No. 24-267

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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JOHN ABDELSAYED and
TRENDS REALTY USA CORP,
*Petitioners*,

v.

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,
*Respondent*.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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# BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Affordable Aerial Photography, Inc. discloses the following: There is no parent corporation or publicly held corporation that owns 10% or more of Respondent's stock.

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## INTRODUCTION

Respondent Affordable Aerial Photography, Inc. respectfully submits that the petition for a writ of certiorari should be denied.

Petitioners John Abdelsayed and Trends Realty USA Corp fail to present a "compelling reason" for the Court to grant their Petition for a Writ of Certiorari (the "Petition"). *See* Sup. Ct. R. 10. Petitioners argue there is a Circuit split as to whether Petitioners should be deemed prevailing parties under the Copyright Act or, alternatively, that this Court should provide guidance (where no split exists and nobody has requested such other than Petitioners) with respect to the contours of Fed. R. Civ. P. 68.

As set forth herein, Petitioners have manufactured Circuit splits and requested guidance regarding an obscure scenario that is not affecting the federal courts in general, but rather (to date) has only affected the unique set of facts in this case. Petitioners, however, are not prevailing parties for purposes of a fee award under the Copyright Act (they have already been awarded their taxable costs under Rule 54) – nor did Respondent obtain any judgment sufficient for Petitioners' Rule 68 offer to trigger. The Petition should be denied.

## REASONS FOR DENYING THE PETITION

### I. There is No Compelling Reason to Clarify the Contours of Rule 68

The Petition asserts that "[w]hether a plaintiff's

voluntary dismissal is a 'judgment that the offeree finally obtains' is also a recurring and important question for litigants."[1] Respectfully, it is not as there is no conflict among the federal courts in situations analogous to the one here – i.e., where a plaintiff voluntarily dismisses its Complaint and therefore has not prevailed on the relief sought in that Complaint.

Petitioners essentially seek to fit a square peg in a round hole by surmising that a voluntary dismissal is a "judgment finally obtained" for purposes of Rule 68. To get there, Petitioners argue that Respondent 'prevailed' on its motion for voluntary dismissal and obtained the 'judgment' of being afforded the right to file a notice of voluntary dismissal without prejudice.

Although Petitioners purportedly seek clarity in the application of Rule 68, they have not identified any actual conflict in the federal courts' application of such to scenarios where a plaintiff voluntarily dismisses its action. There is no conflict amongst the Courts of Appeal, and the courts that have considered this narrow issue have uniformly concluded that a voluntary dismissal without prejudice (as happened here) is not a judgment finally obtained by the plaintiff. *See Burke v. Furniture House of N.C.*, No. C-89-169-S, 1990 U.S. Dist. LEXIS 17103, at *2 (M.D.N.C. Sep. 13, 1990) ("A voluntary dismissal without prejudice is not a 'judgment finally obtained' within the meaning of Rule 68."); *McDermott v. Monday Monday, LLC*, No. 17-CV-9230 (DLC), 2018 U.S. Dist. LEXIS 28664, at *7–9 (S.D.N.Y. Feb. 22,

[1] *See* Petition, at p. 28.

2018) ("[A] voluntary dismissal without prejudice does not operate as a judgment…. In this case, there has been no judgment entered for the defendant. While the defendant is correct that 'plaintiff has won nothing' in this case, the defendant nevertheless has not secured a judgment, on the merits or otherwise, and, as such, Rule 68 is inapplicable."); *Bennouchene v. Videoapp, Inc.*, No. 19-CV-6318 (GBD) (OTW), 2020 U.S. Dist. LEXIS 16201, at *3–5 (S.D.N.Y. Jan. 30, 2020) (same); *Smart Study Co. v. B+Baby Store*, 540 F. Supp. 3d 428, 431 (S.D.N.Y. 2021) ("[A] notice of voluntary dismissal is not a 'judgment' and does not trigger the 14-day clock in Rule 54(d)(2)(B)(i)."); *Sream, Inc. v. HHM Enter.*, No. 16-cv-62641-BLOOM/VALLE, 2017 U.S. Dist. LEXIS 109475, at *4 (S.D. Fla. July 14, 2017) ("Ordinarily, a dismissal without prejudice is not a 'judgment on the merits" for purposes of declaring a prevailing party because it does not alter the legal relationship of the parties, as the plaintiff may re-file the case."); *Physician's Surrogacy, Inc. v. German*, 311 F. Supp. 3d 1190, 1195 (S.D. Cal. 2018) ("Because there is no document labeled 'judgment' in this case and no decree entered by the court and because a voluntary dismissal without prejudice is ordinarily not an appealable order, there is no judgment in this case for purposes of Rule 54.").

