IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al*.,	)	
Plaintiffs,	)	
vs.	)	**No. 08 CV 3697**
	)	**Judge Milton I. Shadur**
THE CITY OF CHICAGO,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW CONTESTING PLAINTIFFS' STATUS AS PREVAILING PARTIES ENTITLED TO ATTORNEYS' FEES

Defendant City of Chicago ("Defendant" or the "City"), by its attorney, Mara S. Georges, Corporation Counsel for the City of Chicago, respectfully submits this memorandum in support of its position that Plaintiffs the National Rifle Association of America, Inc. ("NRA"), Kathleen Tyler ("Tyler"), Van F. Welton ("Welton"), and Brett Benson ("Benson") (collectively, "Plaintiffs") are not prevailing parties entitled to attorneys' fees under 42 U.S.C. § 1988(b) in this matter.

INTRODUCTION

Plaintiffs' request for attorneys' fees in this case is a novel one: they seek an award of fees as "prevailing parties" without having actually received judgment or court ordered relief in their favor on any one of their claims. The single favorable ruling Plaintiffs received was a determination of a *preliminary* legal issue (albeit from the Supreme Court) that was never applied to any of their claims. That ruling resulted solely in an order vacating the Seventh Circuit's judgment, and remanding for further proceedings. As discussed fully below, this measure of "success" falls far short of the standard necessary to confer prevailing party status. Plaintiffs' request for prevailing party status, and their corresponding request for an award of fees, should be denied.

FACTUAL BACKGROUND

Plaintiffs filed this lawsuit, together with *National Rifle Association v. Village of Oak Park*, Case No. 08-cv-3696, one day after the Supreme Court held that the Second Amendment conferred an individual right to keep and bear arms in the home for purposes of self-defense. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). Although originally assigned to different judges, this Court reassigned both of the *NRA* cases to its docket as related to the already pending case of *McDonald v. City of Chicago*, Case No. 08-cv-3645, filed the very same day that *Heller* was decided.

Plaintiffs alleged that several provisions of the City's Municipal Code regulating the ownership and possession of firearms (the "Ordinance") violated the Second Amendment, as incorporated against the states via the Fourteenth Amendment. *See* Plfs' Comp., docket entry # 1. Plaintiffs brought three Counts: (1) Count I, challenging provisions of the Ordinance that prohibited registration (and thereby possession) of any handgun within the City limits; (2) Count II, alleging an equal protection claim based on the prohibition of handgun possession except for certain exempt categories of persons; and (3) Count III, alleging that the City's handgun ban violated federal law, 18 U.S.C. § 926A, which permits persons to carry and transport firearms under certain circumstances. For each of these claims, Plaintiffs sought a declaration that the Ordinance's provisions were null and void and sought injunctive relief prohibiting the City from enforcing those provisions and allowing Plaintiffs to register and possess handguns. *Id*.

The Court noted that the threshold question of whether the Second Amendment was incorporated against the states via the Fourteenth Amendment should be decided as a preliminary issue, since the answer would impact the legal standards governing the Ordinance's constitutionality. Accordingly, Plaintiffs in all three cases filed briefs in support of incorporation. *See, e.g,* docket entry # 22. Before any of the defendants filed a response, however, this Court issued an opinion holding that Supreme Court

precedent required it to find that the Second Amendment was not incorporated. *See* December 4, 2008 Mem. Opinion and Order, docket entry # 26. On December 18, 2008, Defendant was granted judgment on the pleadings on Counts I and II and, by stipulation of the parties, Count III of Plaintiffs' Complaint was dismissed with prejudice. Docket entry #s 38 and 39.

Plaintiffs in all three cases appealed this Court's order to the Seventh Circuit, where the appeals were consolidated. The Seventh Circuit affirmed, finding that it was also bound by Supreme Court precedent to rule against incorporation. *See National Rifle Association of America v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009). The *NRA* and *McDonald* plaintiffs then filed separate petitions for writs of certiorari in the Supreme Court. The Supreme Court granted the petition filed in *McDonald,* but did not act upon the writ filed by the NRA plaintiffs. On June 28, 2010, the Supreme Court issued its opinion holding that the Fourteenth Amendment incorporates the Second Amendment, reversing the decision of the Seventh Circuit and remanding for further proceedings. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010). On the same day, the Supreme Court granted the NRA's petition for writ of certiorari and remanded the case to the Seventh Circuit. *See* June 29 Order, attached as Exhibit A.

On July 2, the City repealed the Ordinance and enacted a new firearm ordinance (the "Responsible Gun Owners Ordinance"), which allows for possession of handguns within the home but places certain restrictions on ownership and possession of firearms. *See* Chicago Mun. Code § 8-20-020 *et seq*. Oak Park repealed its handgun ordinance on July 19. In light of the repeals, the Seventh Circuit issued an order vacating the district court's judgment in all three cases and remanding with instructions to dismiss as moot. *See* August 25 Order, attached as Exhibit B. The order further stated that "[w]e do not express any opinion on the question whether the repealers [sic], enacted before the Supreme Court's decision could be implemented on remand, affect the availability of fees under the approach of

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001)." *Id.*

On October 12, this Court dismissed all three cases as moot. The *NRA* Plaintiffs filed a motion for attorneys' fees under 42 U.S.C. § 1988, and the Court and the parties agreed that it would be most efficient to first resolve the issue of whether Plaintiffs qualified as prevailing parties. Accordingly, the City submits this memorandum of law explaining why, under Supreme Court and Seventh Circuit precedent, Plaintiffs do not qualify as prevailing parties.

ARGUMENT

I. Legal Standard For Attorneys' Fees Under 28 U.S. C. § 1988.

42 U.S.C. § 1988(b) authorizes district courts to allow the "prevailing party" in civil rights litigation its "reasonable attorney's fee as part of the costs." *See, e.g.*, *Federation of Advertising Indus. Reps., Inc v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003); *Hastert v. Illinois State Bd. Of Elections*, 28 F.3d 1430, 1439 (7th Cir. 1994). Status as a prevailing party is a threshold determination under Section 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). While a plaintiff need not be successful on all of his claims to qualify as a prevailing party, he must, at a minimum, have obtained "some relief on the merits of his claims." *Ferrar v. Hobby*, 506 U.S. 103, 112 (1992); *see also Buckhannon,* 532 U.S. at 605 (2001) (prevailing party must have achieved "a judicially sanctioned change in the legal relationship of the parties."); *Zessar v. Keith*, 536 F.3d 788, 795 (7th Cir. 2008) (party considered prevailing when court enters final judgment in its favor on some portion of merits of claims).[1]

[1]Even where a party is deemed a "prevailing party,"he is not necessarily entitled to fees-- a technical victory may be so insignificant that an award of fees would be unreasonable. *See Farrar*, 506 U.S. at 114-15. Because this memorandum addresses Plaintiffs' status as prevailing parties only, Defendant will make, if necessary, other arguments regarding the propriety of awarding any fees at a later date.

In *Buckhannon,* the Supreme Court rejected the "catalyst theory,"(followed by the Seventh Circuit and most other circuit courts), which had held that a plaintiff is a prevailing party if the lawsuit achieved the desired result through a voluntary change in the defendant's conduct. 532 U.S. at 605. There, plaintiff operated an assisted living facility that the state shut down because its residents failed the state "self-preservation" requirement. Plaintiffs sought a declaratory judgment that the self-preservation requirement violated federal law. *Id*. at 601-02. The state legislature then repealed the requirement, and the case was dismissed as moot. *Id*. Plaintiffs sought attorneys' fees, arguing that the lawsuit had achieved their desired result because of the state's repeal of the requirement, but the Supreme Court held that the catalyst theory was not a permissible basis for an award of attorneys' fees. *Id*.

The Court first emphasized that to be a prevailing party, a litigant must have obtained "an enforceable judgment on the merits," a "court-ordered consent decree[s]," or "some other judicially sanctioned material alteration of the legal relationship of the parties." *Id*. at 604-05. *See also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792 (1989) ("plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."). The Court held that the alteration of the relationship "requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id*. at 603. The Court then concluded that voluntary change in conduct, such as repealing an ordinance before a ruling on its constitutionality, "lacks the necessary judicial *imprimatur* on the change" to confer prevailing party status. *Id*.

