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IN THE
SUPREME COURT OF
THE STATE OF CALIFORNIA

DISPUTESUITE.COM, LLC
Plaintiff & Respondent,

vs.

SCOREINC.COM, et al.
Defendants & Appellants.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO, NO. B248694
ON APPEAL FROM ORDER OF LOS ANGELES SUPERIOR COURT
CASE NO. BC489083
HONORABLE JAMES C. CHALFANT, TRIAL JUDGE

PETITION FOR REVIEW

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ISSUE PRESENTED

▶ Whether contractual attorneys' fees may be denied to a successful party who defeats a California lawsuit based on the mere fact that litigation may proceed in a different jurisdiction.

REASONS WHY REVIEW SHOULD BE GRANTED

There are two conflicting views as to whether a party may obtain contractual attorneys' fees in the absence of a final determination of the merits of the case. Given this conflict, this Court previously granted review to resolve this issue in *Kandy Kiss of California, Inc. v. Tex-Ellent, Inc.* (2012) 209 Cal.App.4th 604, review granted January 16, 2013, S206354, review dismissed August 13, 2014. Because the parties settled that case after it was briefed in this Court, this Court never resolved this issue. This case presents the perfect opportunity to finally resolve this conflict.

The issue presented here has significant practical implications. By precluding the recovery of contractual fees by defendants after the dismissal of a lawsuit on procedural grounds, the Court of Appeal's decision below invites non-California plaintiffs to file lawsuits here, burdening our congested courts with lawsuits that lack sufficient connection to California. In addition, the Court of Appeal's decision effectively eliminates the concomitant fee exposure for plaintiffs in pursuing such litigation, a risk that *both* parties would otherwise face at the beginning of each lawsuit. As a result, by minimizing the risk of fee exposure for only one side (the plaintiff losing a lawsuit on procedural grounds), the Court of Appeal's decision undermines the reciprocity principles governing contractual fee shifting under Civil Code section 1717.

While the Court of Appeal's decision here represents one of two lines of authority, there is a glaring need for clear and consistent rules in this area.

Instead of consistency, confusion and disagreement has plagued California trial practice for years, creating substantial inefficiencies regarding whether contractual attorneys' fees may be recovered before a final merits determination. While there are no known statistics regarding the number of procedural dispositions (rulings terminating a case based on equitable forum non conveniens, etc.) or dispositions based upon a contractual forum-selection clause, this conflict calls out for this Court's review and clarification.

The issues presented here come up in all types of contract disputes that entail fee shifting, particularly in the real estate and construction industries. Such cases typically entail contract disputes involving purchase and sale agreements, leases, development agreements, financing and loan agreements. While the fee dispute here arose after contesting the proper forum to litigating a trade secrets case, contractual fee disputes can also arise in employment litigation, attorney-client lawsuits, partnership disputes, etc. When such lawsuits are dismissed on *any* procedural grounds (e.g., improper venue, misjoinder, failure to prosecute, delay in bringing case to trial, compulsory cross-complaint rule, etc.), the parties will be embroiled in satellite litigation over fee recovery, each side invoking a different line of authority.

The published opinion in this case is a prime example of the complete unpredictability of decisions on the issue presented, reflecting a sharp discontinuity in the law that needs to be remedied. Needless to say, the Legislature did not intend to create this sort of disarray when enacting the contractual fee-shifting statute—Civil Code section 1717.

Deep discord on a recurring issue of civil procedure undermines the judicial process and litigants' faith in just results. This Court should step in

before the law becomes even more obscure. The uncertainty occasioned by this conflict is particularly intolerable given this Court's responsibility to oversee the even-handed and consistent functioning of the state judiciary. Different appellate districts have weighed in with discordant results. Some have intramural inconsistencies. The only possible source of clarity is this Court.

The published decision warrants review for all of these reasons.

STATEMENT OF THE CASE

A. The Parties and the Claims

In July 2012, Plaintiff and Respondent DisputeSuite.com, LLC ("DisputeSuite") filed a civil action in the Los Angeles County Superior Court against Defendants and Appellants Scoreinc.com, Joel S. Pate, and Joshua Carmona (collectively "Score"). (1 Appellants' Appendix ("AA") 77-121 [complaint]; 6 AA 1370.) Claiming to be a leading provider of credit repair software/services to credit repair organizations, DisputeSuite alleged that it presented its "confidential proprietary trade secret method of doing business" to Score while providing Score with a license to use the "proprietary copyrighted software at a severely discounted price." (1 AA 84, ¶¶ 20-21.)

