ORAL ARGUMENT NOT YET SCHEDULED

No. 09-5402

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ED BRAYTON,

Appellant,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Appellee.

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

REPLY BRIEF FOR APPELLANT

Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Appellant

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STATUTES AND LEGISLATIVE MATERIALS

GLOSSARY

FOIA	Freedom of Information Act
USTR	Office of the United States Trade Representative
WTO	World Trade Organization

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) provides that a plaintiff who receives relief through a unilateral change in position by the government *may* receive attorney fees if his claim is "not insubstantial." Below, however, the district court held that such a plaintiff may *not* receive fees, even if his claim is not insubstantial, if the government's original position was correct. In other words, the district court held that for a plaintiff to receive fees, his claim must not only be "not insubstantial," but also correct, thereby rendering FOIA's "not insubstantial" language superfluous.

Seemingly hesitant to defend the district court's conclusion that a court *may not* award fees to a category of requesters that the statute expressly says *may* receive them, USTR's primary response is to creatively reinterpret the decision below, as well as the pre-Open Government Act precedents on which the district court relied. According to USTR, in holding that "a party is not entitled to fees if the government's legal basis for withholding requested records is correct," Mem. Op. at 5 (App. 60) (citation omitted), the decision below "permitt[ed], but [did] not requir[e], the District Court to assign a dispositive weight to the [merits] if the agency's position was correct." USTR Br. at 19. This is so, USTR asserts, because district courts have discretion to choose not to reach the question of whether the agency's original position was correct. But courts do not have discretion to avoid an issue that, if reached, would require the court to render a different ruling than it would if it did not

reach the issue. Moreover, USTR's interpretation of the decision below is foreclosed by the case law on which it relies. And even if USTR's interpretation were correct, this case would have to be remanded either for the district court to exercise its supposed discretion or at least for it to explain how it exercised its discretion, which it would be unable to do both because it in fact exercised no discretion and because there are no standards that could reasonably govern a court's exercise of the discretion USTR claims exists here.

USTR's argument that the Open Government Act is irrelevant because it addressed "eligibility," not "entitlement," is similarly unavailing. The Open Government Act's amendments made clear that Congress wanted courts to have discretion to award attorney fees to FOIA plaintiffs who receive relief through a unilateral change in position by the government as long as their claims are "not insubstantial." Under the decision below, however, courts do not have discretion to award such plaintiffs fees if the government's original position was correct.

Finally, USTR attempts to avoid the question whether the district court erred in holding that "a party is not entitled to fees if the government's legal basis for withholding requested records is correct," by claiming it did not change its position and that Brayton therefore did not "substantially prevail" and is not eligible for fees. But although USTR originally told Brayton that the withheld agreement would not

be released until the "multinational negotiation process is complete," it released the record before that process was, in fact, complete. Accordingly, USTR changed its position and Brayton is eligible for fees.

ARGUMENT

I. The Decision Below Categorically Bars Plaintiffs From Receiving Fees If the Government's Withholding of Records Was Correct.

1. USTR's primary argument rests on a misinterpretation of the district court's decision and the case law on which it relied. As Brayton explained in his opening brief, the district court's holding that plaintiffs are categorically barred from receiving attorney fees unless their claims are not only not insubstantial, but also correct on the merits, conflicts with the statutory text of FOIA as amended by the Open Government Act. USTR's main response is to claim that the decision below does not, in fact, categorically bar plaintiffs from receiving fees unless their positions are correct. Rather, according to USTR, district courts have the discretion to choose whether or not to decide the correctness of the government's withholding. If the court makes the "decision to decide whether the withholding was correct," USTR Br. at 9, and finds that the government's position was correct, that is dispositive. However, instead of reaching the merits, the district court can choose to consider only whether or not the government's position was reasonable. If the court chooses only to decide the

reasonableness of the government's position, the merits of the government's position are not dispositive and the court may award fees, even where, had the district court chosen to reach the merits, it would have determined that the government's legal basis for withholding was correct. *See id*. (claiming court "always had the option of finding USTR's position merely reasonable and weighing that finding against the other factors").[1]

