# 07-1615-cv

*To Be Argued By*:
VICTORIA S. SHIN

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 07-1615-cv**

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ZHAOXI MA,

*Plaintiff-Appellant,*

-vs-

MICHAEL CHERTOFF, as Secretary of the United States Department of Homeland Security, EMILIO T. GONZALEZ, as Director of the United States Citizenship and Immigration Service, DENIS RIORDAN, as Director of the United States Citizenship and Immigration Service Connecticut Service Center,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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## BRIEF FOR THE APPELLEES

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## Statement of Jurisdiction

The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over this mandamus action pursuant to 28 U.S.C. § 1361. On March 20, 2007, the district court entered an order denying Plaintiff's application for attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Plaintiff filed a timely notice of appeal on April 17, 2007, pursuant to Fed. R. App. P. 4(a). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## Statement of Issue Presented for Review

Whether Plaintiff is a "prevailing party" entitled to attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), when there was no judicially sanctioned change in the legal relationship between the parties as required by the Supreme Court's interpretation of "prevailing party" in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001)?

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### Preliminary Statement

Plaintiff Zhaoxi Ma ("Mr. Ma" or "Plaintiff") appeals a decision by the United States District Court for the District of Connecticut (Mark R. Kravitz, J.) denying his motion for attorney's fees and costs under the Equal

Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). Mr. Ma filed the underlying suit in this matter seeking an order from the United States Citizenship and Immigration Service ("USCIS") granting him lawful permanent resident status. After USCIS voluntarily granted the requested relief, the district court dismissed Plaintiff's suit as moot. Plaintiff applied for an award of attorney's fees and costs under the EAJA, and the district court denied the application.

The district court's decision should be affirmed. The EAJA limits the award of attorney's fees to a "prevailing party," 28 U.S.C. § 2412(d)(1)(A), and in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), the Supreme Court interpreted this identical language in another fee-shifting statute to preclude the award of attorney's fees unless the plaintiff obtained a judgment on the merits or a court-ordered consent decree. Every federal appellate court to consider the question has held that *Buckhannon*'s interpretation of "prevailing party" applies to the identical language in the EAJA. *See Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006); *Marshall v. Commissioner of Soc. Sec.*, 444 F.3d 837, 840 (6th Cir. 2006); *Morillo-Cedron v. USCIS*, 452 F.3d 1254, 1257-58 (11th Cir. 2006); *Thomas v. National Sci. Found.*, 330 F.3d 486, 492 n.1 (D.C. Cir. 2003); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1377-79 (Fed. Cir. 2002); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002); *see also Scherer v. United States*, 88 F. App'x 316, 320 n.5 (10th Cir. 2004). For the reasons described more completely below, this Court should reach the same conclusion and accordingly hold that Plaintiff here – who

secured no judicially sanctioned change in the legal relationship between the parties – is not entitled to attorney's fees under the EAJA.

## Statement of the Case

On September 20, 2006, the USCIS denied an application by Mr. Ma for adjustment of status to that of lawful permanent resident. Joint Appendix ("JA") 20-21. On October 19, 2006, Mr. Ma filed a complaint in the United States District Court for the District of Connecticut seeking a court order directing the USCIS to reverse the denial of his application and grant him lawful permanent resident status. JA 2, 27-31. After the USCIS unilaterally and voluntarily adjusted Mr. Ma's status to that of a lawful permanent resident on December 11, 2006, JA 12, 35, the district court (Mark R. Kravitz, J.) dismissed Plaintiff's complaint as moot on January 31, 2007, JA 5, 42. On February 9, 2007, Mr. Ma filed an application for attorney's fees and costs. JA 5, 10. The district court denied this application on March 20, 2007. JA 5, 59-71. Plaintiff filed a timely notice of appeal on April 17, 2007. JA 5.

## Statement of Facts

### A. Factual history

Mr. Ma, a native and citizen of China, entered the United States on September 15, 2002, on a B2 visa (visit for pleasure), which was valid until March 14, 2003. JA 21, 28. He remained in the United States after the expiration of this visa, and on September 2, 2003, filed an application with the USCIS for adjustment of status to that

of lawful permanent resident. JA 21, 28-29. This application was denied on September 20, 2006. JA 20-21, 29.

On October 19, 2006, Mr. Ma filed a complaint in the United States District Court for the District of Connecticut, asking that the court order the USCIS to change his status to that of lawful permanent resident. JA 2, 27-31. On October 27, 2006, the district court issued an Order to Show Cause ("OSC") directing the Government to show cause why the relief sought by Plaintiff should not be granted. JA 3, 33.

The Government filed a response to the OSC on December 15, 2006. JA 4, 35-37. In this response, the Government informed the court that the USCIS had adjusted Mr. Ma's status to that of lawful permanent resident on or about December 11, 2006. JA 35. On January 14, 2007, the Government filed a supplemental response to notify the district court that Mr. Ma had received a temporary green card. JA 5, 38-40. The Government noted that, as a result, the case was moot, but that Plaintiff declined to voluntarily dismiss the matter in advance of a telephonic status conference with the district court, set for January 18, 2007. JA 38.

On January 18, 2007, the district court held a status conference with the parties. JA 5. During the conference, Plaintiff's counsel did not contest any of the Government's representations in its responses to the OSC. JA 60. As a result, on January 31, 2007, the court dismissed the case based on the uncontested representations of the Government. JA 5, 42, 60.