DisputeSuite claimed that four contracts governed its business relationship with Score. (1 AA 84, ¶22; 87, ¶25; 90, ¶34.) The complaint alleged breach of contract, bad faith, fraud, conspiracy and misappropriation of trade secrets (among others). (1 AA 77-78.) In addition to seeking damages and injunctive relief, DisputeSuite, a Florida company, sought attorneys' fees. (1 AA 121; 1 AA 79, ¶1.)

B. Score Obtains Dismissal of the California Action.

After opposing DisputeSuite's request for injunctive relief (2 AA 435; 1 AA 154 – 2 AA 433), Score filed its motion to quash service of summons. (2 AA 443-523.) Based on its declarations and supporting evidence, Score argued that "the only connection this case has with California is that Plaintiff's counsel practices here." (2 AA 444:10-11.) Invoking the forum selection clauses found in the parties' Master Re-Seller Agreement and Cross-Marketing Agreement (2 AA 449-450, 452-453), Score argued that those clauses require the parties to litigate their disputes in Florida. (2 AA 453-457.)

DisputeSuite opposed the motion. (3 AA 597-607; 3 AA 608-650 & 5 AA 1150-1176 [declarations]; 3 AA 651 – 5 AA 1149 [exhibits].) After receiving the opposition and reply papers (5 AA 1178-1188), the court held a hearing. While the existence/enforceability of the four contracts alleged in the complaint was disputed, the trial court found that those four contracts, at best, present a "battle of forum selection clauses." (5 AA 1194.) Rejecting DisputeSuite's arguments, the trial court held that the issues presented in this lawsuit "are governed by contracts that select Florida as the proper forum." (5 AA 1195.) [1]

As a result, the court granted Score's motion while staying the case for 60 days pending the filing of a new lawsuit in Florida. (5 AA 1189-1195; typed opn. 3.) Based on Score's stipulation, the court also extended

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[1] The clause in the Master Re-Seller Agreement provides as follows: "any disputes, actions, claims or causes of action arising out of or in connection with this Agreement ... shall be subject to the exclusive jurisdiction of the state and federal courts located in Hillsb[o]rough, Florida." (1 AA 135, ¶23.) Similarly, the Cross-Marketing Agreement provides that "the sole jurisdiction and venue for actions related to the subject matter of the agreement shall be Pinellas County, Florida." (1 AA 150, ¶10 [capitalization omitted].)

by seven days the preliminary injunction that was granted earlier. (5 AA 1280; 3 AA 595.) [2]

A subsequent hearing was held on an order to show cause as to the dismissal of the case, followed by a written order dismissing the case as of December 18, 2012. (5 AA 1279-1280.) The order of dismissal, signed and filed on January 3, 2013, also vacated the preliminary injunction as of December 18, 2012. (5 AA 1280.)

DisputeSuite did not appeal the dismissal of its case or any other rulings. (Code Civ. Proc., § 904.1, subd. (a)(3).) Instead, it filed a new action in Florida. (Typed opn. 3.)

C. After Obtaining Full Dismissal of the California Action, Score Files Its Motion for Attorneys' Fees.

The Cross-Marketing Agreement includes a reciprocal attorneys' fee provision as follows: "The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled ... to reimbursement of legal expenses incurred in such action, including ... reasonable attorney's fees." (1 AA 150-151, ¶11.)

Based on this fee provision, Score filed a fee motion after the hearing on the order to show cause. (5 AA 1197-1206 [fee motion]; 1207-1275 [declaration and exhibits].) Having received opposition (6 AA 1283-1328) and reply papers (6 AA 1329-1365), the trial court held a hearing, denying Score's motion for attorneys' fees. (6 AA 1369-1377.)

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[2] The injunction precluded the sale/use of DisputeSuite's software as to third parties that were not joint customers. (3 AA 595, ¶2.) It also precluded the transfer of any joint customers to anyone that does not use DisputeSuite's software. (*Id.*, ¶1.)