USTR's interpretation of the decision below is wrong. The district court did not purport to be exercising "discretion to assign a range of weights to the fourth factor." USTR Br. at 17. It followed what it believed was a mandatory rule that "[i]f the Government's position is correct as a matter of law, that will be dispositive." Mem. Op. at 5 (App. 60) (citation omitted). In explaining the framework it believed applied, the district court stated that "[a]lthough the entitlement analysis typically involves the balancing of four factors . . . 'a party is not entitled to fees if the

[1]Brayton assumes that USTR means that if the district court decided not to reach the correctness of the government's position it would have the discretion to award fees even when the government's position was correct, although USTR never explicitly says so. If all USTR means is that the district court need not reach the correctness of the government's position if it decides to deny fees on some other basis, that would not establish that there is no categorical rule that plaintiffs cannot be awarded fees where the government's withholding was correct; it would merely mean that in some cases there might be other bases for denying fees. That the categorical rule might not always be the district court's ground for decision does not mean that there is no categorical rule.

Government's legal basis for withholding requested records is correct.'" *Id*. (citation omitted). In other words, the district court stated that although it would otherwise have discretion to award fees, it did not have discretion if the government's position was correct.

Similarly, the pre-Open Government Act case law on which the district court relied did not give courts discretion to award fees by declining to reach the question of whether the government's withholding was correct. Indeed, the case that the USTR calls "the most directly on point," USTR Br. at 13, *Chesapeake Bay Foundation, Inc. v. U.S. Department of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), makes clear that, under the pre-Open Government Act framework that the district court applied, district courts did not have discretion to award fees without deciding the merits of the government's withholding if the government claimed its position was correct. In *Chesapeake Bay Foundation*, after holding that "a party is not entitled to fees if the Government's legal basis for withholding requested records is correct," the Court explicitly stated: "Thus, in a case such as this one, in which the Government continues to insist that it had a valid basis for withholding requested documents, the District Court *must* determine whether the Government's position is legally correct in assessing any claim for fees under FOIA." 11 F.3d at 216 (emphasis added).

USTR latches on to language in *Chesapeake Bay Foundation* stating that "*[i]f*

the District Court reaches the merits, *and* holds [the government's position] is incorrect," the court must weigh the entitlements factors. USTR Br.at 14 (quoting *Chesapeake Bay Found.*, 11 F.3d at 216) (emphasis added by USTR). According to USTR, this language demonstrates that district courts can decide not to reach the merits of the government's position. Reading this sentence in context, however, makes clear that this Court did not hold that district courts have discretion to *award* fees by declining to reach the merits. Rather, the Court held that the district court did not need to reach the correctness of the government's withholding if the district court would deny fees, based on a balancing of factors, even if the government's position was wrong. The Court specifically stated that if the district court would *not* deny fees based on the four balancing factors, "the court *must* decide whether the Government's position is legally correct—for, if so, this will be dispositive of the case." 11 F.3d at 217 (emphasis added). In other words, under the pre-Open Government Act framework followed by the district court, the district court did not, in fact, "*always* ha[ve] the option of finding USTR's position merely reasonable and weighing that finding against the other factors." USTR Br. at 9 (emphasis added). If the government claimed its position was correct, the court had to decide whether that was so before awarding fees; and if it decided the government's position was correct, it could not award fees.

Rather than giving courts discretion to decide whether or not to reach the merits of the government's withholding, the decision below, and the pre-Open Government Act caselaw on which it relied, adopted the following framework: If the government's position was correct, the court could not award fees. *See, e.g, Davy v. CIA*, 550 F.3d 1155, 1162 (D.C. Cir. 2008) ("If the Government's position is correct as a matter of law, that will be dispositive.") (quoting *Chesapeake Bay Found.*, 11 F.3d at 216). If the government's position was incorrect, but reasonable, the court could weigh the reasonableness (as a factor disfavoring the award of fees) along with other relevant factors. *See, e.g., Tax Analysts v. U.S. Dep't of Justice*, 965 F.2d 1092, 1097 (D.C. Cir. 1992) (holding that the government's position was reasonable, though incorrect, and that, therefore, the district court did not abuse its discretion in weighing the fourth factor against awarding fees). And if the government's position was incorrect and unreasonable, the fourth entitlement factor was weighed in favor of awarding fees. *See, e.g., Davy*, 550 F.3d at 1162 (holding that the district court erred in determining that the fourth factor weighed against an award of fees where there was no evidence that the government's position was reasonable).[2]