**B. Plaintiff's application for attorney's fees**

On February 9, 2007, Plaintiff filed an application for attorney's fees and costs under the EAJA, asking for $21,697 in fees for approximately 80 hours spent drafting and filing the complaint and related documents.[1] JA 5, 17. In support of the motion, Plaintiff argued for the application of the "catalyst theory," under which a plaintiff may be considered a prevailing party for purposes of recovering attorney's fees simply if his lawsuit can be considered to have prompted the Government's voluntary change in its conduct. JA 12-14. The Government opposed the motion, JA 5, 51-57, and on March 20, 2007, the district court entered an order denying Plaintiff's application for fees, JA 5, 59-71.

The district court identified the relevant question as "whether Plaintiff is a 'prevailing party' within the meaning of the [EAJA]." JA 59. "To decide that question," the court noted, "the Court must first determine whether the United States Supreme Court's decision in [*Buckhannon*], and its definition of 'prevailing party,' applies to requests for attorney's fees and costs under EAJA" since "the Second Circuit has not yet definitively ruled on [the question]." JA 59.

After reviewing the factual history of the case, JA 60-61, the court outlined the holding of *Buckhannon*, which addressed the definition of "prevailing party" for purposes of the Americans with Disabilities Act ("ADA"), 42

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[1] In this appeal, Plaintiff reduced the requested amount to $9,510. *See* Appellant's Br. at 19-20.

U.S.C. § 12101 *et seq.*, and the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq*. JA 61-62. The court noted that *Buckhannon* held that a "'party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved a desired result because the lawsuit brought about a voluntary change in the defendant's conduct,'" was not a prevailing party. JA 61-62 (quoting *Buckhannon*, 532 U.S. at 600). The district court also observed that *Buckhannon* "expressly rejected the so-called 'catalyst theory,' under which a plaintiff could obtain attorney's fees and costs if a defendant changed its conduct in response to a lawsuit." JA 62.

The district court noted the expansive nature of the *Buckhannon* holding, observing that "numerous courts, including the Second Circuit, have recognized that the Supreme Court's holding in *Buckhannon* extends well beyond" the ADA and FHAA. JA 62-63. The court explained that "[c]ourts extending *Buckhannon*'s reasoning to other fee-shifting statutes have done so for a number of reasons." JA 63. These reasons include the fact that "the Supreme Court in *Buckhannon* 'expressly signaled its wider application.'" *Id.* (quoting *J.C. v. Regional Sch. Dist. 10*, 278 F.3d 119, 123 (2d Cir. 2002)). In addition, noted the district court, the Supreme Court in *Buckhannon* referenced "an appendix listing over 150 fee-shifting provisions, including the EAJA, and noted that it had 'interpreted these fee-shifting provisions consistently.'" JA 63 (quoting *Buckhannon*, 532 U.S. at 602-03 & n.4 (citing *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985))). The district court was mindful of the Second Circuit's view that *Buckhannon*'s rejection of the catalyst

theory does not necessarily extend categorically to every fee-shifting provision listed in the *Marek* appendix. JA 63 (citing *Union of Needletrades Indus. & Textile Employees, AFL-CIO, CLC ("UNITE") v. INS*, 336 F.3d 200, 207 (2d Cir. 2003)). However, so, too, was the district court instructed by the Second Circuit's statement that "'our cases have acknowledged that the principles that guide our interpretation of certain fee-shifting provisions inform our analysis of other such provisions that use similar language." JA 63-64 (citing *UNITE*, 336 F.3d at 207).

According to the court, a further basis for the broad application of *Buckhannon* is its holding that "the term 'prevailing party' is a 'legal term of art' that has a well established and widely applicable meaning – one that requires an award of some relief by a court." JA 64 (quoting *Buckhannon,* 532 U.S. at 603). And consistent with the Second Circuit's view in *UNITE* that interpretation of certain fee-shifting provisions should be informed by analyses of other similar provisions, the district court regarded as pertinent and informative the Supreme Court's reasoning in *Buckhannon*. JA 64.

Lastly, the court noted that *Buckhannon*'s rejection of "a host of policy rationales advanced in support of the catalyst theory" has been understood "to sweep more broadly than the two statutes at issue in that case." JA 64 (citing *J.C.*, 278 F.3d at 124). For instance, as noted by the district court, the Supreme Court found unpersuasive the policy argument that the catalyst theory was necessary to prevent strategic mooting by defendants. JA 65 (citing *Buckhannon*, 563 U.S. at 608). JA 65. And this was because the policy arguments could not overcome the

"'clear legislative language'" in fee-shifting statutes. *Id.* (quoting *Buckhannon*, 563 U.S. at 610).

The court noted that for all of the reasons it had discussed,"every court of appeals to have considered the issue has held that *Buckhannon*'s definition of 'prevailing party' applies to fee requests under the EAJA." JA 65 (collecting cases). In addition, the district court explained that although the Second Circuit had not expressly considered the question, several of its recent cases suggested that it would likely join the other circuits in applying *Buckhannon* to the EAJA. JA 66. For example, the district court noted that in *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005), the Second Circuit's "extensive discussion" of *Buckhannon* suggested that it "assumed that *Buckhannon* applied to the fee requests under the EAJA." JA 66. *See also* JA 66-67 (describing decisions in *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) and *UNITE*, 336 F.3d at 205, as supporting the application of *Buckhannon* to the EAJA).

With this background, the court stated that it "can see no reason to interpret the term 'prevailing party' under the EAJA any differently from the way in which the Supreme Court construed and applied that term in *Buckhannon*." JA 67. The court explained further:

> It is certainly true that the same words in different statutes may have different meanings if Congress has made that intention clear. But there is no basis in either the language or structure of the EAJA to suggest that the term "prevailing party" as

> used in the EAJA should bear a different meaning than the Supreme Court and the Second Circuit have given that identical term in so many other similar fee-shifting statutes . . . .