The trial court reasoned that "[w]hile the Supreme Court will decide" the issue presented here in *Kandy Kiss*, "the court must make a choice between a split in the existing appellate authority." (6 AA 1376.) Choosing one line of authority over another, the court denied the fee motion, citing the fact that DisputeSuite had moved the parties' dispute to Florida by filing a new lawsuit in that forum. (*Id.*)

D. The Court of Appeal Upholds the Denial of Score's Fee Motion.

Score appealed the trial court's ruling on the fee motion. (6 AA 1378.) In a published opinion, the Second Appellate District, Division Two affirmed the Superior Court's decision. (Exhibit A.)

While confirming the existence of a split of authority (typed opn. 6), the Court of Appeal reasoned that Score "obtained merely an interim victory by succeeding in getting the case moved from one forum to another, thereby delaying final resolution of the contract claims." (Typed opn. 8.) The Court of Appeal rationalized that "[w]hile one could argue that the Florida case is a separate lawsuit from the California case, the fact remains that the contract claims against defendants are still the same and still viable." (*Id.*) While practically acknowledging that Score successfully enforced the contractual forum selection clause, the Court of Appeal speculated about the possibility that Score may lose the Florida lawsuit in the future. (Typed opn. 8-9.) The court concluded that there was "no final resolution of the contract claims and therefore it would be premature to make a prevailing party determination at such juncture." (Typed opn. 9.)

E. The Court of Appeal Denies Rehearing.

Score sought rehearing, pointing out a factual error in the opinion regarding which side had insisted on the Florida forum selection clause. The Court of Appeal modified its opinion by deleting the language indicating that Score had insisted on using that clause. (Exhibit B.) The Court of Appeal did not address the other points raised in the rehearing petition regarding the standard of review or other statutory grounds for awarding attorneys' fees.

LEGAL DISCUSSION

A. There Is An Express Conflict Among Appellate Courts Regarding Whether a Party That Obtains Dismissal of a Lawsuit on Procedural Grounds May Recover Contractual Attorneys' Fees.

As the appellate court explained in this case, under the first line of authority, fees may be denied when a case is dismissed on procedural grounds and the ultimate merits determination is left for another day. (Typed opn. 5-6.)

In *Estate of Drummond* (2007) 149 Cal.App.4th 46 (*Drummond*), for example, a probate attorney seeking payment from his former clients filed a petition in the probate court to recover his fees. After the probate court granted the petition, the appellate court reversed that order. The court held that the petition should have been filed as a compulsory cross-complaint in a separate civil action the clients had filed against the attorney. (*Id.* at p. 49.) On remand, the lawyer filed a cross-complaint in the civil action. (*Ibid.*) Conversely, the clients sought contractual attorneys' fees on remand,

claiming they had prevailed by obtaining dismissal of the attorney's petition in the probate court. (*Ibid.*)

The probate court denied the fee motion under Civil Code section 1717. (*Id.* at pp. 49-50.) Upholding the denial of fees, the appellate court found there was no prevailing party under section 1717. (*Id.* at pp. 51-54.) The court reasoned that the clients "obtained only an interim victory, based on [the attorney] having attempted to pursue his claims in the wrong forum." (*Id.* at p. 51.) The court cautioned that it "can conceive of cases where a party obtaining a dismissal of contract claims on purely procedural grounds might be found to have prevailed on the contract, even though the dismissal was without prejudice, because the plaintiff had no other means to obtain relief under the contract." (*Id.* at p. 53.) As an example of its ad-hoc prevailing party determination, the court held that contractual fees may be awarded after a procedural dismissal where "litigation in the proper forum would entail greater expense, inconvenience, or risk than the plaintiff was willing to hazard, or that a new suit wherever brought would be subject to a bar such as the statute of limitations." (*Ibid.*) The court concluded that "neither side can be said to have prevailed" in that case, given the "interim nature of [the clients'] success." (*Id.* at pp. 53-54.)

"More recently, two cases out of the Fourth District reached the opposite result." (Typed opn. 6.) In *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, a California company filed a lawsuit against its former employee, an Oklahoma resident. (*Id.* at p. 952.) After the former employee filed a successful motion to quash service based on lack of personal jurisdiction, the trial court awarded contractual attorneys' fees. (*Id.*)

Affirming the fee award, Division Three of the Fourth Appellate District explained that "the current version of section 1717 does not contain the requirement of a final judgment" (*id.* at p. 954), thereby dismissing the

plaintiff's reliance on obsolete case law. Rejecting the plaintiff's argument "that a determination on the 'merits' of the contract claim is necessary," the appellate court reasoned that the "case in California has been finally resolved" while plaintiff obtained nothing on its entire complaint. (*Id.* at p. 956.)