II. Plaintiffs Were Not Parties To *McDonald v. City of Chicago*.

As an initial matter, Plaintiffs should not be considered "parties" to the *McDonald* case for purposes of attorneys' fees. The cases were brought separately by different plaintiffs. The *NRA* plaintiffs fought hard to distance themselves from *McDonald*, and strongly opposed reassignment of their cases

to this Court. *See, e.g., McDonald,* Case No. 08-3645, docket entry # 39. After the Court issued its ruling on incorporation, the Seventh Circuit consolidated all three appeals into one proceeding to determine the identical legal issue, but it did not consolidate *the cases*. *See NRA,* 567 F.3d at 856. Continuing to distance themselves from each other, the *McDonald* and *NRA* plaintiffs then filed separate petitions for writ of certiorari. The Supreme Court granted the *McDonald* plaintiffs' petition, and then, only after it issued its decision, did it separately grant the *NRA* plaintiffs' petition and remand the case. *See* Ex. A.

Certainly, according to its own operating procedures, the Supreme Court considered the *NRA* plaintiffs parties to *McDonald*. *See* Sp. Ct. Rule 12(6) ("[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court."). In such cases, any party for whom certiorari was not granted is automatically assigned the role of "respondent," and allowed to file a brief. *Id*. As a party-respondent under the Supreme Court's operating rule, the *NRA* plaintiffs filed their own separate brief with the Court. (They were also permitted oral argument, but only after moving for leave, and not as a matter of right). But the Supreme Court's procedural rule designating them as parties should not confer substantive rights, such as entitlement to attorneys' fees as the prevailing party under an entirely unrelated federal statute. Indeed, Defendant found no cases holding that a "party" for purposes of filing designations in the Supreme Court equates to a "party" for purposes of fee awards under 42 U.S.C. § 1988. Therefore, Plaintiffs should not be considered parties entitled to recover any fees. *See, e.g*., *Federation,* 326 F.3d at 933 (denying award of attorneys' fees where City amended ordinance after Supreme Court decision in which neither City nor plaintiff was party).

III. Plaintiffs Do Not Satisfy The Test For "Prevailing Party" Status.

Even if Plaintiffs could be considered parties to the *McDonald* decision, they do not qualify as "prevailing" parties under Supreme Court or Seventh Circuit precedent. While *McDonald* determined

an important legal issue, it was not a judgment on the merits of any of Plaintiffs' claims, nor did it materially alter the legal relationship between Plaintiffs and the City.[2]

A. *McDonald* Is Not A Judgment On The Merits Of Plaintiffs' Claims.

Without question, *McDonald* was a significant ruling on an important constitutional issue. Governments, individuals, and the courts will be testing and analyzing countless state and municipal firearm regulations to determine their compatibility with the Second Amendment. The *future* implications of incorporation, however, do not transform Plaintiffs into prevailing parties in *this case*.

First and foremost, Plaintiffs have not obtained a judgment on the merits of any of their claims. Plaintiffs sought declaratory and injunctive relief prohibiting enforcement of the City's handgun Ordinance, alleging that it violated the Second Amendment, the equal protection clause of the Fourteenth Amendment, and 18 U.S.C. § 926A. Neither this Court, the Seventh Circuit, nor the Supreme Court decided or issued judgment for Plaintiffs on any one of these claims. This Court, following Supreme Court precedent, decided the interim legal issue of incorporation against Plaintiffs, and the Seventh Circuit affirmed. The Supreme Court reversed, holding that the Second Amendment applies to the states via the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3021. It did not, however, invalidate the City's Ordinance under the Second Amendment. It did not decide Plaintiffs' equal protection claim. In short, it did not prohibit the City from enforcing the Ordinance, or otherwise direct the City to do, or refrain from doing, anything. Rather, it reversed and vacated the Seventh Circuit's order, and remanded the case for further proceedings.[3]

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[2]Because there is no settlement or consent decree at issue in this case, that factor recognized in *Buckhannon* and subsequent Seventh Circuit decisions is not applicable.

[3] The fact that the Supreme Court ordered costs in favor of Plaintiffs is immaterial; under Supreme Court Rule 43.2, costs are automatically assessed in favor of the petitioner or appellant in cases

Because both the City and Oak Park voluntarily repealed their ordinances before the Supreme Court's ruling was applied to any of Plaintiffs' claims, the cases were dismissed as moot. The City could have chosen, however, to defend the Ordinance, and the parties would have continued to litigate Plaintiffs' claims to a final resolution. While Plaintiffs suggest that, under *Heller* and *McDonald*, there was no longer any viable way to defend the handgun ban, the actual outcome of Plaintiffs' claims will forever be unknown. The City is a uniquely-situated municipality, its Ordinance was not identical to the ordinance at issue in *Heller*, and there are ways the City could have defended the Ordinance and perhaps prevailed. But the important point is not whether the City had arguments to make but, rather, that it *could* have made them if it chose. The incorporation ruling was merely an interim pronouncement of a *standard of law* that left open a determination of the City's liability. There simply was no judgment on the merits.[4] *See, e.g.*, *Hanrahan v. Hampton*, 446 U.S. 754, 758-59 (1980) (where appellate order reversed directed verdict for defendant and remanded for new trial, plaintiff had not "prevailed" since jury could ultimately decide some or all issues in defendant's favor); *Richardson v. Penfold,* 900 F.2d 116, 119 (7th Cir. 1990) (request for fees denied where plaintiff succeeded in getting summary judgment against him reversed: plaintiff still had to prove case, and had not obtained any substantive relief).

In *Walker v. Calumet City,* 565 F.3d 1031 (7th Cir. 2009), the Seventh Circuit explained what constitutes a "judgment on the merits" for fee purposes. The plaintiff had brought a class action challenging the constitutionality of certain city property code provisions. *Id*. at 1033. While her claim

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where the judgment is reversed or vacated.

[4] Indeed, plaintiffs could not have brought a case simply to determine whether the Second Amendment was incorporated. That issue is not a cause of action with a specific claim of injury that can be redressed by the courts; thus, there would be no Article III case or controversy. *See, e.g.*, *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir.2003).

was pending, the City inspected her property and, after some repairs were made, declared the property in compliance. *Id*. The city sought dismissal of the case as moot and the court agreed, but included in its dismissal order the city's representations that it would not enforce the code provisions against plaintiff. *Id*. The district court awarded plaintiff her fees but the Seventh Circuit reversed, finding that, because the district court had not held the ordinance unconstitutional, it had not issued a "judgment on the merits of her claim." *Id*. at 1036 ("the district court never addressed the merits of Walker's suit."). Likewise, no court in this case ruled that the City's Ordinance was unconstitutional. *See also Federation,* 326 F.3d at 930-33 (denying attorneys' fees where city repealed ordinance before any ruling or judgment on its constitutionality); *Covenant Media of Ill. v. City of Des Plaines,* 2009 WL 2391851, *3-4 (N.D. Ill. July 31, 2009) (attached as Exhibit C) (where plaintiff succeeded on preliminary injunction causing defendant to amend ordinance, plaintiff not prevailing party: "[t]hat [plaintiff] might benefit from the [amendment], should it in the future actually make and complete an application for a sign, is insufficient to distinguish it from any other non-party potential beneficiary of [plaintiff's] endeavor.").

And while fees were ultimately awarded in *Palmetto Properties*, *Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004), that case actually illustrates the requirement for a substantive judgment. There, the plaintiffs sued the county claiming that a local ordinance violated the First Amendment by restricting locations for adult-entertainment clubs. *Id*. at 544. The district court granted partial summary judgment for the plaintiffs, declaring a part of the challenged ordinance unconstitutional. *Id*. After summary judgment was decided, but before final judgment entered, the county offered to repeal the unconstitutional portions of the ordinance. The court continued the case to allow the county time to repeal the ordinance, and then dismissed the case as moot. *Id*. at 546.