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[2]Contrary to USTR's suggestion, Brayton's papers below did not interpret this case law as allowing district courts the "flexibility" to "find the agency's position merely colorable and balance the fourth factor along with the other three or . . . find the agency's position correct." USTR Br. at 16. Rather, Brayton cited *Davy*, 550 F.3d at 1162, argued that the correctness of the government's position cannot be

Under that pre-Open Government Act framework, applied by the district court, district courts had discretion to award fees in the second and third scenarios—in which the plaintiff's position was correct—but did not have discretion to award fees under the first scenario, in which the government's position was correct; in other words, the court could not award fees unless the plaintiff's position was correct. As Brayton explained in his opening brief, however, that framework conflicts with FOIA's language, as amended by the Open Government Act, which provides that the court *may* award fees if the plaintiff's claim was not insubstantial.[3]

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dispositive after the Open Government Act, and asserted that USTR's position was neither correct nor reasonable, but that even if it were, he should be awarded fees because other factors weighed so heavily in his favor. *See* Plaintiff's Motion for a Determination of His Eligibility for and Entitlement to Attorney Fees and Costs (Docket No. 16) at 23; Reply Memorandum in Support of Plaintiff's Motion for a Determination of His Eligibility for and Entitlement to Attorney Fees and Costs (Docket No. 19) at 6-8, 15.

[3]Brayton understands USTR's argument to be that the district court had the discretion whether or not to *reach* the question of whether USTR's position was correct, not that it had discretion in deciding the merits of USTR's withholding of records if it addressed the question. *But see* USTR Br. at 15 (claiming district court had "options" of finding USTR's position correct, merely reasonable, or not colorable). However, if USTR is, in fact, arguing that the district court had discretion to choose between finding USTR's position correct or colorable but incorrect, that argument, too, is wrong. A district court's discretion does not extend to matters of law. *See, e.g., Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Whether the government's legal position is correct as a matter of law is, by definition, a matter of law. Thus, the district court did not have the discretion to choose whether USTR's argument was correct as a matter of law or whether it was incorrect as a matter of law.

2. In addition to misinterpreting the district court's decision and pre-Open Government Act caselaw, USTR's explanation of how the fourth factor works is incoherent. Even where district courts have discretion—as they do in the FOIA attorney fees context—they do not have discretion to avoid a potentially dispositive that might require a contrary ruling from the one they would give if they did not reach the issue. Awarding attorney fees where a properly preserved issue, if reached, would *require* that fees be denied would, itself, be an abuse of discretion. It is unimaginable, for example, that USTR would not have cried foul if the district court had stated that were it to reach the merits, it would have held that USTR's original position was correct and been required to deny fees, but that, instead, it was going to exercise its discretion not to reach the merits and was going to balance the factors and award fees. Moreover, it makes no sense to have a doctrine that requires an issue to be considered dispositive if reached, but does not require the issue to be reached, and that sets forth no factors to guide courts in determining whether or not to reach the dispositive issue. Put another way, USTR's view that district courts have discretion to decide whether the correctness of the government's position will be "controlling" as a matter of law cannot be right because courts do not have discretion with respect to the resolution of matters of law.