To further support its decision, *Profit Concepts* also examined this Court's decision in *Hsu v. Abbara* (1995) 9 Cal.4th 863. In that case, this Court held that "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.'" (*Profit Concepts, supra,* 162 Cal.App.4th at p. 956 [quoting *Hsu*].) Noting that *Hsu* "does not use the term 'merits'", *Profit Concepts* held that "the contract claim was finally resolved within the meaning of *Hsu*", thus triggering fee shifting. (*Id.*) Accordingly, the court upheld the fee award under section 1717.

Applying *Profit Concepts*, another panel of the Fourth Appellate District, Division Three upheld a contractual fee award in *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66 (*PNEC*). In that case, after the trial court dismissed a contract action based on forum non conveniens grounds, the court entered a judgment of dismissal without prejudice. (*Id.* at p. 68.) The court then awarded attorney' fees to the defendant under section 1717. (*Id.* at p. 69.)

Affirming the fee award, the appellate court rejected the argument that a dismissal on forum non conveniens ground "does not provide an adequate basis for deeming a defendant to be a 'party prevailing on the

contract'" under section 1717. (*Id.*) While conducting de novo review, the court found "the cogent statutory analysis set forth in *Profit Concepts* to apply equally to this case." (*Id.* at p. 71.) The court further reasoned that its view "was consistent with other cases awarding attorney fees even though the [lower] court did not reach a final, on-the-merits ruling on the contract claim." (*Id.* at p. 72 [citations omitted; brackets added].) As a result, the court upheld the fee award, even though there was no decision on the merits of the claim presented in the California lawsuit.

In reaching its decision, the court "note[d] that several federal cases point toward a contrary result." (*Id.* at p. 73 [citations omitted].) Rejecting this line of authority, *PNEC* held that "[t]hese federal cases rest on the observation that a jurisdictional or inconvenient forum dismissal is not a final, on-the-merits resolution of a contract claim." (*Id.*) Given the mutually exclusive rationale adopted by *Profit Concepts* and the federal district court decisions invoked by the plaintiff, the court held that "to rely on the rationale of these federal authorities in this case would be to disavow *Profit Concepts*." (*Id.*) Accordingly, unlike the Second Appellate District's decision in this case, the Fourth Appellate District upheld the fee award in *PNEC*, another case involving dismissal based on forum non-conveniens grounds. In sum, the views adopted in these cases are mutually exclusive, thus requiring review.

Finally, review is necessary to minimize forum shopping between state and federal courts. (See *Carnes v. Zamani* (9th Cir. 2007) 488 F.3d 1057, 1059 ["In a diversity case, the law of the state in which the district court sits determines whether a party is entitled to attorney fees, and the procedure for requesting an award of attorney fees is governed by federal law"].) As between *PNEC* and the federal cases rejected by that court, federal courts may be inclined to apply the latter, thus increasing the

likelihood of forum shopping and inconsistency. Therefore, review should be granted for all of these reasons.

B. Given the Current Budget Crisis, Review Is Particularly Necessary to Eliminate the Current Incentive for Non-California Plaintiffs to Clog Up the California Court System without Any Fee Exposure.

Irrespective of the conflicting views applied by the appellate courts, review is necessary for another practical reason. Under the line of authority applied in this case, non-California plaintiffs such as DisputeSuite are incentivized to initiate contract lawsuits in California, even if they have no real connection to this state. After all, regardless of whether their lawsuit was dismissed based on equitable forum non-conveniens grounds or based on a *contractual* forum selection clause (as in this case), non-California plaintiffs who clog California courts have no fee exposure here at all, even if their lawsuit is ultimately dismissed here. As a result, the view adopted by the Second Appellate District essentially encourages plaintiffs who know their legal disputes do not belong in any California courtroom to nonetheless play the litigation lottery in the Golden State while making others pay for their ticket. California's public policy should discourage litigants from clogging the line to our courthouses with civil cases that must be adjudicated in other states – rather than welcome such antics – especially when we are furloughing staff and having our courtrooms go dark to cope with budgetary shortfalls and litigation overload.

Therefore, review should be granted for this additional reason.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Dated: May 26, 2015

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SECOND APPELLATE DISTRICT

DIVISION TWO

DISPUTESUITE.COM, LLC, Plaintiff and Respondent, v. SCOREINC.COM et al, Defendants and Appellants.	B248694 (Los Angeles County Super. Ct. No. BC489083)

APPEAL from an order of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Weintraub Tobin Chediak Coleman Grodin, Marvin Gelfand and Brendan J. Begley for Defendants and Appellants.