But even in the much narrower context of a Rule 41(a)(2) motion (rather than the notice of voluntary dismissal filed by Respondent), Petitioners fare no better in their effort to trigger their Rule 68 offer of judgment. Again, Petitioners do not point to a single case or conflict within which a voluntary dismissal without prejudice triggered a Rule 68 offer of judgment or posit that anyone other than

Petitioners are seeking clarity on the issue. Indeed, the only authority to address the issue (other than the Eleventh Circuit here) – unequivocally provides that an Order granting a motion to voluntarily dismiss without prejudice ***does not*** trigger a Rule 68 offer of judgment. *See, e.g., Live Face on Web, LLC v. Renters Warehouse, LLC*, No. 17-cv-2127 (WMW/KMM), 2018 U.S. Dist. LEXIS 248785, at *5 (D. Minn. Aug. 28, 2018) (holding that granting a plaintiff's motion to voluntarily dismiss under Rule 41(a)(2) would not trigger any right of the defendant to recover its costs under Rule 68 because the plaintiff did not recover a judgment more favorable than the defendant's $1.00 offer of judgment); *Webco Indus. v. Diamond*, No. 11-CV-774-JHP-FHM, 2012 U.S. Dist. LEXIS 170381, at *11 (N.D. Okla. Nov. 30, 2012) ("If Webco were allowed to dismiss its claims without prejudice, then Defendants would be unfairly deprived of the benefits conferred upon them by Rule 68."); *Jones v. Berezay*, 815 P.2d 1072, 1074–75 (Idaho 1991) ("We find the analysis of the Supreme Court in *Delta Air Lines* to be persuasive. The Joneses did not obtain a judgment. The trial court merely allowed the Joneses to dismiss voluntarily. Because the order of dismissal did not specify otherwise, the dismissal was without prejudice.") (noting that Idaho's Rule 68 is "essentially the same as Fed. R. Civ. P. 68"). As succinctly stated in *Live Face on Web, LLC*:

> After a defendant files an answer or a motion for summary judgment, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). A party may not

voluntarily dismiss a case for the purpose of escaping an adverse decision or seeking a more favorable forum. *Thatcher v. Hanover Ins. Grp., Inc.*, 659 F.3d 1212, 1213–14 (8th Cir. 2011). The decision to allow a party to voluntarily dismiss a case rests within the sound discretion of the district court. *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 950 (8th Cir. 1999). When determining whether voluntary dismissal is warranted, courts consider three factors: (1) whether the plaintiff presents a proper explanation for its motion, (2) whether dismissal would result in a waste of judicial time and effort, and (3) whether dismissal would prejudice the defendants. *Donner v. Alcoa, Inc.*, 709 F.3d 694, 697 (8th Cir. 2013). Here, Defendants argue that all three factors favor denying Live Face's motion for voluntary dismissal and that Live Face seeks to escape an adverse decision.

***

Second, Defendants' Rule 68 argument is foreclosed by the *Delta Air Lines* decision, in which the Supreme Court of the United States addressed the effect of a rejected Rule 68 offer after the plaintiff proceeded to trial and judgment for the defendant was entered. 450 U.S. at 348–49. Under those circumstances, Rule 68 does not require the plaintiff to pay the defendant's post-offer costs

> because "the plain language of Rule 68 confines its effects to [the type of case] in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer." *Id.* at 351; accord *Tunison v. Cont'l Airlines Corp.*, 162 F.3d 1187, 1193–94 (D.C. Cir. 1998); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 333 (5th Cir. 1995) ("If a plaintiff takes nothing . . . Rule 68 does not apply."); *see also Felders v. Bairett*, 885 F.3d 646, 656 (10th Cir. 2018) ("Rule 68's role seems to be solely in the context of actual litigation—where plaintiff has proceeded through litigation to victory but with an award less than the pretrial Rule 68 offer of judgment.").