Even if this Court adopted USTR's novel interpretation of how the fourth

entitlement factor works, however, the district court's decision would still have to be vacated and remanded. To begin with, as discussed above, nothing in the district court's decision reflects that it believed it was exercising discretion to decide whether the government's original position was correct. Rather, the court viewed the statement that the fourth factor will be dispositive if the government's position was correct as a *limitation* on its discretion, not an *extension* of its discretion. *See* Mem. Op. at 5 (App. 60) ("Although the entitlement analysis typically involves the balancing of four factors, the Circuit has made clear that 'a party is not entitled to fees if the Government's legal basis for withholding requested records is correct.'") (citation omitted). Thus, if USTR is correct about how the fourth entitlement factor operates, the district court applied the wrong legal framework, thereby abusing its discretion. *See Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (citation omitted) ("The district court 'abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law.'"). Accordingly, even if the Court were now to adopt the position that the correctness of the government's position is dispositive only if the district court chooses as a matter of discretion to reach it, the case would have to be remanded for the district court to exercise that discretion.

Moreover, even if the district court believed it was following USTR's

framework (that is, even if it believed that it possessed discretion and chose to reach the issue of correctness of the government's position in an exercise of that discretion), and even if USTR's framework were correct, the case would still have to be remanded. District courts do not have unfettered discretion; their discretion can be abused. Accordingly, when a district court exercises its discretion, it must "articulate its reasons." *EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406, 1410-11 (D.C. Cir. 1996); *see also McCready v. Nicholson*, 465 F.3d 1, 15 (D.C. Cir. 2006) (in case under abuse of discretion standard, remanding where court did not explain its reasons). At the very least, the court's reasoning must be "apparent." *Pardo-Kronemann v. Donovan*, 601 F.3d 599, 612 (D.C. Cir. 2010). Here, however, the district court did not offer any rationale for choosing to reach the correctness of USTR's position rather than to decide only whether that position was reasonable. Thus, at the very least, this case would have to be remanded for the district court to explain how it exercised its discretion.

On remand, however, the district court would be unable to articulate its reasoning because, under USTR's theory, there are no principles that could rationally guide the district court's discretion. There are only two possibilities of types of variables that could guide the district court: First, the district could be guided by the strength of the merits. But determining the merits would require the court to reach

the merits, so it cannot be the variable that guides *whether* the district court reaches the merits. Second, the district court could base its decision on factors besides the merits. But USTR's position is that the district court does *not* have to consider any factors other than the merits. That the district court, on remand, would be unable to offer any reasoned explanation for how it exercised its discretion further demonstrates that USTR's interpretation of the decision below is incorrect.

II. After the Open Government Act, the Merit of the Government's Original Position Cannot Be Dispositive.

1. USTR does not dispute that forbidding district courts to award fees if they determine that the government's original position was correct would render FOIA's "not insubstantial" language superfluous and effectively rewrite the language enacted by Congress in the Open Government Act of 2007. Instead, USTR contends that the Open Government Act is irrelevant because it "made no change to the entitlement provision." USTR Br. at 24. But there is no separate "entitlement provision" in FOIA's fee provision. The statute simply says that a court "may" award fees to a plaintiff who substantially prevails. 5 U.S.C. § 552(a)(4)(E)(i). Thus, the government apparently means only that Congress did not alter the word "may." *See* USTR Br. at 25 (emphasizing that "the entire statutory basis for the discretionary entitlement determination is . . . the single three-letter word 'may'"). However,

although Congress did not change the word "may," it did, for the first time, explain *when* courts "may" award fees—and that is when plaintiff's claim is "not insubstantial," not just when the claim is correct on the merits.

In stating that courts "may" award fees to plaintiffs who receive relief through a unilateral change in position by the government and whose claims were not insubstantial, Congress made clear that it wanted courts to have discretion to award fees to such plaintiffs. Under the district court's holding, however, courts do *not* have discretion to award fees to such plaintiffs unless their claims were also correct. They *must* deny those plaintiffs fees. Whether labeled "eligibility" or "entitlement," the holding that courts *may not* award fees to plaintiffs whose claims are substantial but incorrect conflicts with the statutory language stating that courts "may" award such plaintiffs fees. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010).[4]

In short, Brayton is not asking "this Court to re-write its precedents." USTR

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[4]USTR devotes a full section of its brief to arguing that *Shady Grove* does not apply because this case does not involve a conflict of federal and state law. USTR Br. at 26-28. USTR misses the point. What *Shady Grove* demonstrates is that when two bodies of law set forth different conditions for when something "may" and "may not" happen, those laws conflict, and providing different names to the different conditions does not resolve the conflict. 130 S.Ct. at 1437-38. When the two bodies of law are a state law and a federal law, the federal law trumps the state law. When the two bodies of law are an amended statute and case law interpreting the statute before it was amended, the statute trumps the case law.