J.J. Little & Associates and James J. Little for Plaintiff and Respondent.

The question presented is whether defendants who obtained dismissal of a case in California pursuant to a Florida forum-selection clause are entitled to contractual attorney fees? We conclude the answer is no, because there has been no final resolution of the contract claims.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and respondent DisputeSuite.com, LLC (plaintiff) filed a lawsuit in the Los Angeles Superior Court against defendants and appellants Scoreinc.com and its principals Joel S. Pate and Joshua Carmona (collectively defendants) on July 26, 2012. The complaint contained 21 causes of action, including causes of action for breach of contract, fraud, misappropriation of trade secrets, and interference with contract. Plaintiff sought compensatory and punitive damages as well as preliminary and permanent injunctive relief.

The complaint alleges that plaintiff is a leading provider of credit repair software and services that it markets to credit repair organizations (CROs) to help them service their customers in need of credit repair. Defendants, on the other hand, work directly for CROs handling daily administrative tasks. According to the complaint, plaintiff agreed to provide defendants with its confidential list of CROs and other proprietary information, including its "secret method by which it sells its software and other products to its customers."

While the parties dispute the existence and enforcement of certain contracts, including end-user agreements, it is undisputed that in September 2010, they entered into a master reseller agreement that enabled defendants to act as a licensed reseller of plaintiff's software. At defendants' insistence, the master reseller agreement contains a forum-selection clause by which "any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Service shall be subject to the exclusive jurisdiction of the state and federal courts located in Hillsb[o]rough, Florida."

It is also undisputed that in March 2012, the parties entered into a cross-marketing agreement, which also contains a Florida forum-selection clause. The cross-marketing agreement further provides that "The prevailing party in any legal action brought by one

party against the other and arising out of this Agreement shall be entitled . . . to reimbursement of legal expenses incurred in such action, including court costs and reasonable attorneys' fees."

The same day plaintiff filed the complaint, plaintiff applied ex parte for an order to show cause regarding a preliminary injunction and temporary restraining order. The trial court denied the application without prejudice. Plaintiff later renewed its ex parte application. This time the trial court granted a temporary restraining order as to two of the five requested actions: barring defendants from transferring any customers referred to them by plaintiff to any entity that did not use plaintiff's software and barring defendants from making commercial use of plaintiff's software. The trial court subsequently granted preliminary injunctive relief on the same two bases.

Meanwhile, defendants filed a motion to quash service of summons and complaint (which the trial court and parties subsequently referred to as the "motion to dismiss") based on the Florida forum-selection clauses in the master reseller agreement and cross-marking agreement. Plaintiff opposed the motion, arguing that a California forum-selection clause in the end-user agreements applied. The trial court granted the motion to dismiss, stayed the case for 60 days, and extended the effective date of the preliminary injunction so that plaintiff could file suit in Florida and seek injunctive relief in that forum. After plaintiff refiled the case in Florida, the trial court dismissed the case in California and dissolved the preliminary injunction.

Defendants then filed a motion in the trial court for an award of attorney fees in the amount of $84,640, on the ground that they were the prevailing parties in connection with the motion to dismiss. The trial court denied the motion. Defendants filed this appeal from the trial court's order denying attorney fees.

DISCUSSION

I. Statutory and Case Law

Civil Code section 1717, subdivision (a) provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." The statute goes on to provide that "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. . . . [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717, subd. (b)(1).)

In *Hsu v. Abbara* (1995) 9 Cal.4th 863 (*Hsu*), our supreme court held that "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]." (*Id.* at p. 876, italics added.) The *Hsu* court concluded that when a defendant "obtains a simple, unqualified victory by defeating the only contract claim in the action" (*id.* at p. 877), "the defendant is the party prevailing on the contract under section 1717 as a matter of law" (*id.* at p. 876), and the trial court has no discretion not to

award fees.[1] In *Hsu*, the defendants obtained a simple, unqualified victory by proving that no contract was ever formed. (*Id.* at p. 868.)