*Live Face on Web, LLC*, 2018 U.S. Dist. LEXIS 248785, at *2–5.

Respondent did not obtain a 'judgment' in its favor. Respondent sought and received authority from the Trial Court to voluntarily dismiss without prejudice. Here, Petitioners are not seeking clarity to resolve a Circuit split or otherwise address a scenario that frequently arises in the federal courts – they are simply unhappy with the particular scenario at issue here (where a plaintiff seeks and receives permission to voluntarily dismiss after a Rule 68 offer has been made). Numerous courts have already addressed and uniformly held that an Order granting a motion to voluntarily dismiss without prejudice does not trigger Rule 68. Nor have Petitioners pointed to any caselaw

contravening that a Notice of Voluntary Dismissal Without Prejudice (the actual procedural mechanism that terminated this case) likewise does not trigger Rule 68.

Respondent's Complaint and subsequent First Amended Complaint sought two (2) forms of relief: (a) monetary damages and (b) injunctive relief. In voluntarily dismissing its lawsuit without prejudice, Respondent 'obtained' neither money damages nor injunctive relief. No legal authority stands for the proposition that Respondent obtained any judgment that would make it a prevailing party for purposes of Rule 68, and such is fatal to Petitioners' attempt to find a basis for an award of fees here. Indeed, a 'judgment' by which a plaintiff (such as Respondent) obtains $0.00 in damages is not even an enforceable judgment and does not render that plaintiff a prevailing party for purposes of a fee award. *See, e.g.*, *Nance v. Maxwell Fed. Credit Union*, 186 F.3d 1338, 1343 (11th Cir. 1999) ("Because we have vacated the plaintiff's damages award, there is nothing in the judgment that can be enforced."); *Tunison v. Cont'l Airlines Corp.*, 162 F.3d 1187, 1190 (D.C. Cir. 1998) ("[A] judgment with no damages at all is not an 'enforceable judgment' -- there is simply nothing to enforce."); *Key v. Bender Shipbuilding & Repair Co.*, CIVIL ACTION NO. 1:98-1123-RV-C, 2000 U.S. Dist. LEXIS 10122, at *11–12 (S.D. Ala. July 10, 2000) ("Salvatori has achieved success on the merits of his claim but has not obtained a judgment, either in the form of damages or equitable relief, that the court may enforce against Westinghouse. Consistent with our decision

in Nance, therefore, we determine that Salvatori is not entitled to attorney's fees.").

## II. A Voluntary Dismissal Without Prejudice Does Not Result in Judicial Imprimatur

In a copyright action, a court may "award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

In *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016), this Court stated:

> The Court has said that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Assn.*, supra, at 792–793, 109 S. Ct. 1486, 103 L. Ed. 2d 866. ***This change must be marked by "judicial imprimatur."*** *Buckhannon*, 532 U.S., at 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855.

*CRST Van Expedited, Inc.*, 578 U.S. at 422 (emphasis added). Likewise, in *Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289 (11th Cir. 2021), the Eleventh Circuit specifically stated: "Of course, in order to confer prevailing party status, the rejection of the plaintiff's attempt to alter the parties' legal relationship 'must be marked by 'judicial imprimatur.'" *Beach Blitz Co.*, 13 F.4th at 1298 (quoting *CRST*, 578 U.S. at 422). The question, therefore, is whether a Rule 41(a)(1)(A)(i) voluntary dismissal without prejudice is marked by judicial imprimatur.

According to the Petition, the Seventh and Federal Circuits "implicitly"[2] hold that a Rule 41(a)(2) order of voluntary dismissal has judicial imprimatur. Yet in both cases cited – *Live Face on Web, LLC v. Cremation Soc'y of Ill., Inc.*, 77 F.4th 630 (7th Cir. 2023) and *Highway Equip. Co. v. Feco, Ltd.*, 469 F.3d 1027 (Fed. Cir. 2006) – the issue was whether a voluntary dismissal ***with prejudice*** held sufficient imprimatur. Petitioners are essentially attempting to manufacture an "implicit" conflict where none exists – the issue here is whether a voluntary dismissal ***without prejudice*** carries with it the necessary judicial imprimatur – there is no conflict (implicit or explicit) in the answer to that question.