Br. at 26. Rather, he is asking this Court to recognize that *Congress* has rewritten FOIA's attorney fee provision and that, under that amendment, district courts have discretion to award fees to FOIA plaintiffs who receive relief through a unilateral change in position by the government as long as their claims are not insubstantial.

2. Despite the amendment to FOIA specifically providing how meritorious a plaintiff's claim must be for the court to be able to award fees, USTR contends that the merits of the government's original position should be allowed to be dispositive because "the Court should presume that Congress was fully aware of this Court's precedents on the entitlement determination when it enacted the [Open Government Act]." USTR Br. at 26. Whatever Congress knew about this Court's precedents, however, it could not have intended that courts interpret the Open Government Act in a way that renders the "not insubstantial" language it enacted irrelevant. Nor could it have anticipated that language stating that a court may award fees to a complainant "if the complainant's claim [wa]s not insubstantial," 5 U.S.C. § 552(a)(4)(E)(ii)(II), would be interpreted to mean that courts may only award fees to a complainant whose claim was correct.

Moreover, the legislative history makes clear how at least Senator Kyl—the Senator who introduced the amendment that added the "not insubstantial" language—thought the amendment would work. In a floor statement, Senator Kyl

said that even when the fourth entitlement factor is taken into account, the Open Government's Act language "will sometimes require the payment of fees to a party whose litigation position lacked merit." 153 Cong. Rec. S10989 (daily ed. Aug. 3, 2007) (Statement of Sen. Kyl). USTR responds that the Open Government Act's legislative history is irrelevant because it does not show that Congress's purpose in enacting the amendments to FOIA was to change the entitlement factors. USTR Br. at 28-29. Of course, that Congress did not separately discuss the "entitlement factors" does not change that the legislative history demonstrates that Senator Kyl, at least, thought he was enacting text under which courts would have discretion to award fees even when the government's original position was correct.[5] In any event, this Court does not need to look to legislative history to know that Congress intended the Open Government Act to affect how meritorious a plaintiff's claim must be in order for the court to have discretion to award fees; Congress made its position on this point clear

[5]USTR also claims that Senator Kyl's statement that the Open Government Act "will sometimes require the payment of fees to a party whose litigation position lacked merit" is "simply silent on the . . . question of whether the district courts are permitted to assign controlling weight to the strength of the government's position." USTR Br. at 21. But if courts may not award fees if the government's original position was correct, as the district court held, then the government will never, in fact, be required to pay fees to a party whose litigation position lacked merit. Thus, Senator Kyl's statement goes directly to the question whether the strength of the government's original position has controlling weight. Stating, as Senator Kyl did, that courts may award fees to a party whose case lacked merit is just another way of saying that the merit of the government's position does *not* have controlling weight.

in the text. And the text provides that a court may award fees "if the complainant's claim is not insubstantial," not "if the complainant's claim is correct."

3. As Senator Kyl explained, the "not insubstantial" language chosen by Congress has the benefit of being clear at the outset, so that attorney fee motions do not result in a "a second major litigation." 153 Cong. Rec. S10989 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001)). In response, USTR offers its own policy arguments, contending that courts should be allowed to hold the merits of the government's position dispositive "in situations where the government's position is so strong that it is not in the public interest to fund a litigated challenge." USTR Br. at 22. The strength of the government's position, however, is not necessarily a proxy for whether the case is in the public interest; the first entitlement factor, for example, specifically looks at "the public benefit derived from the case" as an entirely separate matter from whether the government was technically entitled to withhold the document. *Davy*, 550 F.3d at 1159 (quoting *Tax Analysts*, 965 F.2d at 1093). It is the balance of factors, not just the strength of the government's position, that determines whether the case is in the public interest. District courts should consider factors besides whether the government's position was correct on the merits in considering a motion for attorney fees in a case in which a plaintiff with a not insubstantial claim has

received relief through a unilateral change in position by the government; indeed, after the Open Government Act, the merit of the government's original position cannot be dispositive.