Following dismissal, the district court awarded plaintiff attorneys' fees, and the Seventh Circuit affirmed. Even though there was no final judgment, the court explained that it would defy logic "to hold that simply because the district court abstained from entering a final order formally closing the case [based on Defendant's representations], Palmetto somehow did not obtain a "judicially sanctioned change" in the parties' legal relationship.... ." Thus, the court refused to deny plaintiff prevailing party status merely because of a technicality: no *final* order had been entered. But the court emphasized that the district court had made "a substantive determination as to essentially all the constitutional claims save one" in its summary judgment order. *Id*. at 549-550. Accordingly, unlike here, *Palmetto* involved substantive rulings in the plaintiffs' favor on almost all of its claims, not just an antecedent legal issue in the case. *See also Zessar,* 536 F.3d at 795-97 (reversing district court's award of fees to plaintiff who obtained summary judgment granting future injunctive relief; state repealed ordinance before final judgment entered and thus claims were moot and judgment vacated).

Whatever success Plaintiffs achieved in the Supreme Court, they did not obtain a judgment on the merits. *McDonald* determined that the Second Amendment is incorporated against the states – an interim legal ruling on a standard of constitutional law that was never actually applied to any of Plaintiffs' specific claims. Therefore, Plaintiffs cannot satisfy this requirement under *Buckhannon*.

B. McDonald Did Not Materially Alter The Legal Relationship Between The Parties.

Falling short of a "judgment on the merits," Plaintiffs are left to show that the *McDonald* decision is an otherwise sufficient "judicial *imprimatur*" on their case to qualify them as prevailing parties. This they also cannot do.

Buckhannon recognized that there could be instances – other than a judgment on the merits or a consent decree – constituting a judicial *imprimatur* that renders a party as "prevailing." But merely

obtaining a favorable, isolated ruling on a point of law is not enough. Rather, the judicial relief must directly and materially alter the legal relationship of the parties. *See, e.g., Buckhannon*, 532 U.S. at 604; *Farrar*, 506 U.S. at 111 (plaintiff prevails only when relief on merits of claim "modif[ies] the defendant's behavior in a way that directly benefits the plaintiff."); *Petersen v. Gibson*, 372 F.3d 862, 865 (7th Cir. 2004) (plaintiff must obtain formal judicial relief, not merely 'success,' to be deemed prevailing party), quoting *Crabill v. Trans Union*, 259 F.3d 662, 667 (7th Cir. 2001); *see also Cady v. City of Chicago*, 43 F.3d 326, 330 (7th Cir. 1994) (unless plaintiff "can point to a direct benefit or redressed grievance other than the 'psychic satisfaction' of ending 'invidious discrimination,'" cannot be prevailing party).

For this reason, legal rulings that do not directly affect the legal relationship of the litigating parties lack the requisite judicial *imprimatur* to confer prevailing party status. *See, e.g.*, *Farrar*, 506 U.S. at 112 ("a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party."); *Hewitt v. Helms*, 482 U.S. 755, 760-62 (1987) (favorable instruction and opinion from Third Circuit regarding unconstitutionality of defendant's conduct insufficient to confer prevailing party status where plaintiff ultimately received no substantive relief); *see also Citizens for Better Forestry v. U.S.D.A.*, 567 F.3d 1128, 1133 (9th Cir. 2009) ("a favorable determination on a legal issue, even if it might have put the handwriting on the wall, is not enough by itself.... ").

Peterson illustrates this point well. There, the plaintiff sued her hair salon and a responding police officer for claims arising out of a hair service mishap and refusal to pay for services. *Id*. at 864. The jury returned a verdict for the plaintiff, finding the officer liable for false arrest but awarding nominal damages only. *Id*. The court granted the plaintiff's post-trial motion to vacate the nominal damages

award and, faced with a new trial, the officer settled for $10,000. *Id*. at 865. The court awarded the plaintiff attorneys' fees, but the Seventh Circuit reversed. *Id*.

The Seventh Circuit emphasized that the relief must be "real" to achieve prevailing party status, and relief is real only when it changes the legal relationship of the parties. *Id*. at 865. Even though the plaintiff had obtained a favorable jury verdict, the nominal damages award had been vacated and the settlement followed. Thus, "the only judgment in this case is a determination that [Plaintiff's] rights were violated. . . As the Supreme Court noted in *Buckhannon*, however, attorney's fees are not available where plaintiff has "acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by '*judicial* relief.'" *Id*.at 866. The court concluded that it was "the *settlement*, not the judgment of the court, that obtained the practical relief sought by [Plaintiff], and therefore the judgment cannot provide the basis for prevailing party status." *Id*. (emphasis added).[5] *See also Neblock Trucking v. Scott*, 2010 WL 3023486, *5 (N.D. Ill, July 28, 2010) (attached as Exhibit D) (voluntary removal of special condition in permit after plaintiffs' claims survived motion to dismiss could not confer prevailing party status because "[n]o injunction has been provided, nor have [defendant's] actions been required by a judicially enforceable order or settlement agreement.").

Indeed, at best, *McDonald* is akin to a declaratory judgment that provided no "real" relief to Plaintiffs. And a declaratory judgment supports a fee award only if it directly "affects the behavior of the defendant toward the plaintiff," such as terminating or requiring some conduct by the defendant. *Rhodes*

[5] For this reason,this Court's decision in *C.Z. ex rel. Ziemba v. Plainfield Community,* 680 F. Supp.2d 950 (N.D. Ill. 2010), is inapposite. There, the defendant agreed to provide the plaintiffs all of their requested relief, but only after the hearing officer presiding over their due process proceeding intervened and then entered a final order in the plaintiffs' favor. *Id*. at 952-53. Moreover, in denying the defendant's motion to dismiss plaintiffs' petition for attorneys' fees, the court also strongly rejected the defendant's position that the due process hearing lacked sufficient judicial *imprimatur* because it was "quasi-judicial"only. *Id*.

v. Stewart, 488 U.S. 1, 4 (1988) (for declaratory judgment to afford prevailing party status, relief basically must be same as injunction). In *Rhodes*, two prisoners sued prison officials alleging violations of their constitutional rights because they were refused magazine subscriptions. *Id*. at 2. The district court held that the defendants had not complied with constitutional standards in denying the request, and ordered them to comply. It then awarded the plaintiffs attorneys' fees, and the Sixth Circuit affirmed. *Id*. The Supreme Court reversed the grant of attorneys' fees, finding that, because one of the prisoners had died before the district court's order, and the other one had been released from prison, the plaintiffs had not actually received any real relief. *Id*. at 4 (declaratory judgment constitutes relief for purposes of § 1988 "if, *and only if*, it affects the behavior of the defendant toward the plaintiff.") (emphasis added). Even though the court had declared the defendant's actions unconstitutional and ordered compliance, the plaintiffs did not obtain relief because a "modification of prison policies on magazine subscriptions could not in any way have benefitted either plaintiff." *Id*. *See also King v. Illinois State Bd. Of Elections*, 410 F.3d 404, (7th Cir. 2005) (recognizing rule that declaratory judgments confer prevailing party status only when they directly compel some conduct of defendant towards plaintiff).

Here, of course, Plaintiffs did not obtain a formal declaratory judgment. The only favorable order Plaintiffs received was an order reversing the Seventh Circuit's decision on incorporation, and remanding for further proceedings. While the legal issue of incorporation was decided in Plaintiffs' favor, that ruling did *not* alter the legal relationship of the parties. *See, e.g.*, *Hewitt*, 482 U.S. at 761-63 (where defendants' liability on remand precluded by valid defenses such as immunity, declaratory judgment not basis to award fees). As discussed above, the City could have gone on to defend the Ordinance after *McDonald*, and may have prevailed on some or all of the claims. Plaintiffs received no court ordered payment of

damages, specific performance, or termination of conduct from the City in this case. Therefore, they did not obtain the requisite judicial *imprimatur*, and they should be denied prevailing party status.

C. Any Relief Plaintiffs Obtained From Repeal Of The Ordinance Was Voluntary.

Finally, to the extent that Plaintiffs contend that *McDonald* afforded them real relief because it "forced" the City to repeal the Ordinance, such argument is not supported by, and indeed would contradict, existing case law.

First, it is undisputed that no order in this case ever enjoined the enforcement of the Ordinance or directed Defendant to repeal it. Thus, even assuming *McDonald* impacted the City's decision to repeal the Ordinance, the repeal *itself* was not directed by any judicial order. Without that (or a preceding judgment on the merits),[6] the repeal can only be seen as voluntary. *See, e.g.*, *Farrar*, 506 U.S. at 111 ("whatever relief the [party] secures must directly benefit him *at the time of the judgment or settlement*.") (emphasis added); *Peterson*, 372 F.3d at 865 (where plaintiff received jury verdict, but damages paid were result of post-verdict settlement, relief did not satisfy test for prevailing party). Thus, the judgment or order itself must command the change in conduct, not merely motivate or lead to it.

Second, this argument would undermine the rationale of *Buckhannon*. In rejecting the catalyst theory, *Buckhannon* essentially rejected an inquiry into the defendant's motivations for its change of conduct. Indeed, the Court re-emphasized its prior holdings that "[a] request for attorney's fees should

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[6] In *Palmetto Properties*, the Seventh Circuit noted that the county repealed its ordinance only after the determination of liability had been made "and presumably *because of it* ...." 375 F.3d at 550 (emphasis in original). There, however, the court had actually ruled on the plaintiffs underlying claims in its favor, where here, there was no such ruling. *See also Southworth v. Board of Regents of Univ. of Wisconsin*, 376 F.3d 757, 768 (7th Cir. 2004) (plaintiffs first received judgment that defendant's mandatory fee policy violated First Amendment, which then led to change in policy). Likewise, in *Federation*, the court assumed *arguendo* that the city repealed the ordinance because of the Supreme Court decision in another case, but did not actually hold that the city's actions were involuntary. Moreover, there, the court denied plaintiffs' request for fees. 326 F.3d at 933.

not result in a second major litigation." *Buckhannon*, 532 U.S. at 609, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Analyzing the defendant's subjective motivations for changing its conduct would "likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct." *Id*. at 610 (internal citations omitted). The Court recognized that such inquiries would not lend themselves to "ready administrability," as fee awards should. *Id*. Accordingly, even where a judicial ruling sets certain voluntary acts of the defendant in motion, those voluntary acts cannot be bootstrapped into a determination that the plaintiff "prevailed." To hold otherwise would "constitute an impermissible drift towards the 'catalyst theory' that was clearly rejected in *Buckhannon*." *Neblock Trucking,* 2010 WL 3023486 at * 5.

CONCLUSION

For the reasons stated herein, Defendant the City of Chicago respectfully requests that the Court find that Plaintiffs are not prevailing parties entitled to attorneys' fees under 42 U.S.C. § 1988, deny Plaintiffs' request for any such award of fees, and grant Defendant any other relief the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record for the Defendants, hereby certifies that on December 15, 2010, she served copies of the foregoing **Defendant's Memorandum of Law Contesting Plaintiffs' Status As Prevailing Parties Entitled To Attorneys' Fees** via electronic means to the counsel of record listed below:

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SUPREME COURT OF THE UNITED STATES

No. 08-1497

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,

Petitioners

v.

CITY OF CHICAGO, ILLINOIS, ET AL.

The Court today reversed the judgment below in *McDonald* v. *Chicago*, 561 U.S. ___ (2010). Therefore, the petition for a writ of certiorari is granted, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings .

IT IS FURTHER ORDERED that the petitioners National Rifle Association of America, Inc., et al. recover from City of Chicago, Illinois, et al. Three Hundred Dollars ($300.00) for costs herein expended.

June 29, 2010

Clerk's costs: **$300.00**

A True Copy WILLIAM K. SUTER
Test
Clerk of the Supreme Court of the United States
By

EXHIBIT
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A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 25, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

Nos. 08-4241, 08-4243 & 08-4244

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ILLINOIS, and VILLAGE OF OAK PARK, ILLINOIS,
Defendants-Appellees.

On Remand from the Supreme Court of the United States.

Order

After the Supreme Court's decision in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), both the City of Chicago and the Village of Oak Park repealed the ordinances that had been the subject of this litigation. Accordingly, we vacate the district court's judgments and remand with instructions to dismiss as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Plaintiffs contend that the new ordinances enacted to supersede the ones challenged in these suits have constitutional flaws. Plaintiffs are entitled to pursue those contentions in new suits. The subject matter of this litigation, however, no longer exists.

EXHIBIT
tabbies
B

If plaintiffs believe that the repeals entitle them to attorneys' fees under 28 U.S.C. §1988, they may file appropriate motions in the district court. We do not express any opinion on the question whether the repealers, enacted before the Supreme Court's decision could be implemented on remand, affect the availability of fees under the approach of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

Westlaw.

Slip Copy, 2009 WL 2391851 (N.D.Ill.)
(Cite as: 2009 WL 2391851 (N.D.Ill.))

HOnly the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
COVENANT MEDIA OF ILLINOIS, L.L.C., Plaintiff,
v.
CITY OF DES PLAINES, ILLINOIS, Defendant.
No. 04 C 8130.

July 31, 2009.

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OPINION AND ORDER

JOAN HUMPHREY LEFKOW, District Judge.

***1** In this civil rights case plaintiff, Covenant Media, Inc. ("Covenant"), has moved for an award of attorney's fees and costs under the provisions of 42 U.S.C. § 1988. The motion must denied for the reasons that follow.

On December 16, 2004, Covenant initiated this action alleging that the City of Des Plaines's Sign Ordinance was unconstitutional under the First Amendment. It sought damages and an injunction against enforcement of the ordinance. On June 8, 2005, this court denied a motion to dismiss for lack of standing and for failure to state a claim upon which relief may be granted (Dkt. No. 21). In response to this ruling, on August 29, 2005, Des Plaines amended its ordinance in an effort to eliminate unconstitutional provisions.

On June 22, 2005, Covenant moved for a preliminary injunction. The amended ordinance became the subject of Covenant's motion for preliminary injunction. On September 15, 2005, this court issued an opinion and order granting Covenant's motion for a preliminary injunction against enforcement of Des Plaines's amended sign ordinance during the pendency of this litigation (Dkt. No. 43). The docket entry of that date directed the parties to submit a proposed draft injunction order (in conformity with Federal Rule of Civil Procedure 65(d)(1) [FN1]) to chambers by September 20, 2005 (Dkt. No. 42). On September 20, Des Plaines filed a proposed order (Dkt. No. 46). Any proposed injunction order that may have been submitted by Covenant is not on the case docket.

> FN1. Rule 65(d)(1), Fed R. Civ. P., provides that "[e]very order granting an injunction and every restraining order must:
>
> (A) state the reasons why it issued;
>
> (B) state its terms specifically; and
>
> (C) describe in reasonable detail-and not by referring to the complaint or other document-the act or acts restrained or required."

On September 22, 2005, however, before entry of a draft injunction order, the court ruled the motion moot because Des Plaines had amended its sign ordinance a second time ("Second Amended Sign Ordinance") correcting the constitutional violations that had been identified in the September 15, 2005 order. *See* Mem. Op. and Order of March 7, 2007 at 7-8 (Dkt. No. 121) ("On September 20, 2005, [Des Plaines] enacted the Second Amended Sign Ordinance, removing the provisions identified by the court as the basis for granting Covenant's request for injunctive relief. As a result, this court determined that the motion for preliminary injunction previously granted had become moot and declined to enter Covenant's proposed draft order for injunction.").

The opinion of September 15, 2005 stated fully the reasons for the injunction, and the Order at the end of the Memorandum Opinion stated, "The City is enjoined from enforcing its Amended Sign Ordinance as contained in Article 11 of the City's Zoning Ordinance during the pendency of this suit." Mem. Op.

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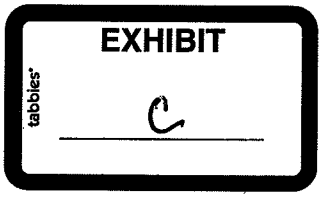

and Order of Sep. 15, 2005 at 14 (Dkt. No. 43). Des Plaines has not rested its position on the fact that an injunction was never entered, so the Court will treat the question before the court as if the September 15 Opinion and Order were sufficiently compliant with Rule 65(d) to amount to an injunction.

The case proceeded. On March 7, 2007 (Dkt. No. 121), the court granted Des Plaines's motion for summary judgment. It concluded that Covenant lacked standing to pursue its as-applied challenge to the Second Amended Sign Ordinance because Covenant could not demonstrate that it had suffered a redressable injury in that Des Plaines would have denied the applications for other valid reasons. Specifically, the court found that all of Covenant's applications were within an area where signs could be prohibited: single family residential areas within 660 feet of an interstate highway and beyond the 1959 city limits. For the same reason, the court rejected Covenant's facial challenge. *See id.* at 27 (Covenant has not submitted evidence of "either a causal nexus between its injury and the provisions of the Sign Ordinance it challenges or that a favorable decision would redress its injuries.").

***2** Covenant, however, convinced the court to reconsider its summary judgment on the as-applied challenge because it had overlooked a genuine issue of material fact as to whether Covenant's application to erect a sign at 911 E. Touhy could have been granted but for the offending original ordinance. There was evidence in the record that despite the original ordinance's prohibition of signs in single family residential areas within 660 feet of an interstate highway and beyond the 1959 city limits, like the 911 E. Touhy site, several sign permits had been granted in such areas. Thus the court permitted the case to go to trial, framing the issue as follows:

> Accordingly, the court's mistake of fact led it incorrectly to conclude ... that Covenant's injuries as to the denial of its permit application for the 911 E. Touhy location were not redressable. That is not to say, though, that the standing issue has now been conclusively and finally determined. Since the Illinois Act and the IDOTs [Illinois Department of Transportation's] implementing regulations on their face appear to preclude the erection of the billboard at the subject location, the case must proceed to trial to determine whether Covenant can satisfy the redressibility element of the tripartite test for standing.

Mem. Op. and Order of July 26, 2007 at 5 (Dkt. No. 154). The jury was instructed that in order to find for Covenant it must find that Covenant (1) would have completed its application for a sign at 911 E. Touhy by fulfilling specific requirements and (2) would have provided IDOT with the information required to receive an IDOT permit. Jury Instructions at 15 (Dkt. No. 205, incorrectly titled "Proposed" Jury Instructions). The jury returned a verdict for Des Plaines. The only permissible inference of fact from the verdict is that Covenant would not have completed the application for the 911 E. Touhy site. This means that Covenant lacked standing and the court lacked jurisdiction.

ANALYSIS

The Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988(b), authorizes the court in civil rights cases to allow the prevailing party (other than the United States) a reasonable attorney's fee as part of the costs. The issue is whether Covenant is a prevailing party for purposes of 42 U.S.C. § 1988.

Covenant contends that its success on the motion for preliminary injunction that resulted in Des Plaines's amending its unconstitutional ordinance to comply with the court's opinion establishes its prevailing party status because "(i) the Court, based upon a finding of a likelihood of Plaintiff's success on the merits, entered a judicially enforceable injunction materially altering the legal relationship between the parties; (ii) the City chose not to appeal from that order and remained subject to its restrictions for over two years; and (iii) the defendant ultimately avoided final resolution of the merits of Plaintiff's initial case by enacting new legislation." Covenant's Mem. in Supp. of Mot. at 4-5 (Dkt. No. 232-2). Des Plaines contends that, in spite of Covenant's success on the preliminary injunction, Covenant is not a prevailing party because the jury ultimately decided that Covenant had no standing to sue, voiding any temporary victory achieved in the preliminary injunction.

***3** Des Plaines relies on *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), which rejected the "catalyst theory" of pre-

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vailing party status [FN3] and held that a litigant who had not obtained a "material alteration of the legal relationship of the parties" [FN4] was not a "prevailing party." *Id.* at 604-05. *See Palmetto Props., Inc. v. County of DuPage,* 375 F.3d 542, 548 (7th Cir.2004) (characterizing *Buckhannon* as holding "that in order to be a 'prevailing party,' a litigant must have obtained a judgment on the merits, a consent decree, or some other judicially sanctioned change in the legal relationship of the parties.").

> FN3. The Court described the catalyst theory as one "which posits that 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." *Buckhannon,* 532 U.S. at 601.
>
> FN4. The Court cited as examples a judgment on the merits or a court-ordered consent decree.

Covenant distinguishes *Buckhannon* on the basis that the decision does not foreclose prevailing party status where, as here, Des Plaines adopted the Second Amended Sign Ordinance as a direct result of the court's issuance of an injunction order in favor of Covenant, whereas in *Buckhannon,* it was not a court order or consent decree, but voluntary action by the State, that changed the legal relationship of the parties. The difficulty with Covenant's position is that the court order in this case did not change the legal relationship *between Covenant and Des Plaines.* That Covenant might benefit from the Second Amended Sign Ordinance, should it in the future actually make and complete an application for a sign, is insufficient to distinguish it from any other non-party potential beneficiary of Covenant's endeavor.

Des Plaines also relies on *Sole v. Wyner,* 551 U.S. 74, 77-78, 127 S.Ct. 2188, 2191-92, 167 L.Ed.2d 1069 (2007), which held that "prevailing party" does not include a plaintiff who gains a preliminary injunction after an abbreviated hearing but is denied a permanent injunction after a dispositive adjudication on the merits. Covenant attempts to distinguish *Sole* on the basis that in *Sole* the preliminary injunction was "reversed, dissolved, or otherwise undone" by the final decision in the same case, whereas here the preliminary injunction was not undone by this court's decision on summary judgment, or the jury's verdict at trial. Covenant's Reply at 5 (Dkt. No. 234).

In *Sole,* the plaintiff obtained a preliminary injunction against Florida's "bathing suit rule" that interfered with her ability to display a Valentine's Day anti-war artwork using nude individuals on a beach. The court preliminarily enjoined enforcement against the plaintiff so long as the artwork was displayed behind a screen that protected members of the public on the beach who did not want to observe nudity. At the actual event, however, the participants failed to stay behind the screen, so when the plaintiff sought a permanent injunction for future displays, the court denied it because it determined that the bathing suit rule was necessary to protect the public from the unwanted observation of nudity on a public beach.

***4** The plaintiff sought fees on the basis that, although she did not ultimately prevail, she did obtain a preliminary injunction that permitted her to display her Valentine's Day artwork one time. The district court accepted that argument, but the Supreme Court did not: "Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole,* 551 U.S. at 83.

Sole is instructive here because, in the end, the facts found by the jury determined the result that plaintiff had no standing to bring this lawsuit in the first place. That can only mean that a preliminary injunction was a preliminary decision based on incomplete facts just as it had been in *Sole.* As the Court there stated, "[T]he eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. [The plaintiff's] temporary success rested on a premise the District Court ultimately rejected." *Id.* at 84-85.

Recently, the Seventh Circuit decided *Walker v. Calumet City,* 565 F.3d 1031, 1032 (7th Cir.2009), where the plaintiff, a property owner, challenged the constitutionality of an ordinance that required properties to be inspected and code violations corrected before they could be sold. The district court entered a preliminary injunction. When the plaintiff's property was inspected and it was determined that violations had been corrected, and the city agreed not to enforce its ordinance against the subject property and to designate it as a legal nonconforming use, the court dismissed the case as moot but still awarded attorney's

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fees because the plaintiff had achieved "total victory." The court of appeals ruled that the award of fees was in conflict with *Buckhannon:* "[B]ecause no judgment was rendered by the district court on the merits of her claims, [the plaintiff] is not a prevailing party under the first example given in *Buckhannon." Walker,* 565 F.3d at 1034.

There is no need to elaborate further.[FN5] No judgment on the merits of Covenant's claims was rendered because, at the end of this long road of litigation, Covenant's lack of standing to bring its law suit was established. Without standing to sue, the court lacks jurisdiction. Without jurisdiction, there can be no judicially sanctioned change in the relationship between the parties.

FN5. Covenant cites many cases, some predating *Buckhannon,* which will not be discussed here, and most from other circuits, which lend little guidance where the Seventh Circuit has rendered ample exposition of *Buckhannon* to guide the analysis. The post-*Buckhannon* Seventh Circuit cases that Covenant cites are addressed briefly in this note.

Southworth v. Bd. of Regents of Univ. of Wis. Sys., 376 F.3d 757, 759 (7th Cir.2004), affirmed an award of fees to students who, although they did not prevail in the United States Supreme Court on their original complaint seeking to bar the university from collecting mandatory student fees, they were permitted to amend their complaint on remand and did obtain a district court ruling that the mandatory fee system violated the principle of viewpoint neutrality. The district court's ruling led the University to adopt detailed criteria and procedures governing funding decisions that did benefit the plaintiff students (according to the court-but this might be questionable since the litigation was filed in 1996 and at least two generations of students would likely have come and gone during that period of time). *See Fry v. Bd. of Regents of Univ. of Wis. Sys.,* 132 F.Supp.2d 744 (W.D.Wis.2000) (reflecting a 1996 filing date.)) The students also prevailed on appeal challenging some of those criteria. *Southworth,* F376 F.3d at 768. Although the cases are parallel in that the court's ruling on the preliminary injunction led directly to Des Plaines's amending its ordinance, here, unlike the students in *Southworth,* Covenant achieved nothing for itself, so there was no change in the legal relationship of the parties.

Gatreaux v. Chicago Hous. Auth., 491 F.3d 649, 662 (7th Cir.2007), dealt with post-consent decree enforcement proceedings, where the court rejected CHA's argument that agreed-to modifications to the decree over a period of years eliminated the plaintiffs' prevailing party status. The situation in *Gatreaux* is hardly comparable, but it is significant that the court rested its ruling on the continued binding effect of the original decree and the actual benefits achieved for the plaintiff class, facts not present here. *See id.* at 654*ff.*

In *Palmetto Props., Inc. v. County of DuPage,* 375 F.3d 542, 546 (7th Cir.2004), the district court ruled in favor of the plaintiffs on a motion for summary judgment, holding that a portion of the County's ordinance restricting location of an adult entertainment establishment within a certain distance of a forest preserve was unconstitutional. The County advised the court that it intended to amend the ordinance, so the court continued the case in lieu of entering a final judgment order. Once the ordinance was amended, the court ruled the case moot. The district court awarded fees and the court of appeals affirmed, finding that the legal relationship of the parties was changed by the summary judgment, also indicating that the County qualified as "mischievous," *id.* at 550, and stating,

It would defy reason and contradict the definition of "prevailing party" under *Buckhannon* and our subsequent precedent to hold that simply because the district court abstained from entering a final order formally closing the case-a result of

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> the Defendant's assertions that it would repeal the challenged portion of the ordinance-Palmetto somehow did not obtain a "judicially sanctioned change" in the parties' legal relationship.
>
> *Id.* at 549-50. If Des Plaines set out to game § 1988 by mooting the case with its Second Amended Sign Ordinance, its strategy was ineffective. Rather, this litigation continued two-and-a-half years past the entry of the preliminary injunction, through a trial and, ultimately, Des Plaines's original position that Covenant lacked standing prevailed.

ORDER

Covenant's motion for attorney's fees is denied. Costs and expenses are also denied.

N.D.Ill.,2009.
Covenant Media of Illinois, L.L.C. v. City of Des Plaines, Illinois
Slip Copy, 2009 WL 2391851 (N.D.Ill.)

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Slip Copy, 2010 WL 3023486 (N.D.Ill.)
(Cite as: 2010 WL 3023486 (N.D.Ill.))

HOnly the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
NEBLOCK TRUCKING, INC., John Andruch and Jack Andruch, Jr. d/b/a/ Walnut Farms, Plaintiffs,
v.
Douglas P. SCOTT, in his official capacity as Director of the Illinois Environmental Protection Agency, Defendant.
No. 09 C 1985.

July 28, 2010.

West KeySummary
Civil Rights 78 1482

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
Environmental Protection Agency's (EPA) voluntary removal of a special condition on waste transfer station operator's operational permit did not make operator a "prevailing party," in a § 1983 action against EPA challenging the validity of the condition. Therefore, operator was ineligible for attorneys' fees. 42 U.S.C.A. §§ 1983, 1988.

Jennifer J. Sackett-Pohlenz, Querrey & Harrow, Ltd., Chicago, IL, Charles M. English, Wendy M. Yoviene, Ober, Kaler, Grimes & Shriver PC, Washington, DC, for Plaintiffs.

James Allen Lang, Rachel Jana Fleischmann, Illinois Attorney General's Office, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

RUBEN CASTILLO, District Judge.

*1 Neblock Trucking, Inc. ("Neblock"), John Andruch and Jack Andruch, Jr. (the "Andruch Brothers") (collectively, "Plaintiffs") filed this action against Douglas P. Scott ("Scott"), in his official capacity as Director of the Illinois Environmental Protection Agency ("IEPA"), alleging that a permit issued by the IEPA violated Article I, Section 8, Clause 3 of the U.S. Constitution (the "Commerce Clause"). (R. 17, Corrected Compl.) After the Court's ruling on a prior motion to dismiss, Scott filed an additional motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). (R. 41, Def.'s Mot. to Dismiss.) In his motion, Scott argued that actions subsequently taken by the IEPA rendered Plaintiffs' action moot. (*Id.*) The Court granted Scott's motion on December 17, 2009, and dismissed Plaintiffs' suit without prejudice.[FN1] (R. 44, Min.Entry.) Presently before the Court is Plaintiffs' petition for fees and motion for instructions pursuant to 42 U.S.C. § 1988 ("Section 1988"), Federal Rule of Civil Procedure 56(d), and Local Rule 54.3. (R. 49, Pls.' Pet.) For the reasons stated below, Plaintiffs' petition and motion are denied.

FN1. Plaintiffs subsequently filed a motion for reconsideration and clarification. (R. 45, Pls.' Mot. for Recons.) This motion was denied on July 21, 2010. (R. 64, Min.Entry.) In denying their motion for reconsideration, the Court, after concluding that there was no substantive legal difference between Plaintiffs' corrected and amended complaint, also dismissed their amended complaint without prejudice.

BACKGROUND

I. Relevant Prior Proceedings

Prior to December 22, 2004, the Illinois Environmental Protection Act (the "Act"), 415 III. Comp. Stat. 5/1 *et seq.*, distinguished between regional pollution control facilities ("RPCFs") and local pollution control facilities ("LPCFs"). (R. 17, Corrected Compl. ¶ 6.) LPCFs were prohibited from receiving waste generated outside of the local general purpose unit of government in which they were located, while RPCFs did not have such a limitation. (*Id.* ¶ 18.) To obtain an IEPA permit for a LPCF, zoning approval of the local government in which the LPCF was lo-

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EXHIBIT
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cated was required. (*Id.*) RPCFs, on the other hand, had to obtain site location approval pursuant to the Act. (*Id.*) After the December 22, 2004 effective date of an amendment to the Act, the distinction between RPCFs and LPCFs was eliminated, and all new pollution control facilities, including transfer stations, were required to obtain site location approval. (*Id.* ¶ 20.)

Prior to the effective date of this amendment, United Disposal of Bradley, Inc. ("United Disposal")-which operates both a waste collection business and a waste transfer station-applied for a development permit to construct a LPCF in Bradley, Illinois. (*Id.* ¶¶ 4, 21, 23.) After United Disposal received local zoning approval from Bradley, the IEPA granted its application for a development permit on September 21, 1994 (No.1994-306-DE). (*Id.* ¶ 23.) On December 5, 1994, United Disposal applied for an operational permit from the IEPA. (*Id.* ¶ 24.) In January 1995, the IEPA issued United Disposal the operational permit for its solid waste transfer station in Bradley (No.1994-306-OP). (*Id.*) The issued operational permit contained Special Condition No. 9, which provided: "No waste generated outside of the municipal boundaries of the Village of Bradley may be accepted at this facility." (*Id.*)

***2** On March 31, 2003, United Disposal filed an application with the IEPA for the modification of their operating permit, in which they requested that Special Condition No. 9 be removed from their operational permit. (*See id.* ¶ 25; R. 45, Pls.' Mot. for. Recons., Ex. B at 3.) The IEPA denied their request, and the Illinois Pollution Control Board ("IPCB") subsequently affirmed the denial. (R. 45, Pls.' Mot. for. Recons., Ex. B at 13.) In affirming, the IPCB found that before the IEPA could grant the requested modification to United Disposal's operating permit, "United Disposal must request a corresponding change to its development permit." *United Disposal of Bradley v. Ill. Envtl. Prot. Agency*, PCB 03-325, 2004 WL 1470978, at *14 (Ill. Poll. Control Bd. June 17, 2004). Additionally, the IPCB concluded that "proof of local siting approval is a condition precedent to the [IEPA] granting a modification to [United Disposal's] development permit." (*Id.*) United Disposal appealed the IPCB's decision to the Appellate Court of Illinois, Third District. (R. 17, Corrected Compl. ¶ 25.) Again, the denial of United Disposal's application was affirmed. *United Disposal of Bradley, Inc. v. Pollution Control Bd.*, 363 Ill.App.3d 243, 299 Ill.Dec. 809, 842 N.E.2d 1161, 1168 (Ill.App.Ct.2006).

II. The Present Litigation

Neblock is a corporation engaged in the business of hauling steel. (*Id.* ¶ 9, 299 Ill.Dec. 809, 842 N.E.2d 1161.) In the execution of its business in and outside of Illinois, Neblock also generates waste. (*Id.*) Neblock has sought to have United Disposal collect and transfer its waste through United Disposal's Bradley waste transfer station. (*Id.*) United Disposal informed Neblock that it could not accept waste generated outside of Bradley because of Special Condition No. 9's geographic limitation. (*Id.*)

The Andruch Brothers operate Walnut Farms, a feed and livestock farm, and have sought to bring the waste they generate on their farm to United Disposal's transfer station. (*Id.* ¶ 11, 299 Ill.Dec. 809, 842 N.E.2d 1161.) Similarly, United Disposal informed them that it was unable to accept waste generated outside of Bradley because of Special Condition No. 9. (*Id.*)

On March 31, 2009, Plaintiffs, along with several other parties, filed a two-claim complaint against Scott.[FN2] (R. 1, Compl.) In their complaint, Plaintiffs alleged that Special Condition No. 9, acting in conjunction with 415 Ill. Comp. Stat. 5/21(d)(1),[FN3] "discriminates against waste generated outside of Bradley and outside of Illinois in violation of [the Commerce Clause]." (R. 17, Corrected Compl. ¶ 35.) As a remedy for this alleged violation, Plaintiffs sought declaratory and injunctive relief. (*Id.* ¶ 36, 299 Ill.Dec. 809, 842 N.E.2d 1161.)

> FN2. Due to an electronic filing error, Plaintiffs filed a corrected complaint on May 7, 2009. (R. 17, Corrected Compl.)
>
> FN3. This provision of state law prohibits any person from conducting any waste-storage, waste-treatment, or waste-disposal operation without a permit or in violation of any conditions imposed by a permit. *See* 415 Ill. Comp. Stat. 5/21(d)(1).

Scott filed a motion to dismiss on May 20, 2009. (R.

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24, Def.'s Prior Mot. to Dismiss.) The Court, on August 26, 2009, partially granted his motion. *Liberty Disposal, Inc. v. Scott,* 648 F.Supp.2d 1047, 1056 (N.D.Ill.2009). Specifically, the Court dismissed all parties-except for Neblock and the Andruch Brothers-for lack of standing. *Id.* at 1054. Additionally, Plaintiffs' first claim for relief was also dismissed. *Id.* The Court did, however, find that Plaintiffs' second claim for relief pursuant to 42 U.S.C. § 1983 ("Section 1983")-which alleged a violation of the Commerce Clause-withstood the motion to dismiss. *Id.* at 1055.

***3** On December 11, 2009, the IEPA removed Special Condition No. 9 from United Disposal's permit.[FN4] (R. 41, Def.'s Mot, Ex. A.) That same day, Scott filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). (*Id.*) In his motion, Scott argued that the IEPA's voluntary removal of Special Condition No. 9 rendered Plaintiffs' action moot. (*Id.* at 2-3.) The Court granted Scott's motion on December 17, 2009, and dismissed Plaintiffs' suit without prejudice. (R. 44, Min.Entry.) The Court retained post-judgment jurisdiction on the issue of attorneys' fees. (R. 51, Tr. of Dec. 17, 2009 Proceedings at 4-5.)

> FN4. The letter setting forth this change suggests that the modification was made to United Disposal's development and operational permits. (*See* R. 41, Def.'s Mot. to Dismiss, Ex. A ("The special conditions of revised Permit No. 1994-306-DE/OP are identical to all previous permits, except Condition A.13 has been modified by removal of the description of the waste acceptance area.").)

Plaintiffs filed a motion for reconsideration and clarification on January 14, 2010. (R. 45, Pls.' Mot. for. Recons.) In their motion, they argued that Scott's "voluntary, unilateral decision to modify the permit is insufficient to resolve the controversy." (*Id.* at 3.) Plaintiffs maintained that because Scott's authority to remove Special Condition No. 9 is questionable, potential third-party suits challenging the revised permit indicate that he "has certainly not shown it is 'absolutely clear' that future litigation will not force him to restore the restrictions or that a future administration will not do so." (*Id.* at 6.) As a result, they contended that this action is not moot. (*Id.* at 4-6.) Alternatively, they asked the Court to "clarify that [our] mootness determination of December 17, 2009, relies on and incorporates [our] August 26, 2009 Memorandum and Opinion." (*Id.* at 9.) The Court denied Plaintiffs' motion for reconsideration and clarification on July 21, 2010. (R. 64, Min.Entry.)

Approximately two weeks after filing their motion for reconsideration and clarification, Plaintiffs filed a petition for attorneys' fees and motion for instructions. (R. 49, Pls.' Pet.) In their petition for fees, Plaintiffs argue that they are prevailing parties entitled to fees because the removal of Special Condition No. 9 from United Disposal's permits came after Scott "los[t] the [May 2009 motion to dismiss] in such a way that the discrimination issue had been decided in the Plaintiffs' favor." (R. 49, Pls.' Pet. ¶¶ 4, 12.) Additionally, given Scott's alleged "all-or-nothing approach" towards fees, Plaintiffs ask, pursuant to Local Rule 54.3(g), for "instructions from the Court as to what, if any, further procedure in addition to this Petition, the Court wants Plaintiffs to initiate with [Scott] on fees." (*Id.* ¶¶ 15-19.)

LEGAL STANDARD

In any action or proceeding to enforce Section 1983, The Civil Rights Attorney's Fees Awards Act of 1976 authorizes district courts to award reasonable attorney's fees to a "prevailing party." 42 U .S.C. § 1988(b). It is well-established that the term "prevailing party" as used in Section 1988 "includes only those parties that have achieved a 'judicially sanctioned change in the legal relationship of the parties.' " *Zessor v. Keith,* 536 F.3d 788, 795 (7th Cir.2008) (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.,* 532 U.S. 598, 605, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)). " '[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.' " *Id.* (quoting *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)), Status as a prevailing party is a threshold determination under Section 1988. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

ANALYSIS

***4** Plaintiffs argue that the Court's August 2009 Memorandum Opinion and Order establishes their

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status as "prevailing parties" under Section 1988, and thus provides the basis for their petition for attorneys' fees. (R. 49, Pls.' Pet. ¶¶ 4-5.) Specifically, they contend that the Court's ruling decided a "critical and central legal issue" by concluding that Special Condition No. 9 was facially discriminatory and subject to the *"per se"* rule under Dormant Commerce Clause doctrine.[FN5] (*Id.*) They assert that this ruling, combined with subsequent admissions made by Scott,[FN6] establish that "the core legal and factual issues in the cases were determined in favor of Plaintiffs." (*Id.* ¶ 7.) Accordingly, Plaintiffs maintain that they "are prevailing parties entitled to fees in this case, as they succeeded on the merits of their case ... and [Scott] had removed the *per se* discriminatory permit condition from United Disposal's transfer station permits only after losing the Motion to Dismiss in such a way that the discrimination issue had been decided in Plaintiffs' favor." [FN7] (*Id.* ¶ 12 .) The Court disagrees.

FN5. The Dormant Commerce Clause is generally analyzed under a two-tiered approach. *Alliant Energy Corp. v. Bie,* 330 F.3d 904, 911 (7th Cir.2003). The first tier is often referred to as the *"per se"* rule, which is applied when a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 578, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). In such cases, the statute can only be saved by a showing that it "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *Id.* (quoting *Oregon Waste Sys. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)). The second tier is for cases where a statute "has only indirect or incidental effects on interstate commerce and regulates evenhandedly." *Id.* (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)). Under the second tier analysis, a court will employ the Pike balancing test and uphold the statute "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the local benefits." *Id.* In its August 2009 ruling, the Court found that Plaintiffs stated a Dormant Commerce Clause claim that was properly analyzed under the *"per se"* approach. *Liberty Disposal,* 648 F.Supp.2d at 1054-56.

FN6. Plaintiffs point to two admissions: (1) that "the permit conditions at issue prohibit[ed] acceptance of waste from outside of Bradley"; and (2) that "waste is a commodity in interstate commerce." (R. 49, Pls.' Pet. ¶ 6.)

FN7. Contrary to Plaintiffs' statements in their petition, the Court has not recognized that they are "prevailing parties" entitled to fees. In the portion of the record cited by Plaintiffs, the Court merely stated that "there's an argument to be made that plaintiffs have prevailed in this case[.]" (R. 51, Tr. of Dec. 17, 2009 Proceedings at 4-5.)

In *Buckhannon,* the Supreme Court rejected as a basis for awarding attorney's fees the "catalyst theory," which deemed the plaintiff a "prevailing party" if it achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. 532 U.S. at 601-02, 610. Instead, it held that the term "prevailing party," as used in various fee-shifting statutes, includes only those parties who have obtained a "judicially sanctioned change in the relationship of the parties." *Id.* at 605. In rejecting the "catalyst theory," the Supreme Court observed that 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." *Id.* As examples of the sort of "judicially sanctioned change" required to be deemed a "prevailing party," it cited "enforceable judgments on the merits and court-ordered consent decrees." *Id.* at 604. These two examples, the Supreme Court noted, create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. *Id.* Such an alteration, it held, must be accompanied by some award of judicial relief. *Id.* at 603; *see Walker v. Calumet City, Ill.,* 565 F.3d 1031, 1033-34 (7th Cir.2009) (holding that the material alteration "must arise from a court order").

Here, the Court finds that Plaintiffs are not prevailing parties under Section 1988. In its August 2009 ruling, the Court did not enter an enforceable judgment on

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the merits. *Liberty Disposal,* 648 F.Supp.2d at 1056. Nor has a court-ordered consent decree been entered. All that the August 2009 ruling found was that "Plaintiffs have stated a claim under the dormant Commerce Clause." *Id.* As the Supreme Court observed in *Buckhannon,* mere survival of a motion to dismiss cannot serve as the basis for "prevailing party" status. *See* 532 U.S. at 605 ("Even under a limited form of the 'catalyst theory,' a plaintiff could recover attorney's fees if it established that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction of failure to state a claim on which relief may be granted ... This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary."). Indeed, even a partial victory on a motion for summary judgment is insufficient to confer "prevailing party" status where the order lacks finality and is unenforceable. *Zessar,* 536 F.3d at 798 (holding that the lack of enforceable terms and disputed nature of the district court's partial summary judgment order rendered it insufficient to provide the basis for "prevailing party" status). Rather, what is needed is a court-ordered material alteration of the legal relationship between the parties. *Walker,* 565 F.3d at 1033-34. In the absence of any enforceable judicial relief to Plaintiffs, there has been no such change in the legal relationship between Plaintiffs and Scott. Accordingly, Plaintiffs cannot be considered a "prevailing party," and are thus ineligible for attorneys' fees pursuant to Section 1988.

***5** In support of their position, Plaintiffs correctly note that *Buckhannon* did not limit the judicial actions necessary to confer "prevailing party" status to enforceable judgments on the merits and court-ordered consent decrees. (R. 63, Pls.' Reply at 2.) What they fail to establish is how survival on a motion to dismiss led to the "material alteration of the *legal* relationship" of the parties in this case. *Buckhannon,* 532 U.S. at 604 (emphasis added). Plaintiffs do not provide any case law which either directly or indirectly supports the proposition that stating a claim for relief-which in turn leads to a non-court ordered change on the part of the defendant-is enough to transform a litigant into a "prevailing party." [FN8] The cases Plaintiffs cite to support their position are inapposite for one simple reason: they all involve situations where the prevailing party was granted some award of judicial relief which altered the legal relationship between the parties. *See Perez v. Westchester County Dep't of Corrections,* 587 F.3d 143, 149-53 (2d Cir.2009) (plaintiffs deemed "prevailing parties" after the entry of a judicially reviewed and revised settlement agreement which provided for judicial enforcement); *Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.,* 574 F.3d 1054, 1058-61 (9th Cir.2009) (plaintiff considered "prevailing party" where settlement agreement was judicially enforceable, required certain behavior by defendant, and indicated actual relief on the merits of plaintiff's claim); *Dearmore v. City of Garland,* 519 F.3d 517, 524-26 (5th Cir.2008) (status as "prevailing party" partially established by the district court's entry of a preliminary injunction); *Select Milk Producers, Inc. v. Johanns,* 400 F.3d 939, 949 (D.C.Cir.2005) (same); *Pres. Coal, of Erie County v. Fed. Transit Admin.,* 356 F.3d 444 (2d Cir.2004) (finding that plaintiff attained "prevailing party" status when it obtained a court order which materially altered the legal relationship of the parties).

> FN8. Plaintiffs' reliance on *Young v. City of Chicago,* 202 F.3d 1000 (7th Cir.2000) to support an argument regarding the Seventh Circuit's interpretation of *Buckhannon* is misplaced, as *Young* predates *Buckhannon.*

In this case, there has been no award of judicial relief. No injunction has been provided, nor have Scott's actions been required by a judicially enforceable order or settlement agreement. Thus, despite Plaintiffs' statements to the contrary, Scott's removal of Special Condition No. 9 was voluntary. [FN9] As previously noted, such a voluntary change by a defendant does not make a plaintiff a "prevailing party." *See 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."). Acceptance of Plaintiffs' position in this case would constitute an impermissible drift towards the "catalyst theory" that was clearly rejected in *Buckhannon.* Plaintiffs have not provided any persuasive arguments grounded in existing case law that would justify such a development. Thus, Plaintiffs have failed to show that they are "prevailing parties" under Section 1988.

> FN9. Plaintiffs argue that they are "prevailing parties" because "Defendant represented, when it amended its complaint against United Disposal in a pending state

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court action, that this Court found the subject geographical permit restriction to be unconstitutional and, as a result, the state court complaint was amended." (R. 63, Pls.' Reply at 6.) Indeed, the record does indicate that the State of Illinois, in amending its enforcement proceeding against United Disposal, did consider the Court's August 2009 ruling. (*See* R. 63, Pls.' Reply, Ex. A ¶¶ 2-3.) Its subjective belief regarding the import of the August 2009 ruling, however, does not disturb the Court's analysis under the line of cases flowing from *Buckhannon.*

CONCLUSION

***6** Plaintiffs are not "prevailing parties," and are thus ineligible for attorneys' fees pursuant to Section 1988. Accordingly, Plaintiffs' petition for fees (R. 49) is DENIED. Given this conclusion, Plaintiffs' motion for instructions (R. 49) is also DENIED.

N.D.Ill.,2010.
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Slip Copy, 2010 WL 3023486 (N.D.Ill.)

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