JA 68.

The court was unpersuaded by the single contrary decision by a district court, *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897 (E.D. Wis. 2007), which concluded that *Buckhannon* did not apply to the EAJA because the legislative history of the EAJA countenanced the application of the "catalyst theory":

> [W]hile there certainly is some language in the legislative history of the EAJA that points in the direction that the *Kholyavskiy* court suggests, there were similar statements in the legislative history of the fee-shifting statute that the Supreme Court considered in *Buckhannon*. *See Buckhannon*, 532 U.S. at 607 (quoting the Senate Report stating that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*") (emphasis added). Nonetheless, the Supreme Court concluded that "[p]articularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative is *clearly insufficient* to alter the accepted meaning of the statutory term." *Id.* at 608 (emphasis added).

JA 69.

Upon determining that *Buckhannon*'s standards and reasoning apply to Mr. Ma's request for fees and costs under the EAJA, the district court determined that he was ineligible for such recovery "for he did not obtain any 'judicially sanctioned' relief." JA 70. Rather, "the change in the parties' legal relationship was not judicially sanctioned because the Government voluntarily gave Plaintiff precisely what he sought in his lawsuit and the Government did so without any judicial decision, order, or award in Plaintiff's behalf." JA 70-71 (collecting cases reaching same conclusion under similar facts). As a result, the district court denied Plaintiff's motion for attorney's fees and costs under the EAJA.

Plaintiff filed a timely notice of appeal on April 17, 2007. JA 5.

## Summary of Argument

The EAJA authorizes an award of attorney's fees to a "prevailing party," and the Supreme Court's interpretation of that same phrase in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001), applies to limit an award of fees under the EAJA to a party who has obtained a judicially sanctioned change in the legal relationship between the parties. Plaintiff's arguments to the contrary are unavailing for the following reasons: (1) the Supreme Court in *Buckhannon* suggested a broad application of its analysis and holding to federal fee-shifting statutes; (2) this Court presumed the application of *Buckhannon* to the EAJA in *Vacchio v. Ashcroft, supra*, and also has broadly construed *Buckhannon* to apply to multiple fee-shifting statutes

beyond those considered in *Buckhannon*; (3) the Supreme Court in *Buckhannon* considered legislative history resembling that of the EAJA, but concluded that such legislative history was insufficient to justify application of the catalyst theory in the face of plain statutory language requiring "prevailing party" status to recover fees; (4) every circuit court of appeals to consider whether *Buckhannon* applies to the EAJA has concluded that it does; and (5) both the Supreme Court and this Court considered the policy reasons reiterated by Plaintiff in support of the catalyst theory, and found them unpersuasive.

Plaintiff is not a "prevailing party" as defined in *Buckhannon* and its applications by this Court. Plaintiff's case was dismissed as moot because the Government voluntarily and unilaterally provided him with the outcome he sought – adjustment of his status to that of lawful permanent resident. The district court did not order any relief for Plaintiff or otherwise sanction an alteration in the legal relationship between parties. Accordingly, he does not qualify as a "prevailing party," and thereby is not entitled to attorney's fees under the EAJA.

## Argument

### I. Plaintiff is not entitled to recover attorney's fees and costs under the EAJA because he does not qualify as a "prevailing party" as defined by the Supreme Court in *Buckhannon*.

#### A. Governing law and standard of review

"[W]here an appellant's contention on appeal regarding an award of attorneys' fees is that the district court made an error of law . . . the district court's rulings of law are review de novo." *Preservation Coalition*, 356 F.3d at 450 (internal quotations omitted); *see also Vacchio*, 404 F.3d 672 ("[T]he question of whether [plaintiff] prevailed in his action is a legal issue, and we review it *de novo*.").

The EAJA provides, in relevant part as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

In 2001, the Supreme Court handed down its decision in *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., supra*, in which the Court answered in the negative the following question: "whether [the] term ["prevailing party"] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 600. The petitioners in *Buckhannon* sought attorney's fees under the ADA, 42 U.S.C. § 12101 *et seq.*, and the FHAA, 42 U.S.C § 3601 *et seq*. *Id.* at 601. The Court, however, framed the issue to suggest wider applicability. *See id.* at 600 ("Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.'"); *id.* at 602-603 ("Congress, however, has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here, such as the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e-5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. § 1973*l*(e), and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988."). Indeed the Court cited an appendix in an earlier opinion that listed approximately 150 fee-shifting statutes and noted that it had "interpreted these fee-shifting provisions consistently . . . ." *Id.* at 603 & n.4 (citing *Marek*, 473 U.S. at 43-51 (appendix to opinion of Brennan, J., dissenting)).

The Supreme Court in *Buckhannon* rejected the "catalyst theory" as a basis for "prevailing party" status. 532 U.S. at 605. The "'catalyst theory' . . . posits that a plaintiff is a 'prevailing party' if it achieves the desired

result because the lawsuit brought about voluntary change in the defendant's conduct." *Id.* at 601. The Court explained:

> 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. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

*Id.* at 605 (emphasis in original). The Supreme Court rejected the petitioners' arguments that legislative history and policy concerns supported a definition of "prevailing party" broad enough to include the "catalyst theory." *Id.* at 607-10. This was because the term "prevailing party" bears a clear and accepted meaning, *id.* at 607, 610, and neither the "ambiguous" legislative history, *id.* at 608, nor policy arguments were sufficient to overcome the plain statutory language, *id.* at 607, 610.