In addition to *Hsu*, the trial court and the parties focused primarily on three other cases in connection with the motion to dismiss. In *Estate of Drummond* (2007) 149 Cal.App.4th 46 (*Drummond*), an opinion by the Sixth District, a lawyer filed a petition in probate court for contractual attorney fees against his former clients, who had filed a separate civil action against him. His petition was granted, but the appellate court reversed on the ground urged by the clients that the petition violated the compulsory cross-complaint rule. (*Id.* at p. 49.) On remand, the lawyer filed a cross-action seeking his fees and the clients also sought their fees for having litigated the petition. The trial court denied the clients' motion for attorney fees. The clients appealed, and the *Drummond* court affirmed.

Relying on *Hsu*, the *Drummond* court found there had been no "'final resolution of the contract claims.'" (*Drummond, supra,* 149 Cal.App.4th at p. 51.) The court stated: "Appellants' argument could be reconciled with *Hsu* only by qualifying 'final' to mean, 'final for purposes of a particular lawsuit.' But this view is inconsistent with the thrust of the decision, which is that status as the 'party prevailing on the contract' is ascertained not by technicalities of pleading and procedure but by a pragmatic assessment of the parties' ultimate positions vis-à-vis their litigation objectives as reflected in pleadings, prayers, and arguments. . . . Appellants' reading is also inconsistent with the phrase 'prevailing *on the contract*,' which implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement." (*Drummond, supra,* at p. 51.)

The *Drummond* court concluded that the clients had obtained only an "interim victory" based on the lawyer's having attempted to pursue his claims in the wrong forum. (*Drummond, supra,* 149 Cal.App.4th at p. 51.) The court stated that the clients had "at no

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[1] While we review the determination of the legal basis for an award of attorney fees de novo, (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828), the trial court's actual determination of prevailing party status is often reviewed for an abuse of discretion (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109).

time won a victory 'on the contract.' They have only succeeded at moving a determination on the merits from one forum to another." (*Id.* at p. 53.) While the *Drummond* court could "conceive of cases where a party obtaining a dismissal of contract claims on purely procedural grounds might be found to have prevailed on the contract, even though the dismissal was without prejudice, because the plaintiff had no other means to obtain relief under the contract," it found that in the case before it "[t]he dismissal of [the lawyer's] petition in the probate matter did not defeat his contract claims; it merely deflected or forestalled them." (*Ibid.*) The *Drummond* court stated: "We think the interim nature of appellants' success provided a sound basis for a discretionary finding that neither party prevailed on the contract." (*Id.* at p. 54.)

More recently, two cases out of the Fourth District reached the opposite result. In *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950 (*Profit Concepts*), a California company sued a former employee for breach of contract. The employee, a resident of Oklahoma, brought a motion to quash service of summons for lack of personal jurisdiction. The company filed a notice of nonopposition, and the trial court granted the motion. The employee then filed a motion for attorney fees as the prevailing party, which the trial court granted, and the appellate court affirmed. (*Id.* at p. 952.) The *Profit Concepts* court stated: "The only claims before the trial court were contained in Profit Concepts's complaint, which sought compensatory and punitive damages in an amount to be determined, as well as preliminary and permanent injunctive relief. The case *in California* has been finally resolved. What was awarded on Profit Concepts's complaint? Zero. Thus, the contract claim was finally resolved within the meaning of *Hsu v. Abbara*, and that case does not use the term 'merits.' [¶] The determination of which party is the prevailing party must be made without consideration of whether the plaintiff may refile the action after a motion to quash service is granted. The issue of final resolution should not depend on the plaintiff's possible *future* conduct. Prevailing party attorney fees should be awarded based on the contract language, the statutory language, and the fact of dismissal of the case, not on speculation." (*Profit Concepts, supra,* at p. 956.) The *Profit Concepts* court noted that the employer had

refiled its suit in Oklahoma, but found "nothing in the language of the statute or of *Hsu v. Abbara*, or any other case, that requires resolution in another state on the merits of a contract claim first asserted in California before a prevailing party can be determined here, when the matter has been completely resolved vis-à-vis the California courts." (*Profit Concepts, supra,* at p. 956.)

In *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66 (*PNEC*), the trial court dismissed a contract action against a defendant based upon forum non conveniens, and entered a judgment of dismissal without prejudice. (*Id.* at p. 68.) The defendant then sought and obtained an award of attorney fees pursuant to the contract, which the *PNEC* court affirmed. The court essentially rejected *Drummond* and followed *Profit Concepts* in finding that the trial court "did not abuse its discretion in making an award for the work done while the case was under its jurisdiction." (*PNEC, supra,* at p. 73.)