III. Brayton is Eligible for Fees.

USTR urges this Court to avoid deciding whether a plaintiff is barred from receiving fees if the government's original position was correct by holding instead that Brayton is not eligible for fees because he did not substantially prevail. But USTR voluntarily changed its position during the course of the lawsuit, and Brayton's claim was not insubstantial. Accordingly, Brayton substantially prevailed and is eligible for fees. *See* 5 U.S.C. § 552(a)(4)(E)(ii) ("[A] complainant has substantially prevailed if the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.")

USTR does not argue that Brayton's claim was insubstantial. Instead, it claims that it "maintained [its] position throughout," and that Brayton, therefore, did not receive relief through a unilateral change in position by the government. USTR Br. at 32. But USTR's contention that its position has always been that "it would release the Joint Letter as soon as it was permissible to do so under WTO rules," *id.*, is not supported by the facts. USTR's original position, which it communicated to Brayton in rejecting his administrative appeal from the denial of his FOIA request, was that

it would release the record once "the multinational negotiation process is complete." Declaration of Ed Brayton Exh. C (App. 27).; *see also* USTR's Answer (App. 11); Declaration of Bonnie I. Robin-Vergeer Exh. A (App. 49) (letter from USTR Chief Counsel for Administrative Law explaining that USTR originally told Brayton the agency would be "free to disseminate the information when the relevant GATS negotiations—then underway—were completed"). USTR, however, voluntarily released the withheld record *before* the multinational negotiation process was complete. *See id*. (App. 49-50) (explaining that, at the time of release, the United States had failed to reach agreement with one particular WTO member). Accordingly, USTR changed its position.

USTR now claims that its response to Brayton's administrative appeal was just its "initial prediction of one route to de-restriction." USTR Br. at 32. The agency's pre-litigation position, however, left no ambiguity regarding the timing of the release of the withheld record: It would be released when the multinational negotiation process was complete. To be sure, USTR may have known from the beginning that it would also be willing to release the document if it and the European Community went to the WTO and got the document derestricted. But it did not so state until well into this litigation. What matters is not the position the agency secretly held, but the position it set forth in its responses to plaintiff's FOIA request and before this Court.

And USTR changed its position from the one it originally set forth.

USTR's original response prompted plaintiff to sue under FOIA rather than wait an indefinite period of time until multinational negotiations were over. Plaintiff's lawsuit, in turn, led USTR to release the compensation agreement much earlier than the agency had stated. Indeed, even if USTR had stated in its response to Brayton's administrative appeal that the record could be derestricted if the European Community agreed to do so, Brayton would still be eligible for fees because the lawsuit catalyzed USTR into pursuing that option. According to USTR it "was under no obligation to pursue" derestriction of the document, but did so out of "an accommodation to Mr. Brayton." *See* Declaration of Bonnie I. Robin-Vergeer Exh. A (App. 49-50). USTR's brief acknowledges that after this litigation was initiated, USTR "sought to *assist* the process of eventual disclosure" by "working towards an earlier release." USTR Br. at 32. USTR's contention that fees should be withheld to avoid "discourag[ing]" agencies from responding to litigation by making efforts to speed release of records, *id*., is nothing more than a rejection of Congress's policy choice to make fees available in such cases as an incentive for agencies to produce records *before* plaintiffs must resort to litigation.

In short, USTR rejected plaintiff's FOIA request; plaintiff sued; and USTR released the document plaintiff sought before the court issued any order and earlier

than it would have had plaintiff not filed suit. Quite simply, USTR's "position" changed from "no, you cannot have the compensation agreement now" to "yes, here it is and even sooner than we said." Nothing more is required to establish a change in position, and Brayton is eligible for fees.

CONCLUSION

The district court's decision should be vacated and the case should be remanded for further consideration of plaintiff's motion for attorney fees and costs.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Appellant

July 14, 2010

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 5,034 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, July 14, 2010, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum