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Shifting Targets on Shifting Fees: Attorney’s Fees in the Wake of <i>Singer Management Consultants, Inc. v. Milgram</i>

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SHIFTING TARGETS ON SHIFTING FEES: ATTORNEY’S FEES IN THE WAKE OF SINGER MANAGEMENT CONSULTANTS, INC. v. MILGRAM

Abstract: On June 15, 2011, in Singer Management Consultants, Inc. v. Milgram, the U.S. Court of Appeals for the Third Circuit sitting en banc held that a temporary restraining order vacated after a defendant’s change in position is insufficient to confer prevailing-party status for purposes of awarding attorney’s fees. As a result, parties who obtain in-court relief short of a formal court order may not be able to obtain attorney’s fees. This Comment argues that in arriving at that decision, the Singer court too narrowly construed the phrase “judicially sanctioned.” It further advises that, to avoid this result, attorneys who plan to seek fees should request a permanent formal order, which courts have recognized as sufficient to confer prevailing-party status.

Introduction

In the United States, under the “American Rule,” parties to litigation must pay their own attorney’s fees. Certain statutes, however, carve out “fee-shifting” exceptions to this rule. Many of these statutes authorize courts to award reasonable attorney’s fees to prevailing parties. For example, the Civil Rights Attorney’s Fees Awards Act of 1976 (“Fees Awards Act”) permits courts to grant prevailing parties attorney’s fees in civil rights cases. Congress passed this law to encourage indi-

2 Buckhannon, 532 U.S. at 602-03.
4 Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (providing that courts “may allow the prevailing party . . . a reasonable attorney’s fee”); Buckhannon, 532 U.S. at 602; PAPV, 520 F.3d at 231–32; Martin A. Schwartz, Attorneys Fees in Federal Civil Rights Cases, 27 Touro L. Rev. 113, 115 (2011).
individuals to vindicate their civil rights, thereby enforcing civil rights laws.\footnote{See S. Rep. No. 94-1011, at 2–3 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5909–10, 1976 WL 14051.} Because the remedy in civil rights suits is often an injunction, plaintiffs act as private attorneys general, obtaining relief not only for themselves but also for others.\footnote{See id. at 3.} Courts typically treat prevailing party fee-shifting statutes similarly; principles applied under one such statute will be applied under other such statutes as well.\footnote{Rossi, supra note 3, § 10:3.}

Notwithstanding this history, in 2011, in Singer Management Consultants, Inc. v. Milgram, the U.S. Court of Appeals for the Third Circuit sitting en banc dealt a significant blow to “prevailing parties” seeking to claim attorney’s fees under fee-shifting statutes.\footnote{See Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 241 (3d Cir. 2011) (en banc) (Aldisert, J., dissenting). The case name is something of a misnomer because, by the time the case reached the en banc court, Singer Management had dropped out of the suit and Live Gold was the only plaintiff remaining. See Reply Brief for Appellant at 1, 14 n.2, Singer, 650 F.3d 223 (No. 09-2238).} Specifically, the court concluded that a party may not collect as a prevailing party from adversaries that relinquish a claim in in-court proceedings.\footnote{See Singer, 650 F.3d at 231.} In so doing, the court undermined the congressional intent behind creating a fee-shifting exception to the “American Rule” for parties vindicating their civil rights.\footnote{See S. Rep. No. 94-1011, at 2–3 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5909–10, 1976 WL 14051.}

Part I of this Comment outlines the factual and procedural history leading up to the Third Circuit’s decision.\footnote{See infra notes 16–46 and accompanying text.} It then provides the legal landscape from which this decision emerged.\footnote{See infra notes 47–75 and accompanying text.} Part II explores the reasoning used by the majority and the dissents in the en banc decision.\footnote{See infra notes 76–99 and accompanying text.} Finally, Part III argues that the Third Circuit’s decision unnecessarily narrowed parties’ rights in civil rights litigation.\footnote{See infra notes 100–127 and accompanying text.} It further recommends that, to avoid this result, attorneys who plan to seek attorney’s fees should request a permanent formal order.\footnote{See infra notes 125–127 and accompanying text.}
I. SINGER MANAGEMENT CONSULTANTS, INC. v. MILGRAM: THE ROAD TO REQUESTING PREVAILING PARTY ATTORNEY’S FEES