**B. Discussion**

This case presents the Court with two questions: (1) whether the Supreme Court's decision in *Buckhannon* and its definition of "prevailing party" applies to the EAJA; and (2) if *Buckhannon* does apply to the EAJA, whether Plaintiff is a "prevailing party" entitled to fees where the district court dismissed the lawsuit as moot because the Government voluntarily and unilaterally provided Plaintiff with the relief he sought.

### 1. *Buckhannon* applies to the EAJA.

The Supreme Court's decision in *Buckhannon* regarding the definition of "prevailing party" in fee-shifting statutes applies to the EAJA: (1) the Supreme Court's logic in *Buckhannon* supports a broad and consistent application of "prevailing party" across federal fee-shifting statutes, including the EAJA; (2) this Court contemplated the application of *Buckhannon*'s definition of "prevailing party" to the EAJA in its recent opinion in *Vacchio v. Ashcroft*, *supra*; (3) the legislative history of the EAJA does not provide a basis to distinguish it from the fee-shifting provisions analyzed in *Buckhannon* and in cases in which this Court has extended *Buckhannon* to other fee-shifting provisions; (4) every circuit court of appeals that has addressed the question has held that *Buckhannon* applies to the EAJA; and (5) *Buckhannon* and its progeny have rejected the policy concerns articulated by Plaintiff because they are insufficient to overcome the plain language of fee-shifting provisions such as the EAJA.

#### a. The logic of *Buckhannon* applies to the EAJA.

In *Buckhannon*, the Supreme Court interpreted the phrase "prevailing party" in the context of fee-shifting statutes. Buckhannon Board and Care Home, Inc., one of the petitioners in *Buckhannon,* operated assisted living facilities and was ordered closed by West Virginia authorities because, upon investigation by state authorities, some of the residents were incapable of "self-preservation" as defined and required under West Virginia

law. *Buckhannon*, 532 U.S. at 600. After receiving orders from the State to close the facilities, Buckhannon brought suit in district court against the state defendants, seeking declaratory and injunctive relief that the "self-preservation" requirement ran afoul of the FHAA and ADA. *Id.* at 601. While the case was pending, the West Virginia Legislature eliminated the "self-preservation" requirement, and, upon respondents' motion, the district court dismissed the case as moot. *Id.*

The petitioners sought attorney's fees as "the prevailing party" under the FHAA and the ADA. *Id.* (citing FHAA, 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"); ADA, 42 U.S.C. § 12205 ("[T]he court . . ., in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs")). The request was premised on the "catalyst theory," pursuant to which "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* The district court denied the motion for attorney's fees, and the court of appeals affirmed that decision. *Id.* at 602. On review, the Supreme Court concluded that the catalyst theory was not a valid basis upon which to find that a plaintiff was a "prevailing party." *Id.* at 600, 602-10

The Supreme Court's decision was based primarily on the term Congress chose to determine eligibility for attorney's fees: "prevailing party." *Id.* at 603-04. The Court explicitly characterized the term as "a legal term of art," *id.*, and quoted the definition contained in Black's

Law Dictionary 1145 (7th ed. 1999): "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>. – Also termed *successful party*." *Id.* (emphasis in *Buckhannon*).[2] The Court commented that this understanding of "prevailing party," i.e., as "one who has been awarded some relief by the court," was reflected in prior cases. *Id.* With this understanding from earlier cases, *see id.* at 603-06, the Court explained that the catalyst theory was not an adequate basis for awarding attorney's fees:

> 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. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

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[2] Plaintiff argues that the Supreme Court's reference to Black's Law Dictionary "made clear that its opinion would not preclude awards of attorney fees and costs under statutes enacted for the primary, specific and stated purpose of making such awards available for purposes of encouraging vindication of equitable rights where the denial of such rights by governmental parties was not substantially justified under applicable law." Appellant's Br. at 9. This assertion to the contrary notwithstanding, there is nothing in *Black's Law Dictionary* or *Buckhannon* itself that suggests the legal term of art "prevailing party" should apply differently in different statutes.

*Id.* at 605 (emphasis in original); *see also Sole v. Wyner*, 127 S. Ct. 2188, 2194 (2007) ("'The touchstone of the prevailing party inquiry,' this Court has stated, is 'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.") (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

In reaching this decision the Supreme Court expressly signaled the broad applicability of its decision to other fee-shifting statutes with similar language. *See Buckhannon*, 532 U.S. at 600 ("Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.'"); *id.* at 602-603 ("Congress, however, has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here, [citing statutes]."). Unsurprisingly, therefore, courts of appeals, including this Court, have taken a broad view of the *Buckhannon* decision. *See, e.g., UNITE*, 336 F.3d at 205 ("Our cases acknowledge that *Buckhannon*'s rejection of the catalyst theory extends to more than just the two fee-shifting provisions at issue in that decision. . . . A number of circuits addressing fee-shifting provisions other than those under consideration in *Buckhannon* have taken a similarly broad view of the Court's decision.") (collecting cases); *J.C.*, 278 F.3d at 123 ("*Buckhannon* concerned the fee-shifting provisions of the [ADA] . . ., and the [FHAA], but the decision expressly signaled its wider applicability."). And while this Court has declined to presume "that *Buckhannon*'s rejection of the catalyst theory necessarily extends to each and every fee-shifting provision listed in the *Marek* appendix[,]"*UNITE*, 336 F.3d at 207, it has also "acknowledged that the principles

that guide our interpretation of certain fee-shifting provisions inform our analysis of other such provisions that use similar language[,]" *id.* (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1357 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992)); *see Buckhannon*, 532 U.S. at 603 n.4 (stating that, with respect to the fee-shifting provisions in the *Marek* Appendix, which includes the EAJA, "[w]e have interpreted these fee-shifting provisions consistently . . . .") (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983)).

On that score, this Court has repeatedly recognized that an award of attorney's fees under a provision limiting fees to a prevailing party demands judicial action which "carries with it sufficient judicial imprimatur." *Roberson v. Guiliani*, 346 F.3d 75, 81 (2d Cir. 2003); *see also, e.g.*, *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 101 (2d Cir. 2006) (per curiam) ("In the context of fee-shifting statutes, the Supreme Court has held that, for a party to be 'prevailing,' there must be a 'judicially sanctioned change in the legal relationship of the parties.'") (quoting *Buckhannon*, 532 U.S. at 605).

As with the FHAA and ADA in *Buckhannon*, as well as the statutes to which this Court has applied *Buckhannon*,[3] the EAJA explicitly requires that a party

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[3] *See, e.g., New York State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158 (2d Cir. 2001) (holding that *Buckhannon* applies to 42 U.S.C. § 1988(b), which provides for an award of attorney's fees to a "prevailing party"); *J.C.*, 278 F.3d at 124-25 (applying (continued...)

seeking attorney's fees be a "prevailing party." *See* 28 U.S.C. § 2412(d)(1)(A) ("[A] court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."). Since the EAJA does not define "prevailing party" as it relates to this case,[4] this Court is guided by analysis of similar language in other fee-shifting statutes. *UNITE*, 336 F.3d at 207. And

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[3] (...continued)
*Buckhannon* to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B), and the Rehabilitation Act, 29 U.S.C. § 794a(b), which both allow award of attorney's fees to a "prevailing party").

[4] The EAJA provides a definition of "prevailing party" limited to eminent domain cases:

> (H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government[.]

28 U.S.C. § 2412(d)(2)(H). There is no further definition of "prevailing party," or any suggestion that, except in the eminent domain context, the term should be construed differently in the EAJA than in other fee-shifting provisions.

as Justice Scalia observed in his concurrence in *Buckhannon*, "prevailing party" has long been in circulation in common law, and therefore is "not some newfangled legal term invented for use in late-20th century fee-shifting statutes." *Buckhannon*, 532 U.S. at 610-11 (Scalia, J., concurring). Justice Scalia further explained that

> [w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning. "Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

*Id.* at 615 (Scalia, J., concurring) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) ("'Where Congress uses terms that have accumulated settled meaning . . . under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms . . . .'") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)) (ellipses in *Reid*)).

In sum, *Buckhannon*, as well as this Court's understanding of that decision, supports finding that *Buckhannon*'s definition of "prevailing party," and the exclusion of the "catalyst theory" from that definition, applies to the EAJA. *See J.C.*, 278 F.3d at 123 (observing that the Supreme Court in *Buckhannon*, 532 U.S. at 603 n.4, indicated the broad applicability of the decision by citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which addressed the award of fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, and "held that the standards used to interpret the term 'prevailing party' under any given fee-shifting statute 'are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'") (quoting *Hensley*, 461 U.S. at 433 n.7).

**b. This Court's cases suggest that *Buckhannon* applies to the EAJA.**

As described above, this Court has confirmed the expansive nature of the *Buckhannon* decision. *See, e.g.*, *J.C.*, 278 F.3d at 123; *Dattner*, 458 F.3d at 101 (citing *J.C.* for the proposition that "although *Buckhannon* concerned fee-shifting provisions of [ADA] and [FHAA], standards used to interpret term 'prevailing party' under any given fee-shifting statute are generally the same"); *UNITE*, 336 F.3d at 207 ("[O]ur cases have acknowledged that the principles that guide our interpretation of certain fee-shifting provisions inform our analysis of other such provisions that use similar language."). Consistent with this view, this Court has extended *Buckhannon* to other fee-shifting provisions. *See, e.g., Dattner*, 458 F.3d at 102 (Fed. R. Civ. P. 54); *Preservation Coalition*, 356 F.3d at

452 (National Historic Preservation Act, 16 U.S.C. § 470w-4); *UNITE*, 336 F.3d at 207 (Freedom of Information Act, 5 U.S.C. § 552); *J.C.*, 278 F.3d at 125 (Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(3)(B) and the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b)); *New York Fed'n of Taxi Drivers v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158 (2d Cir. 2001) (42 U.S.C. § 1988); *See also United States v. Khan*, No. 05-6522-cv, 2007 WL 2283505, at *3 n.7 (2d Cir. Aug. 10, 2007) (indicating inclination to apply *Buckhannon* to the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 117 Stat. 202).

Of particular relevance to this case, in *Vacchio*, this Court appeared to presume that *Buckhannon* applied to the EAJA. In that case, the Court considered, *inter alia*, whether the petitioner was a "prevailing party" under the EAJA. 404 F.3d at 672-74. Although the Court did not expressly decide whether *Buckhannon*'s definition of "prevailing party" applied to the EAJA – it is unclear if this issue was even contested in the case – the Court discussed *Buckhannon* extensively and effectively assumed that that decision and its progeny governed the analysis. Specifically, the Court explicitly drew upon *Buckhannon* and *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997), to determine whether the disposition of Vacchio's habeas petition (which included an order by this Court on appeal granting Vacchio's motion to be released on bail pending appeal), rendered Vacchio a "prevailing party." *Vacchio*, 404 F.3d at 672-74. The Court noted that under *Buckhannon*, "'status as a prevailing party is conferred whenever there is a "court ordered chang[e] [in] the legal

relationship between [the plaintiff] and the defendant" or a "material alteration of the legal relationship of the parties."'" *Id.* at 674 (quoting *Preservation Coalition*, 356 F.3d at 452) (quoting *Buckhannon*, 532 U.S. at 604)). Further, the Court's conclusion that Vacchio was a "prevailing party" rested on the dictates of *Buckhannon*:

> The case before us presents anything but a "voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 600. The Government sought to keep Vacchio in detention during the pendency of the appeal, and succeeded in doing so until the Court of Appeals ordered him released on bail. That ruling by this Court, which . . . involved an assessment of the merits, unquestionably materially altered the existing legal relationship between the parties, and thus sufficed to confer prevailing party status.

