 (6th Cir. 2004) (applying 28 U.S.C. § 2412(a)(1)). Contrary to the government's implication, the court in all three cases declined to address whether securing a favorable dismissal with prejudice made the defendant a prevailing party. *See Cantrell*, 69 F.3d at 458 (overruling much-maligned circuit precedent that held that a

defendant does not prevail when a case is voluntarily dismissed with prejudice); *Bridgeport Music*, 226 F.App'x at 495 (declining to reverse the prevailing-party determination because it "would have no effect on the ultimate outcome of this appeal"); *Alpha Med.*, 102 F.App'x at 10 (similar).

The government also cited opinions of various district courts outside of this circuit as examples of a court finding that a forfeiture claimant or civil defendant did not prevail when the plaintiff secured a voluntary dismissal with prejudice. *See* Appellee's Br. 24. For instance, the government cited *United States v. $32,820.56 in U.S. Currency*, 106 F.Supp.3d 990 (N.D. Iowa 2015). But that case concerned claimants who were attempting to convert a dismissal without prejudice into a dismissal with prejudice in order to secure attorney's fees under CAFRA, citing *United States v. Ito*, 472 F.App'x 841 (9th Cir. 2012), in support of their claim. *$32,820.56*, 106 F.Supp.3d at 992–93, 996. Simply put, the government's brief misrepresents the holding of the case. Moreover, the district court identified two alternative reasons why the claimants' argument failed. "First, it was not timely raised." *Id.* at 996. Second, the district court predicted the Eighth Circuit was unlikely to adopt the

holding in *Ito*, so it declined to follow that decision. *Id.* at 997. Unlike the claimants in *$32,820.56*, however, Brian timely raised arguments about attorney's fees when the district court was considering whether to grant the government's voluntary dismissal. *See* Doc. 31, at 7–8. And although the second justification for the court's decision could provide some support to the government's argument, the district court was wrong about how the Eighth Circuit would consider *Ito*—on appeal, the Eighth Circuit indicated its approval of *Ito*'s holding, though it ultimately affirmed the district court's exercise of discretion in dismissing under Rule 41(a)(2). *See United States v. $32,820.56 in U.S. Currency*, 838 F.3d 930, 936–37 (8th Cir. 2016) ("If a court is convinced that dismissal without prejudice at the government's request would cause legal prejudice to a claimant by unfairly depriving her of the ability to seek attorney fees under CAFRA, then the court may deny the government's motion." (citing *Ito*, 472 F.App'x at 842)).

The other two cases the government cited at least concern voluntary dismissals with prejudice, but nonetheless are only minimally helpful to the government's argument. In *Lear v. Hitachi Automotive Systems Americas, Inc.*, the court did deny costs to a defendant after granting a voluntary dismissal with prejudice. 5:17-CV-186-CHB, 2019

WL 13177724, at *1 (E.D. Ky. June 7, 2019). However, the court did not apply the *Buckhannon* test; rather, it appeared to be exercising its vested discretion to deny costs as a condition of the dismissal under Rule 41(a)(2). *Id.* That is unlike what happened here, where the Rule 41(a)(2) dismissal order imposed no such conditions and was wholly separate from the later order denying fees. Moreover, *Lear*'s stated reason for denying such costs was that "the Defendant has not provided any reason to believe that should they prevail in the on-going state Court litigation, they will not be able to recover these costs." *Id.* That is clearly a distinct situation from the one at issue, where the district court has no discretion to deny fees to a substantially prevailing party and Brian has no other opportunity to recover such fees.

The only case cited by the government that actually provides direct support for its proposition is *Lum v. Mercedes Benz, USA, LLC*, 246 F.R.D. 544 (N.D. Ohio 2007). That decision is only persuasive authority, and it fails to persuade. First, it wrongly read *Buckhannon* to "undermine[]" the well-established principle that a dismissal with prejudice is tantamount to a judgment on the merits. *Id.* at 546 (discussing the holdings of *Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207

(9th Cir. 1997), and *Schwarz v. Folloder,* 767 F.2d 125, 130 (5th Cir. 1985)). However, both circuits still recognize that dismissals with prejudice are dismissals on the merits. *See Robinson v. Farmbrough*, No. 121-CV-00990, 2023 WL 5109764, at *4 (E.D. Cal. Aug. 9, 2023) (noting that *Zenith* was "abrogated on other grounds" by *Ass'n of Mexican-Am. Educ. v. California*, 231 F.3d 572 (9th Cir. 2000)); *Blanchard-Daigle v. Geers*, 802 F.App'x 113, 121 (5th Cir. 2020). Second, the *Lum* court appeared to confuse Rule 41(a)(1) dismissals with Rule 41(a)(2) dismissals, as it claimed that it "did not determine or oversee the dismissal," *Lum*, 246 F.R.D. at 547, even though it noted that Rule 41(a)(2) governed the dismissal and denied the defendants' requests for costs as a condition of that dismissal. *Id.* at 545–46. Indeed, the *Lum* court purported to "adopt the view" of *Bridgeport Music*, even though that case concerned a Rule 41(a)(1) dismissal with prejudice, not Rule 41(a)(2). *Id.* at 547; *Bridgeport Music*, 345 F.Supp.2d at 838. Given the weakness of *Lum*'s reasoning, this court should decline to afford it any persuasive weight.

* * *

Accordingly, the district court's order of dismissal in Brian's case satisfies both prongs of the *Buckhannon* test and Brian is rightfully entitled to attorney's fees as the substantially prevailing party under 28 U.S.C. § 2465(b)(1)(A).

CONCLUSION

For the foregoing reasons, Claimant-Appellant Brian Moore, Jr. requests that the lower court decision denying him fees under 28 U.S.C. § 2465(b)(1)(A) be reversed and remanded with instructions to award reasonable fees under § 2465(b)(1)(A).

Dated September 27, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated September 27, 2023.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 27, 2023, I caused the foregoing *APPELLANT'S REPLY BRIEF* to be filed electronically with the Clerk of Court using the CM/ECF system, which will send notice of such filing to the following CM/ECF users:

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