A. Events Leading up to Legal Action

Live Gold Operations, Inc. (“Live Gold”) held common-law unregistered trademarks for the names of two 1950s Doo-Wop musical groups known as “The Platters” and “The Cornell Gunter Coasters.”[16] Under these unregistered trademarks, Live Gold managed and promoted these groups’ musical recordings and performances.[17] In August 2007, both groups were scheduled to perform at a two-week concert series at the Atlantic City Hilton Hotel.[18] Upon learning about the concert, the State of New Jersey Attorney General’s Office (the “State”) informed Live Gold that its use of the trademarks “The Platters” and “The Cornell Gunter Coasters” might violate the New Jersey Deceptive Practices in Musical Performances Act, commonly referred to as the Truth in Music Act (TIM Act).[19] In response, Live Gold provided the State with evi-

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[18] Id.

[19] Id.; see Deceptive Practices in Musical Performances Act, N.J. Stat. Ann. § 2A:32B-1 to B-3 (West 2010). The TIM Act is one of many recently enacted state statutes governing how a musical group may advertise itself for live performances. Jennifer K. Craft & Robert B. Kouchoukos, Setting the Record Straight, Nev. Law., Mar. 2009, at 6, 7. In pertinent part, the Act provides that “[a] person shall not advertise or conduct a live musical performance or production through the use of an affiliation, connection or association between the performing group and the recording group unless” one of five criteria is met: (1) the performing group must own a registered trademark for the group, (2) at least one member of the performing group must have been a member of the recording group and must have a legal right to the name, (3) the performance must be identified in all promotion as a “salute” or “tribute,” (4) the advertising relates to a performance taking place outside of the state, or (5) the performance is expressly authorized by the recording group. § 2A:32B-2(a)–(e). “Person” is not defined by the Act and, therefore, this statute likely makes liable a broad swath of entities, including not only members of the performing group and their managers but also the performance venue. See id. § 2A:32B-1; Craft & Kouchoukos, supra, at 6–7. Compare N.J. Stat. Ann. § 2A:32B-2 (not defining “person”), with Nev. Rev. Stat. Ann. § 598.0922 (LexisNexis 2010) (defining “person” to exclude the performance venue and its owners, operators, and managers “unless the performance venue has a controlling or majority ownership interest in and produces the performing group”).
dence of its ownership of unregistered trademarks in each group’s name.\textsuperscript{20} The State, however, was not satisfied that unregistered trademarks should be treated the same as registered trademarks under the Act.\textsuperscript{21} Accordingly, the State advised the Hilton Hotel that it could avoid liability under the Act by ticketing and advertising the concert as a “tribute” or “salute.”\textsuperscript{22} The Hilton Hotel complied and litigation ensued.\textsuperscript{23}

B. Litigation and Procedural Posture of the Underlying Case

The day before the first Hilton concert in August 2007, Live Gold sued the State seeking a temporary restraining order (TRO) and injunctive relief against the State’s enforcement of the Act.\textsuperscript{24} Live Gold argued that the State’s enforcement of the TIM Act conflicted with the federal Lanham Act and violated Live Gold’s civil rights.\textsuperscript{25} The U.S. District Court for the District of New Jersey issued the TRO, stating that there was “sufficient problem with the State’s position” and “a likelihood of success on the merits”; further, in issuing the order, it reasoned that it would have an opportunity to “get to the merits” of the case at the preliminary injunction hearing.\textsuperscript{26} The TRO enjoined the State from interfering with the Hilton concert in any way.\textsuperscript{27}

Several weeks later, after the Hilton concert series had ended, the district court held a hearing on the preliminary injunction.\textsuperscript{28} During the hearing, the court made clear that it did not agree with the State’s arguments.\textsuperscript{29} The court repeatedly rejected the State’s arguments and suggested that the State interpret the Act to allow owners of unregistered trademarks to perform under the trademarked name without any additional requirements.\textsuperscript{30}

After the court repeatedly rejected the State’s position, the State reversed its position, adopting Live Gold’s and the court’s interpreta-
tion of the Truth in Music Act. Furthermore, when questioned, the State confirmed its new interpretation of the Act. As a result, the court stated that the State would be “bound” by this new interpretation.” Thus, when Live Gold moved for summary disposition, the court, reasoning that the State’s new position resolved the “basic legal problem,” concluded that it saw no need to “go any further.” Additionally, the court summarized the State’s new position, declaring that the owner of a common law trademark would be treated the same as the owner of a registered trademark for purposes of enforcing the Act. The court then vacated the TRO—which had already expired by its own terms—and opted not to convert the TRO to a preliminary injunction.

Live Gold’s counsel subsequently sought leave under the Civil Rights Attorney’s Fees Awards Act of 1976 (Fees Awards Act) to recover its attorney’s fees and costs incurred in representing Live Gold from the State. This request formed the basis of the Third Circuit’s hearing of Singer in 2011.

C. Procedural Posture of Live Gold’s Attorney’s Fees Claim

A magistrate judge denied Live Gold’s application for attorney’s fees and costs. It did so by concluding that Live Gold was not a prevailing party as required by the Fees Awards Act because the State had voluntarily changed its position. Live Gold sought review of the order by the district court. The district court upheld the magistrate judge’s ruling and Live Gold appealed. On August 5, 2010, the Third Circuit, vacated the district court’s order and remanded the case for entry of an award of attorney’s fees to Live Gold. But on September 1, 2010, the

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31 Id.
32 Singer, 650 F.3d at 226.
33 Id.
34 Id. at 226–27.
35 Id. at 227.
36 Id.
38 Singer, 650 F.3d at 227.
39 Id. at 228.
40 Id. at 227.
41 Id.
42 Id.
43 Id. at 227–28.
Third Circuit granted a rehearing en banc, thereby vacating the Third Circuit’s August opinion. The en banc Third Circuit then affirmed the district court’s order, holding that Live Gold did not meet prevailing-party status and, as such, should not be awarded attorney’s fees.

D. The Legal Landscape of the Prevailing Party Theory

Many fee-shifting statutes allow prevailing parties to recover attorney’s fees from their opponents. Because these fee-shifting statutes do not define the term, what confers “prevailing party” status has often been the subject of litigation. Essentially, to be awarded attorney’s fees as a prevailing party under a fee-shifting statute: (1) the legal relationship between the plaintiff and the defendant must have changed, (2) the change must be “judicially sanctioned,” and (3) the change must “achieve[] some of the benefit the part[y] sought in bringing the suit.” Furthermore, a plaintiff must “receive at least some relief on the merits of his claim before he can be said to prevail.” Nevertheless, a “voluntary change in conduct, . . . lacks the necessary judicial imprima tur on the change.”

This final condition, that a voluntary change in conduct is not sufficient to confer prevailing-party status, arose in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources in 2001. In Buckhannon, a corporation sued the State of West Virginia, claiming that a provision of state law violated the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA). While the parties were conducting discovery, the state legislature eliminated the offending provision, effectively mooting

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45 Singer Mgmt. Consultants, Inc. v. Milgram, 619 F.3d 301, 301 (3d Cir. 2010).
46 Singer, 650 F.3d at 232.
47 See supra notes 2–4 and accompanying text.
49 Buckhannon, 532 U.S. at 603; see Singer, 650 F.3d at 228 (detailing requirements articulated in previous Supreme Court cases (citing Buckhannon, 532 U.S. at 605; Tex. State Teachers Ass’n, 489 U.S. at 792; Hewitt v. Helms, 482 U.S. 755, 760 (1987); Hensley v. Eckhart, 461 U.S. 424, 433 (1983); Hanrahan v. Hampton, 446 U.S. 754, 757 (1980))).
50 Tex. State Teachers Ass’n, 489 U.S. at 792.
51 Singer, 650 F.3d at 228 (citing Buckhannon, 532 U.S. at 605).
52 See Hensley, 461 U.S. at 433 (citation and internal quotation marks omitted).
53 Hewitt, 482 U.S. at 760 (citing Hanrahan, 446 U.S. at 757).
54 Buckhannon, 532 U.S. at 605.
55 See id.
56 Id. at 600–01.
the case. Accordingly, the district court granted the State’s motion to dismiss the case as moot. The corporation then moved for attorney’s fees as the “prevailing party” under the FHAA and ADA, relying on the catalyst theory. The so-called “catalyst theory” granted a plaintiff prevailing-party status if its suit prompted voluntary action of the defendant which afforded the plaintiff some or all of the relief sought.