*Id.*

Numerous district courts in the Second Circuit have held (consistent with the district court in this case) that *Buckhannon* applies to the EAJA, based on this Court's repeated application of *Buckhannon* to other fee-shifting statutes, as well as this Court's acknowledgment that "standards used to interpret [the] term 'prevailing party' under any given fee-shifting statute are generally the same." *Dattner*, 458 F.3d at 101 (citing *J.C.*, 278 F.3d at 123). *See, e.g.*, *McKay v. Barnhart*, 327 F. Supp. 2d 263, 266-67 (S.D.N.Y. 2004)*; Edwards ex rel. Edwards v. Barnhart*, 238 F. Supp. 2d 645, 656 (S.D.N.Y. 2003)

("District courts within this Circuit have expressly applied *Buckhannon* to the EAJA . . . .").

Plaintiff, nevertheless, insists that the EAJA is unique among fee-shifting vehicles and should be broadly construed to embrace the "catalyst theory" because it is a fee-shifting *statute*, rather than merely an ancillary fees provision. Appellant's Br. at 11-13. This argument is misguided. This Court recently expressed its view that the text and legislative history of the EAJA suggest that the EAJA applies only in the absence of other fee-shifting vehicles. *Khan*, 2007 WL 2283505, at *5; *see id.* at *5 n.9 ("[T]his section is not intended to replace or supercede any existing fee-shifting statutes . . . or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.") (quoting H.R. Rep. No. 96-1418, at 18 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4983, 4997). The EAJA, in other words, merely acts as a default avenue to recover attorney's fees and costs from the Government where Congress has provided no alternative fee-shifting statute. *See* 28 U.S.C. § 2412(d)(1)(A) ("Except as otherwise specifically provided by statute . . . ."). The EAJA's status as a supplemental fee statute supports a construction of "prevailing party" that is consistent with the definition used in other fee-shifting provisions.

Additionally, the purpose of the EAJA is not at all unique, despite Plaintiff's claims to the contrary. For example, 42 U.S.C. § 1988 has an almost identical purpose: "The purpose and effect of [this law] are simple – it is designed to allow courts to provide the familiar

remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." S. Rep. 94-1011, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909-10. That statute, like the EAJA, recognized that the costs of litigation may deter potential claimants, and attempted to remove this obstacle. *Id.* at 5910. Nevertheless, this Court has upheld the rejection of a catalyst theory for awards under § 1988. *New York State Fed'n of Taxi Drivers*, 272 F.3d at 158. Thus, the nearly identical purpose of the EAJA offers none of the support for the "catalyst theory" that Plaintiff claims.

Furthermore, as this Court appears to have presumed that *Buckhannon* extends to the EAJA, *see Vacchio*, 404 F.3d at 672-74, and because the Court has expressed its preference in *Dattner*, *UNITE*, and *J.C.* to apply consistent interpretations of "prevailing party," this Court should hold that *Buckhannon* applies to the EAJA.

**c. The legislative history of the EAJA does not place the EAJA beyond the reach of *Buckhannon*.**

Despite the clear indications that *Buckhannon* is to be broadly applied, as well as this Court's implicit understanding in *Vacchio* that *Buckhannon* applies to the EAJA, Plaintiff argues that *Buckhannon* should not apply to the EAJA. He posits that the legislative history of the EAJA sets it apart from the statutes considered in *Buckhannon*. Appellant's Br. at 9-12. Plaintiff's contention is unpersuasive. First, like other fee-shifting provisions, the statutory terms of the EAJA expressly require "prevailing party" status, thereby tying an award

of attorney's fees to a legal term of art the Supreme Court has held precludes an award based on a "catalyst theory." There is nothing in the language of the EAJA to suggest that it should be construed differently from other fee-shifting provisions containing that term.

Second, Plaintiff reads too much into the legislative history. Plaintiff acknowledges that the Supreme Court in *Buckhannon* contemplated the legislative history of § 1988, which resembles that of the EAJA, and found it insufficient to overcome the clear statutory mandate that a party be a "prevailing party" to qualify for attorney's fees. Appellant's Br. at 10; *see Buckhannon*, 532 U.S. at 607-608 ("We think the legislative history cited by petitioners is at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees. Particularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term.") (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994)). Nevertheless, Plaintiff contends that the Supreme Court's view of legislative history in *Buckhannon* was "provisional" insofar as the Court's analysis was informed by the "American Rule" that attorney's fees "will not be awarded absent 'explicit statutory authority.'" Appellant's Br. at 10 (quoting *Buckhannon*, 532 U.S. at 608).

It appears that Plaintiff misunderstands the significance of the quoted language from *Buckhannon*. The quoted language indicates that in the absence of a fee-shifting statute by Congress, such as the EAJA, the "American Rule" would require parties to bear their own litigation

costs. *See Buckhannon*, 532 U.S. at 602 ("In the United States, parties are ordinarily required to bear their own attorney's fees – the prevailing party is not entitled to collect from the loser.") (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)). Congress chose to make attorney's fees available to "prevailing parties" under the EAJA. 28 U.S.C. § 2412(d)(1)(A). Congress did not, however, express in the statute its intention to use that term differently than in other fee-shifting provisions. The district court noted this and explained the significance:

> It is certainly true that the same words in different statutes may have different meanings if Congress has made that intention clear. But there is no basis in either the language or structure of the EAJA to suggest that the term "prevailing party" as used in the EAJA should bear a different meaning than the Supreme Court and the Second Circuit have given that identical term in so many other similar fee-shifting statutes**.**

JA 68. Despite the fact that the EAJA contains no indication that "prevailing party" should bear a different meaning than the use of that term in other fee-shifting provisions, Plaintiff nonetheless argues that the legislative history of the EAJA overrides this absence, and thereby supports his argument. Appellant's Br. at 12-13. The Court should reject Plaintiff's assertion.