The Eleventh Circuit's explanation of the law concerning 'prevailing party' status in *$70,670.00 in United States Currency* is relevant here. That case arose from a Rule 41(a)(2) motion to voluntarily dismiss and a subsequent motion for fees from a defendant claiming to be a 'prevailing party.' In holding that the defendant was not a prevailing party for purposes of fees, the Eleventh Circuit explained in detail the law concerning what constitutes a prevailing party – noting the requirement of "judicial imprimatur":

> ***The claimants have not substantially prevailed because a dismissal without prejudice places no "judicial imprimatur" on "the legal relationship of the parties,"***

[2] *Id.* at p. 25.

which is "the touchstone of the prevailing party inquiry." *CRST Van Expedited, Inc. v. Equal Emp't Opportunity Comm'n*, 136 S. Ct. 1642, 1646, 194 L. Ed. 2d 707 (2016) (citations and internal quotation marks omitted); *see also Loggerhead Turtle v. Cty. Council of Volusia Cty.*, 307 F.3d 1318, 1322 n.4 (11th Cir. 2002) (explaining that we interpret "substantially prevailed" fee-shifting statutes consistently with "prevailing party" fee-shifting statutes). ***A voluntary dismissal without prejudice "renders the proceedings a nullity and leaves the parties as if the action had never been brought***." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (alterations adopted) (quoting *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996)).

As the government points out, the order of dismissal poses "no legal bar precluding the government from refiling the same forfeiture action in the future." True, the government admits that, "as a practical matter, it might be difficult for the government to pursue a subsequent civil forfeiture action against the defendant properties… because they may be difficult to bring back within the district court's in rem jurisdiction." ***But this practical difficulty is irrelevant. What matters is that the***

> ***claimants have not obtained a "final judgment reject[ing] the [government's] claim" to the defendant funds***. *CRST Van Expedited*, 136 S. Ct. at 1651; cf. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (holding that "[a] defendant's voluntary change in conduct"—the mirror image of a plaintiff's voluntary decision to withdraw a claim—"lacks the necessary judicial imprimatur" to qualify the defendant as a prevailing party).

*United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293, 1303 (11th Cir. 2019) (emphasis added). The Eleventh Circuit further addressed these concepts in *Simon Prop. Grp., Ltd. P'ship v. Taylor*, No. 20-14374, 2021 U.S. App. LEXIS 29171 (11th Cir. Sep. 27, 2021):

> Here, there was no prevailing party, because Sawgrass Mills dismissed the appellants from the case without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A). *See United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293, 1303 (11th Cir. 2019), cert. denied sub nom. *Salgado v. United States*, 140 S. Ct. 2640, 206 L. Ed. 2d 713 (2020) (holding that a dismissal without prejudice as a result of a motion for voluntary dismissal "places no judicial imprimatur on the legal

relationship of the parties, which is the touchstone of the prevailing party inquiry." (quotations omitted)). *SnugglyCat, Inc. v. Opfer Communs., Inc.*, 953 F.3d 522, 527 (8th Cir. 2020) ("Where an action is dismissed without prejudice, there is no 'prevailing party' and, thus, neither party is entitled to seek an award of attorney fees under the Lanham Act."); *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1215 (10th Cir. 2010) ("Voluntary dismissal of an action ordinarily does not create a prevailing party[.]"); *RFR Indus., Inc. v. Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) (holding that "a plaintiff's voluntary dismissal without prejudice pursuant to Rule 41(a)(1)[(A)](i) does not bestow 'prevailing party' status upon the defendant."). ***Under the plain language of the Rule, this kind of dismissal is "without a court order," Fed. R. Civ. P. 41(a)(1), and therefore the district court placed no judicial imprimatur on the disposition of Sawgrass Mills's attempt to change its legal relationship with the appellants***. *See Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1990) (noting that a dismissal under the Rule "is effective immediately upon the filing of a written notice of dismissal, and no subsequent court order is

> required."). Nor does the district court's determination that the appellants' motion to dismiss was moot affect our analysis. The district court found that motion to be moot because the appellants had already been voluntarily dismissed from the case.

*Simon Prop. Grp., Ltd. P'ship*, 2021 U.S. App. LEXIS 29171, at *5–7 (emphasis added). As recognized by the Eleventh Circuit in *Simon Prop. Grp., Ltd. P'ship*, a voluntary dismissal under Rule 41(a)(1)(A) is "without a court order" – i.e., it is self-executing and not marked by judicial imprimatur. *See, e.g.*, *Royal Palm Vill. Residents, Inc. v. Slider*, 57 F.4th 960, 963 (11th Cir. 2023) (noting that Rule 41(a)(1)(a)(i) voluntary dismissal is "self-executing").

Here, Petitioners did not prevail on a Rule 12(b)(6) motion and therefore obtain "involuntary" dismissal of Respondent's claims as the defendant in *Beach Blitz Co.* did. The District Court did not reach any conclusion or issue any orders with respect to the merits of Petitioners' claim prior to Respondent's self-executing voluntary dismissal without prejudice (as the subject Order allowed Respondent to file a voluntary dismissal but did not itself dismiss the case). There was no "judicial imprimatur" here when Respondent voluntarily dismissed its lawsuit ***without prejudice***. *See, e.g.*, *U.S. Nineteen, Inc. v. Orange Cty.*, 13 Fla. L. Weekly Fed. D 72 (M.D. Fla. 1999) ("Rule 54 of the Federal Rules of Civil Procedure, entitled 'Judgment; Costs,' defines 'judgment' to include 'a decree and any order from which an appeal lies.' Here, the case was voluntarily dismissed by the

Plaintiff, pursuant to Rule 41(a)(1), Fed. R. Civ. P. A voluntary dismissal without prejudice is not an adjudication on the merits, is not a 'judgment,' and is not an appealable order. As such, Defendants are not prevailing parties, within the meaning of Rule 54, and are not entitled to costs."); *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 904–05 (11th Cir. 2003) ("It is now established that in order to be considered a prevailing party under § 1988 (b), there must be a court-ordered material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."); *Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009) ("We conclude *Corcoran* is clearly irreconcilable with *Buckhannon* and no longer good law. We therefore overrule *Corcoran* and hold *Buckhannon's* material alteration test applies to § 505 of the Copyright Act. Because the plaintiffs in this lawsuit remained free to refile their copyright claims against the defendants in federal court following their voluntary dismissal of the complaint, we hold the defendants are not prevailing parties and thus not entitled to the attorney's fees the district court awarded them.") (internal citation omitted).

Indeed, the same holds true even where a court is required (under Rule 41(a)(2)) to issue an order effectuating a plaintiff's request to voluntarily dismiss its action without prejudice or where a court involuntarily dismisses an action without prejudice. *See, e.g.*, *Temurian v. Piccolo*, No. 18-CV-62737-SMITH/VALLE, 2021 U.S. Dist. LEXIS 41832, at *9 (S.D. Fla. Mar. 3, 2021) ("[A] party is not considered to be the 'prevailing party' after a voluntary dismissal without prejudice under Rule 41(a)(2). Such a voluntary dismissal places no judicial imprimatur on

the legal relationship of the parties, which is the touchstone of the prevailing party inquiry. Rather, a voluntary dismissal without prejudice renders the proceedings a nullity and leaves the parties as if the action had never been brought.") (internal citations omitted); *United States v. 2007 BMW 335i Convertible*, 648 F. Supp. 2d 944, 952 (N.D. Ohio 2009) ("[T]he Court's [Rule 41(a)(2)] order dismissing the Government's civil forfeiture action without prejudice does not constitute a judicially sanctioned change in the parties relationship…. Nothing in the Court's dismissal order or the procedural history of the case precludes the Government from filing the same complaint at some point in the future. Accordingly, the Claimants are not entitled to attorney's fees pursuant to CAFRA, 28 U.S.C. § 2465(b)(1)(A)."); *Herkemij & Partners Knowledge, B.V. v. Ross Sys.*, No. 1:05-cv-650-WSD, 2006 U.S. Dist. LEXIS 38783, at *18–19 (N.D. Ga. June 12, 2006) (dismissal without prejudice under Rule 41(a)(2) was not an adjudication on the merits and did not confer prevailing party status on the defendant under § 505); *Kent v. L.A. Lakers*, No. 12-21055-CIV-MARTINEZ/MCALILEY, 2013 U.S. Dist. LEXIS 204875, at *5 (S.D. Fla. Apr. 17, 2013), report and recommendation adopted, No. 12-21055-CIV, 2013 U.S. Dist. LEXIS 204874 (S.D. Fla. Aug. 22, 2013) (holding that an involuntary dismissal without prejudice but not on the merits, after the plaintiff failed to respond to a motion to dismiss, "is not an enforceable judgment on the merits nor did it materially alter the relationship between the parties, as the dismissal left Plaintiffs free to bring their claims against Defendant at a later time).

In the context of a voluntary dismissal without prejudice of a copyright infringement claim, the court in *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, No. LA CV16-00339 JAK (FFMx), 2023 U.S. Dist. LEXIS 152617, at *8–9 (C.D. Cal. July 7, 2023) plainly stated:

> "[A] 'prevailing party' is one who has been awarded some relief by the court. The key inquiry is whether some court action has created a material alteration of the legal relationship of the parties." *Cadkin v. Loose*, 569 F.3d 1142, 1148-49 (9th Cir. 2009) (internal citation and quotation marks omitted). A court action materially alters "the legal relationship of the parties" when it "deprive[s the losing party] of the ability to seek relief in federal court" under the Copyright Act against the party that is seeking a fee award. *Id.* at 1150 (defendants were not "prevailing parties" under section 505 because they had been dismissed voluntarily and without prejudice and "remain[ed] subject to the risk" that the plaintiffs could refile the copyright claims). Thus, a "defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refiling the claim against the defendant in federal court." *Id.*; cf. *Tavory v. NTP, Inc.*, 297 Fed. Appx. 986, 989–90 (Fed. Cir. 2008) (dismissal of copyright infringement claim on the ground that the registration

> was invalid materially altered the legal relationship between the parties because "[b]y finding the deposit copy of that work to be an invalid reconstruction, the court essentially decided that [Plaintiff] cannot ever succeed in a copyright infringement claim against [Defendant] based on the work represented in that invalid copy").

Dismissal without prejudice "is insufficient to constitute a change in the legal relationship of the parties so as to satisfy the *Buckhannon* test because the plaintiff is free to refile its action." *Sream, Inc. v. SMOKE THIS TOO, LLC*, No. 16-cv-61439-BLOOM/VALLE, 2017 U.S. Dist. LEXIS 109474, at *6 (S.D. Fla. July 14, 2017); *see also George v. Wayman*, No. 15-14435-CIV-MARTINEZ/LYNCH, 2016 U.S. Dist. LEXIS 175133, at *4 (S.D. Fla. Dec. 16, 2016) (finding that defendant in a copyright infringement action was not a "prevailing party" under § 505 following dismissal without prejudice of plaintiff's claims).

There is no division or conflict amongst the Circuit Courts as to whether a dismissal without prejudice constitutes the imprimatur necessary to effectuate prevailing party status. While Petitioners attempt to create such conflict, they do so only by citing cases in which a dismissal ***with prejudice*** was at issue. That is not the scenario here.

## III. The Requirement of Judicial Imprimatur Resolves any Purported Circuit Conflict

As acknowledged by the Petition, even the Tenth Circuit has recently acknowledged that a defendant was not a prevailing party where there is no judicial imprimatur. *See Xlear, Inc. v. Focus Nutrition, Ltd. Liab. Co.*, 893 F.3d 1227, 1239 (10th Cir. 2018) ("In summation, under *Buckhannon, Bell*, and *Biodiversity Conservation Alliance*, to establish that it was a prevailing party, a litigant must demonstrate the existence of judicial imprimatur by identifying judicial action that altered or modified the legal rights of the parties.").

The Petition, however, attempts to create a conflict here where there is realistically none. The Petition does not point to a single case akin to this – where a plaintiff sought authority to voluntarily dismiss, was provided that authority (rather than the trial court dismissing the case itself), and then filed a notice of voluntary dismissal without prejudice. While the Petition paints the questions presented as "important," they are issues for which no true conflict exists.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted

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