The Supreme Court in Buckhannon, however, held that the catalyst theory is not an appropriate basis for granting prevailing-party status and thus permitting attorney’s fees under federal fee-shifting statutes. Instead, the Court identified two resolutions which carry the judicial imprimatur necessary to confer prevailing-party status: judgments on the merits and court-ordered consent decrees. Significantly, these resolutions were provided merely as examples of outcomes that the Supreme Court has deemed appropriate to confer prevailing-party status. The Court did not foreclose other, yet-to-be-identified outcomes from being added to the list.

Nevertheless, the Court did identify several instances in which attorney’s fees should not be awarded: (1) when the plaintiff has “secured the reversal of a directed verdict”; (2) when the plaintiff has “acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by ‘judicial relief’” such as when a party has only obtained an interlocutory ruling that his complaint

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57 Id. at 601.
58 Id.
59 See id. Both the FHAA and the ADA contain fee-shifting provisions, similar to the fee-shifting provision of the Fees Awards Act, which allow attorney’s fees to be awarded to prevailing parties. Id. at 601, 602–03; see Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2) (2006) (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee and costs.”); Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006) (“[T]he court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs . . . .”).
60 Buckhannon, 532 U.S. at 601; Rossi, supra note 3, § 10:3.
61 Buckhannon, 532 U.S. at 605, 610; Rossi, supra note 3, § 10:3. Although the Buckhannon case specifically addressed the fee-shifting provisions contained in the FHAA and the ADA, the Court made it clear it was rejecting the use of the catalyst theory with any fee-shifting provision using the “prevailing party” language. See 532 U.S. at 603 & n.4 (citing Hensley, 461 U.S. at 433 n.7); J.C. v. Reg’l Sch. Dist. 10, Bd. of Educ., 278 F.3d 119, 123 (2d Cir. 2002); accord John T. ex rel. Paul T. v. Del. Cnty. Intermediate Unit, 318 F.3d 545, 560–61 (3d Cir. 2003); Rossi, supra note 3, § 10:3.
62 Buckhannon, 532 U.S. at 604. Under the Supreme Court’s interpretation, consent decrees also include settlement agreements enforced through consent decrees. Id.
63 See id. at 604–05; Singer, 650 F.3d at 231.
64 See Buckhannon, 532 U.S. at 604–05; Singer, 650 F.3d at 231; id. at 233 (Roth, J., dissenting).
65 Buckhannon, 532 U.S. at 605–06 (citing Hanrahan, 446 U.S. at 759).
should not have been dismissed for failure to state a constitutional claim; or (3) when there has been a “nonjudicial alteration of actual circumstances,” such as when a legislature revises an offending law.

Following Buckhannon, in 2008, the Third Circuit awarded prevailing-party status under the Fees Awards Act in People Against Police Violence v. City of Pittsburgh (PAPV). In PAPV, the court conferred prevailing-party status when: (1) the district court had proclaimed that a city ordinance was unconstitutional on its face; (2) the court had issued a preliminary injunction that lasted two years (while the parties worked together to revise the ordinance); and (3) the ordinance had been revised so that it satisfied all of the plaintiffs’ concerns before the court lifted the injunction and closed the case. Significantly, in reaching its decision, the court emphasized that: (1) the City’s change in practice was in no way voluntary (because it opposed the TRO and preliminary injunctions at the first two hearings and, after the injunction’s imposition, the injunction “remained mandatory and subject to judicial enforcement”); (2) the preliminary injunction was not “dissolved for

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66 Id. (quoting Hewitt, 482 U.S. at 760).
67 Id. at 606. The Court elaborated in a footnote that “private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.” Id. at 604 n.7 (citations omitted).
68 See PAPV, 520 F.3d at 229. PAPV is singled out for inclusion here because the majority in Singer devoted substantial space to contrasting Singer and PAPV. See Singer, 650 F.3d at 229. The Third Circuit, however, has also awarded prevailing-party status in other cases post-Buckhannon. See P.N. v. Clementon Bd. of Educ., 442 F.3d 848, 856, 857 (3d Cir. 2006) (holding plaintiffs who obtained consent decrees entered by administrative law judge in administrative proceedings to be prevailing parties because they not only “succeeded on a significant issue” but “received all that they sought”); Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 161, 165 (3d Cir. 2002) (holding that plaintiff was the prevailing party when parties reached a settlement agreement during preliminary injunction hearing and agreement was memorialized in court order containing settlement terms, mandatory language, and means for judicial enforcement). Conversely, the Third Circuit has refused to award prevailing-party status in other post-Buckhannon cases. See John T., 318 F.3d at 558–59, 560 (determining that the plaintiff was not the prevailing party when a preliminary injunction was not merit-based and the agreement reached through out-of-court negotiations was not endorsed by “judicial imprimatur”); J.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 272, 273–74 (3d Cir. 2002) (holding that “stay-put” orders that simply maintain status quo and are not merit-based could not confer prevailing-party status).
69 See PAPV, 520 F.3d at 229.
70 See id. at 228, 235–36.
71 See id. at 230.
72 Id. at 234.
73 Id. at 235.
lack of entitlement”; and (3) the injunction did not simply maintain the status quo but rather “afforded plaintiffs virtually all of the substantive relief they sought.”

II. CONFLICTING INTERPRETATIONS OF WHAT CONFER A PREVAILING-PARTY STATUS POST-BUCKHANNON

The en banc majority in Singer concluded that Live Gold was not a prevailing party under the Civil Rights Attorney’s Fees Awards Act (“Fees Awards Act”) because it did not receive a judgment on the merits and the State’s actions after the TRO issued were voluntary. The court based its conclusion that Live Gold did not receive a judgment on the merits on two intermediary conclusions. First, the TRO was not issued on the merits. Second, no judgment was issued on the merits because the State mooted the case at the preliminary injunction hearing by adopting Live Gold’s interpretation of the Act.

The Third Circuit concluded that the TRO was not issued on the merits by distinguishing Singer from the Third Circuit’s 2008 decision People Against Police Violence v. City of Pittsburgh (PAPV). First, the court observed that the Singer court never ruled that the challenged law was unconstitutional, as the PAPV court did, but rather based the TRO on a “likelihood of success on the merits” standard. Such a standard, it reasoned, was not sufficient to meet the merit requirement imposed by the U.S. Supreme Court. As further evidence that the TRO was not merits-based, the court observed that, unlike the order in PAPV, the TRO in Singer pertained only to the State’s actions against Live Gold. That is, while the TRO was in operation, the State remained free to enforce the challenged law against other parties.

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74 See id. at 234 (quoting Watson v. Cnty. of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002)).
75 See PAPV, 520 F.3d at 234.
78 Id. at 229–30.
79 Id. at 229.
80 Id. at 230.
81 Id. at 229–30.
82 Id. at 230.
83 See Singer, 650 F.3d at 230.
84 See id.
85 See id. Compare Singer, 650 F.3d at 230 (concluding that the TRO prevented the State from enforcing the statute in a particular manner against plaintiffs), with PAPV, 520 F.3d at
Then, the court considered whether any judgment (looking beyond the TRO) was issued on the merits. The court first observed that there was no determination on the merits because the State mooted the case by agreeing with Live Gold’s position at the preliminary injunction hearing. In doing so, the court implied that when the state relinquished its claim at the preliminary hearing, it prevented the court from reaching the merits of the claim. The court then repeated the two resolutions identified by the Buckhannon Court as conferring prevailing-party status—enforceable judgments on the merits and court-ordered consent decrees—and concluded that Buckhannon “precludes the events in this case from qualifying as a third form of resolution that can support prevailing party status.” The court explained this conclusion by detailing Buckhannon’s rejection of the catalyst theory and concluding that the State’s action was voluntary.

In contrast, the dissents concluded that Live Gold should have been granted prevailing-party status and offered alternative means of reaching that conclusion within the Buckhannon framework. Judge Roth concluded that Live Gold was a prevailing party because the TRO was a judgment on the merits and the district court permanently altered the legal relationship of the parties by binding the State to its new interpretation of the Act. She argued that the court’s conclusion (that both valid common law trademarks and registered trademarks would be recognized henceforth under the TIM Act) satisfied the merits requirement. Furthermore, because of the judicial estoppel doctrine, the district court permanently altered the legal relationship between the parties by binding the State to its new interpretation of the TIM Act. Moreover, the court’s “bound” statement amounted to a “court-
ordered ‘change in the legal relationship.’”\textsuperscript{95} Finally, she analogized the district court’s binding of the State to a consent decree; in both, a court formalizes voluntary conduct resulting in “a material alteration in the legal relationship between the parties.”\textsuperscript{96}

Similarly, Judge Ruggero Aldisert, in his dissent, rejected the majority’s holding as an application of conceptual jurisprudence that entirely disregarded the important policy consideration of protecting civil rights.\textsuperscript{97} He concluded that the majority used a “stingy interpretation” of the phrase “judicially sanctioned” in light of the facts of the case.\textsuperscript{98} That is, rather than focusing on the substance behind the facts, as they should have done, the majority focused superficially on the lack of an explicit order granting some kind of judgment for the plaintiff.\textsuperscript{99}

III. Live Gold Should Have Been Deemed a Prevailing Party

The en banc majority in Singer reached a restrictive and surprising result.\textsuperscript{100} It did so, in part, by characterizing the district court’s actions at the preliminary injunction hearing as a denial of the preliminary injunction “because the opposing party’s voluntary change of position moot[ed] the case . . . .”\textsuperscript{101} This portrayal implies that the district court made a determination adverse to Live Gold at the preliminary injunction stage based on the merits, but that was not the case.\textsuperscript{102} As noted

\footnotesize{three factors in determining whether to invoke judicial estoppel: (1) whether the positions adopted are “clearly inconsistent”; (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (internal citations omitted) (stating the three factors); Singer, 650 F.3d at 239 (Roth, J., dissenting) (noting that the judicial estoppel test is not stringent).

\textsuperscript{95} Singer, 650 F.3d at 239 (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 604 (2001)).

\textsuperscript{96} Id.

\textsuperscript{97} See id. at 241 (Aldisert, J., dissenting). Conceptual jurisprudence, Judge Aldisert asserts, is “a philosophy of jurisprudence no longer in general acceptance . . . a philosophy that preaches that a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results—and wholly inappropriate for cases that touch upon civil rights.” Id.

\textsuperscript{98} See id. at 242.

\textsuperscript{99} Id.

\textsuperscript{100} See Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 232–33 (3d Cir. 2011) (en banc) (Roth, J., dissenting); id. at 242 (Aldisert, J., dissenting).

\textsuperscript{101} Id. at 224 (majority opinion); id. at 232–33 (Roth, J., dissenting) (discussing the majority’s characterization of the district court’s actions and reframing the question at issue).

\textsuperscript{102} See id. at 232–33; \textit{infra} notes 103–104 and accompanying text.
above, it was only after the district court had repeatedly rejected the State’s arguments—and suggested an alternate interpretation—that the State “voluntarily” adopted the court’s interpretation. The court then “bound” the State by its newly adopted interpretation.

The Supreme Court’s reasoning in Buckhannon illustrates why these events made Live Gold a prevailing party. The Supreme Court fully explained its decision to reject the catalyst theory in Buckhannon. First, it explicitly based its rejection on the fact that the catalyst theory confers prevailing-party status “where there is no judicially sanctioned change in the legal relationship of the parties.” Then, it cautioned lower courts that it disapproved of awarding prevailing-party status to a party that has merely gained a reversal of dismissal for failure to state a claim. The Court reasoned that such a ruling does not reach the merits of the claim and “is not the stuff of which legal victories are made.” Finally, the Court stressed the requirement of a judicial imprimatur on the change in the legal relationship between the parties.

In effect, the district court’s actions in Singer amounted to a judicially sanctioned change in the legal relationship of the parties that was based on a determination on the merits. The district court judicially sanctioned this change first by openly expressing disagreement with the defendant’s stance, then by suggesting a potential solution, and finally, after the defendant abandoned its position, by binding the defendant to its new interpretation. The significance of this exchange is that the court’s rejection of the State’s arguments and suggestion that the State adopt a different interpretation plainly evidenced a conclusion on the merits. Additionally, having agreed to be bound by the interpretation it espoused in court, the State would be subject to judicial estoppel if it tried to renege, whether against Live Gold or against other holders of valid unregistered trademarks. Although judicial estoppel is a discre-
tionary doctrine, it is difficult to imagine a circumstance in which the State would be released from its in-court agreement to a binding statutory interpretation.115

In short, the result in Singer was precisely “the stuff of which legal victories are made.”116 Live Gold did not simply obtain some of the benefit it sought in bringing suit, it obtained complete relief.117 Moreover, Live Gold’s victory is a boon to other common law trademark holders.118 Both Live Gold and other common law trademark holders can now prevent the State from requiring them to promote their musical groups’ performances or productions with labels of salute or tribute.119 If the State ever tried to adopt a contrary interpretation, a party would need only file an action drawing the court’s attention to the preliminary injunction hearing at issue in this case.120

Furthermore, an in-court relinquishment of a position leading to one party being bound to a position is very different from the situations in which the Supreme Court has found the requisite judicial imprimatur to be lacking.121 In Singer, there was not an out-of-court “alteration of actual circumstances,” as when a legislature moots the action or the parties come to an out-of-court settlement.122 Instead, the events in this case equate to a consent decree, because the State’s voluntary change of position occurred in court and the State agreed to be judicially bound by its change.123

Nonetheless, despite the Third Circuit’s restrictive interpretation of Supreme Court jurisprudence, practitioners may take steps to help ensure they will be able to collect attorney’s fees.124 The Third Circuit’s conclusion in Singer made clear its preference for formal judicial orders

115 See id. at 233, 239.
116 See Buckhannon, 532 U.S. at 605; infra notes 117–120 and accompanying text.
117 See Singer, 650 F.3d at 233 (Roth, J., dissenting) (concluding that Live Gold obtained complete relief); id. at 239 (reasoning that the state would be judicially estopped from asserting a contrary position in any future proceeding).
118 See id. at 233, 239.
119 See id.
120 See id. at 239.
121 Compare Buckhannon, 532 U.S. at 606 (legislature mooted action), with Singer, 650 F.3d at 226 (defendant capitulated in court and court bound it to its position).
122 See Buckhannon, 532 U.S. at 604 n.7, 606.
123 Singer, 650 F.3d at 239 (Roth, J., dissenting).
124 See infra notes 125–127 and accompanying text.
when prevailing-party status is sought. Drawing on this and other Third Circuit precedents, practitioners who plan to seek attorney’s fees in the Third Circuit would do well to request that the court: (1) issue an order containing a consent decree or stipulated settlement; (2) include mandatory language in the order; and (3) provide for judicial enforcement in the order. Although this will not prevent opposing parties from challenging the court’s order, it would at least provide an appellate court with an explicit grant of the kind already identified by the Supreme Court and Third Circuit as acceptable.

CONCLUSION

The Third Circuit in Singer determined that Live Gold did not meet the requirements for prevailing-party status under the Civil Rights Attorney’s Fees Awards Act. It did so by focusing on the fact that the district court granted only a temporary restraining order and by characterizing the State’s change in position as a voluntary change unconstrained by a judicial imprimatur. This ruling needlessly expanded the scope of the Supreme Court’s holding in Buckhannon by concluding that the State’s in-court relinquishment of its argument equated to an out-of-court settlement or alteration of the circumstances, as when a legislature changes a law. Nonetheless, until the Third Circuit recognizes that such circumstances confer prevailing-party status, practitioners who find themselves in Live Gold’s position should press the court to issue a formal order in the form of a consent decree or stipulated settlement, using mandatory language and providing for judicial enforcement.

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125 See Singer, 650 F.3d at 242 (Aldisert, J., dissenting); supra notes 76–99 and accompanying text.
126 See Buckhannon, 532 U.S. at 604 (stating that settlements enforced through consent decrees may confer prevailing-party status); Singer, 650 F.3d at 231, 232 (concluding that the trial court’s binding of the defendant to an interpretation was insufficient to confer prevailing-party status because binding language was not memorialized in an order); Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 161, 165 (3d Cir. 2002) (holding that a court order containing a settlement agreement terms and mandatory language and providing for judicial enforcement, was an appropriate means of conferring prevailing-party status).
127 See Buckhannon, 532 U.S. at 604 (naming a consent decree as an acceptable avenue to obtain prevailing-party status); Singer, 650 F.3d at 228 (recognizing that court-ordered consent decrees confer prevailing-party status); Truesdell, 290 F.3d at 161, 165 (awarding prevailing-party status where the plaintiff obtained a court order containing the terms of a settlement agreement, mandatory language, and means for judicial enforcement).