Plaintiff offers no excerpts from the legislative history of the EAJA demonstrating that Congress intended "prevailing party" to be construed more broadly or

differently in the EAJA than in other fee-shifting statutes featuring that term. The passages he cites merely illustrate that Congress intended only "prevailing parties" to recover EAJA fees. For example, Plaintiff quotes the following legislative history in support of his view that the EAJA was to operate differently from other fee-shifting statutes, such as the FHAA and the ADA: "The purpose of the [EAJA] bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified." Appellant's Br. at 11 (quoting H.R. Rep. No. 96-1418) (1980) (alteration in Appellant's Br.). He also quotes the following excerpt from the legislative history, presumably to assert that access to EAJA fees should be more liberal than for other fee-shifting provisions: "The purpose of the Equal Access to Justice Act is to ensure that the cost of litigation does not prevent individuals and businesses who have been the targets of unjustified government action from opposing that action in court." Appellant's Br. at 12 (quoting H.R. Rep. No. 99-120(I) (1985)). Neither of these snippets of legislative history evidences either Congress's intent to define "prevailing party" differently in the EAJA than in other fee-shifting provisions, or its intent to include the "catalyst theory" in the application of the EAJA.

Similarly unhelpful is the legislative history quoted in the "Prefatory Note" of Plaintiff's brief: "The phrase 'prevailing party' should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case." Appellant's Br. at 1

(quoting H.R. Rep. No. 96-1418). Plaintiff does not again reference this language in his brief. This is understandable, for the Supreme Court in *Buckhannon* was not swayed by the following, nearly identical, legislative history of § 1988: "'The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits.'" *Buckhannon*, 532 U.S. at 607 (quoting H.R. Rep. No. 94-1558, p.7 (1976)). The Court regarded this language as "at best ambiguous as to the availability of the 'catalyst theory' for awarding attorney's fees. Particularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term." *Id*. at 608 (citing *Key Tronic*, 611 U.S. at 819).

Finally, Plaintiff further argues that the legislative history of the re-authorization of the EAJA concerning "reasonable behavior" by an agency and the Government's lawyers supports the "catalyst theory." Appellant's Br. at 16-19. This argument is based on a misreading of the House Report. Plaintiff cites the House Report comment that "the amendment will make clear that the congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation." H.R. Rep. 99-120(I) *reprinted in* 1985 U.S.C.C.A.N. 132, 140. This comment was addressed to the "substantially justified" prong of the EAJA, clarifying that an unjustified agency position could not be remedied by reasonable behavior during litigation. The comment had nothing to do with the definition of a

"prevailing party," and Plaintiff's attempt to cast this language in such a light should be rejected.

As the foregoing discussion shows, the EAJA contains no unique features, whether in the statute or the legislative history, that distinguishes it from the fee-shifting provisions in *Buckhannon* and the many fee-shifting provisions to which *Buckhannon* has been extended.

**d. Every court of appeals presented with this question has applied *Buckhannon* to the EAJA.**

All seven courts of appeals that have addressed this question have applied *Buckhannon* to the EAJA. *See Goldstein*, 445 F.3d at 751; *Marshall*, 444 F.3d at 840; *Morillo-Cedron*, 452 F.3d at 1257-58; *Thomas*, 330 F.3d at 492 n.1; *Brickwood Contractors, Inc.*, 288 F.3d at 1377-79; *Perez-Arellano*, 279 F.3d at 794; *see also Scherer*, 88 F. App'x at 320 n.5.

These courts performed similar analysis to the district court in this case. For example, the Fourth Circuit based its holding that *Buckhannon* applies to the EAJA on the fact that "the EAJA shares the 'prevailing party' language with the statute at issue in *Buckhannon*." *Goldstein*, 445 F.3d at 751. The D.C. Circuit followed *Buckhannon*'s analysis of the term "prevailing party," finding it a legal term of art, and noted that the Supreme Court "establish[ed] a framework for construing and applying the 'prevailing party' requirement more broadly." *Thomas*, 330 F.3d at 493. The Ninth Circuit emphasized the consistent interpretation of fee-shifting statutes.

*Perez-Arellano*, 279 F.3d at 794. The Federal Circuit rejected the legislative history arguments raised here by Plaintiff. *Brickwood*, 288 F.3d at 1378 ("Our examination of the text and the legislative history of the EAJA leads us to conclude that there is no basis for distinguishing the term 'prevailing party' in the EAJA from other fee-shifting statutes."). Finally, as the district court noted, "the Eleventh Circuit recently held that *Buckhannon* applied to an EAJA request for attorney's fees in the context of a lawsuit that was virtually identical to Plaintiff's case here." JA 65 (citing *Morillo-Cedron*, 452 F.3d at 1257-58).

Against this backdrop, the district court's opinion in *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897 (E.D. Wis. 2007) holding that *Buckhannon* does not apply to the EAJA is unpersuasive. The court in *Kholyavskiy* focused on legislative history of the EAJA, *id.* at 903-04, that is similar to the legislative history of § 1988 and FOIA, for example. The Supreme Court and this Court found such language insufficient to preserve the "catalyst theory" within the meaning of "prevailing party." In other words, *Kholyavskiy* offers no reason to depart from the conclusion by seven circuit courts of appeals that *Buckhannon* applies to the EAJA.

**e. The policy concerns raised by Plaintiff have been rejected by both the Supreme Court and this Court.**

Finally, Plaintiff argues that policy considerations counsel, contrary to *Buckhannon*, retention of the "catalyst theory" in the EAJA's use of the term "prevailing party." Appellant's Br. at 16-19. More specifically, Plaintiff insists that the possibility of tactical mooting by defendants is of sufficient concern to justify rejection of *Buckhannon*. The Supreme Court in *Buckhannon* considered a range of policy arguments, 532 U.S. at 608-10, including the one presented by Plaintiff, but declined to express a position on their strength, "[g]iven the clear meaning of 'prevailing party' in the fee-shifting statutes," *id.* at 610. The Supreme Court, however, expressed skepticism about the validity of this argument, noting that it was "speculative and unsupported by any empirical evidence." *Id.* at 608.

A similar argument was made to and rejected by this Court in *UNITE*:

> The petitioners in *Buckhannon* advanced a similar argument, contending that in the absence of the catalyst theory, defendants seeking to avoid an award of attorney's fees would be able to do so by unilaterally mooting an action just prior to judgment. *See Buckhannon*, 532 U.S. at 608. The Court rejected the petitioner's claim, noting that it was "entirely speculative and unsupported by any empirical evidence." *Id.* We agree and find UNITE's argument on this front unavailing. We

> would add that this is a policy argument best addressed to Congress.

336 F.3d at 211.

Plaintiff's policy arguments are unpersuasive, and do not provide a basis to place the EAJA outside the reach of *Buckhannon* and its progeny in this circuit. For this reason, as well as those discussed above, this Court should conclude that *Buckhannon* applies to the EAJA.

**2. Plaintiff is not a prevailing party as defined in *Buckhannon*.**

Mr. Ma does not qualify as a "prevailing party" entitled to attorney's fees under the EAJA. As discussed above, to qualify as a "prevailing party" there must have been a "court ordered change in the legal relationship between the plaintiff and the defendant or a material alteration of the legal relationship of the parties." *Preservation Coalition*, 356 F.3d at 452 (internal quotations and alterations omitted). Plaintiff claims that the Order to Show Cause issued by the district court in this case constituted a judicially sanctioned change in the legal relationship of the parties. This argument is baseless, and this Court should reject it.

Following *Buckhannon*, this Court has consistently held that for a plaintiff to be a prevailing party, there must be a court-ordered change in the legal relationship between the parties or a material alteration of the *legal* relationship of the parties. *See Vacchio*, 404 F.3d at 674; *Preservation Coalition*, 356 F.3d at 452; *see also UNITE*, 336 F.3d at

207 ("*Buckhannon* precludes a fee award to a FOIA plaintiff whose 'lawsuit did not result in a judicially sanctioned change in the legal relationship of the parties.'") (quoting *New York State Fed'n of Taxi Drivers, Inc.*, 272 F.3d at 158-59).

The *Vacchio* Court observed that the question of whether a plaintiff "has 'prevailed' turns on the accurate characterization of the claim upon which he sought to prevail." *Vacchio*, 404 F.3d at 672. Here, the crux of Plaintiff's goal in initiating litigation was to "[c]ompel Defendants. . . to grant the Application to Register Permanent Residence or Adjust Status owed to Plaintiff[.]" JA 30. On or about December 11, 2006, without prompting by the court, the Government adjusted Plaintiff's status to that of lawful permanent resident. JA 35. The district court accordingly dismissed the case as moot, JA 5, and subsequently denied Plaintiff's status as a "prevailing party" under *Buckhannon*, as "the change in the parties' legal relationship was not judicially sanctioned because the Government voluntarily gave Plaintiff precisely what he sought in his lawsuit and the Government did so without any judicial decision, order, or award in Plaintiff's behalf." JA 70-71.

Plaintiff attempts to characterize the Order to Show Cause, JA 33, as a judicial action that "materially altered, at least overall, the legal relationship of the parties, because it required Appellees to justify their previous denial of Appellant's status, or else attempt to tactically moot the case . . . ." Appellant's Br. at 15. This attempt fails. The Order essentially set a briefing deadline for the Government to respond to the allegations in the

Complaint. The court did not order the Government to provide Plaintiff with any relief. In fact, other than issuing the Order to Show Cause, the district court's involvement in this matter consisted of a telephonic status conference on January 18, 2007, JA 4, dismissal of the case as moot, JA 5, and a ruling denying Plaintiff's motion for attorney's fees, *id.* No relief was provided by the court.

Although Plaintiff ultimately obtained the relief that he wanted, because that relief came through the voluntary actions of the Government and not as the result of a judicial order, Plaintiff's claim of entitlement to attorney's fees under the EAJA is based on the "catalyst theory" rejected in *Buckhannon*. 532 U.S. at 605 ("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."). For that reason, and because Plaintiff's lawsuit "did not result in a judicially sanctioned change in the legal relationship of the parties," *New York State Fed'n of Taxi Drivers*, 272 F.3d at 158-59, he was not entitled to attorney's fees and costs under the EAJA.

## Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed in all respects.

Dated: September 19, 2007

Respectfully submitted,

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9016 words, exclusive of the Table of Contents, the Table of Authorities, and this Certification.

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ASSISTANT U.S. ATTORNEY

# ADDENDUM

**28 U.S.C. § 2412. Costs and fees**

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.