II. The Motion for Attorney Fees Was Correctly Denied

Not surprisingly, defendants here rely on *Profit Concepts* and *PNEC* in arguing that the trial court erred in denying their motion for an award of attorney fees. They go one step further and argue that their position is even stronger than that of the defendants in those cases because, unlike those defendants who obtained dismissal of the contract actions on procedural grounds, defendants here obtained dismissal by successfully enforcing the contractual forum-selection clause. Thus, they claim they prevailed on the only contract claim at issue here. According to defendants, they "conclusively ended the litigation in California and thereby achieved a final resolution of the dispute so far as the Golden State is concerned."

In denying the motion to dismiss, the trial court found that *Drummond* more closely followed the *Hsu* court's dictate that "[t]he prevailing party determination is to be made *only upon final resolution of the contract claims.*" (*Hsu, supra*, 9 Cal.4th at p. 876, italics added.) The trial court agreed that defendants had prevailed in the sense that they obtained dismissal of the *case* in California, but because the *contract claims* were still in dispute and being litigated in Florida, there had been no final resolution of those claims, and therefore no prevailing party on the contract.

We agree with the trial court's reasoning. As stated in *Drummond*, defendants' argument "could be reconciled with *Hsu* only by qualifying 'final' to mean, 'final for purposes of a particular lawsuit.' But this view is inconsistent with the thrust of the [*Hsu*] decision, . . ." that courts look at the overall objectives of the parties. (*Drummond, supra*, 149 Cal.App.4th at p. 51.) Defendants did not obtain a simple, unqualified victory on the only contract claim against them, thus ending all litigation on the contract. Rather, plaintiff put its entire complaint before the trial court, including all of its contract claims against defendants. Defendants succeeded only in enforcing one contractual clause, not in disposing of all of plaintiff's contract claims. Thus, defendants obtained merely an interim victory by succeeding in getting the case moved from one forum to another, thereby delaying final resolution of the contract claims.

Defendants' position is also inconsistent with the plain language of Civil Code section 1717, subdivision (b)(1) that "the party prevailing on the contract shall be the party who recovered a greater relief in the *action on the contract*." (Italics added.) As *Drummond* and other cases explain, the language *action on the contract* "refers to the contract claims in the lawsuit as a whole," since a single action can involve multiple contract claims, like here. (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 539 (*Frog Creek*).) Based on its analysis of the statutory language, legislative history, and case law, the *Frog Creek* court concluded that "under Civil Code section 1717 there can only be one prevailing party on a given contract in a given lawsuit." (*Frog Creek, supra,* at p. 543.) While one could argue that the Florida case is a separate lawsuit from the California case, the fact remains that the contract claims against defendants are still the same and still viable.

If it were not the case that there can only be one prevailing party on a contract, then a party could be considered a prevailing party by succeeding on one contract issue or claim while later losing on others. Surely, the Legislature did not intend this result. Nor do we believe the Legislature intended for courts to make piecemeal attorney fee awards for each resolution of a contract clause. Like here, resolution of one contract clause does not always equate to a resolution of all contract claims.

Defendants complain that our result is unfair because "there is no evidence that [Civil Code] section 1717 is applicable in Florida." But defendants cannot be heard to complain about a forum they chose.

We conclude that where, as here, a defendant obtains an interim procedural victory that results only in a relocation of an active contract dispute from one forum to another, there has been no final resolution of the contract claims and therefore it would be premature to make a prevailing party determination at such juncture. Accordingly, the trial court did not err in denying defendants their attorney fees for obtaining a dismissal of the case in California based on a Florida forum-selection clause.

DISPOSITION

The order denying defendants' motion for attorney fees is affirmed. Plaintiff is entitled to recover its costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DISPUTESUITE.COM, LLC,

Plaintiff and Respondent,

v.

SCOREINC.COM et al,

Defendants and Appellants.

B248694

(Los Angeles County Super. Ct. No. BC489083)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the opinion filed herein on April 14, 2015, be modified as follows:

On page 2, the second sentence of the fourth full paragraph, the words "At defendants' insistence," are deleted so the sentence now reads:

> The master reseller agreement contains a forum-selection clause by which "any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Service shall be subject to the exclusive jurisdiction of the state and federal courts located in Hillsb[o]rough, Florida."

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* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

On page 9, the second sentence of the first full paragraph, the words "they chose" are changed to "to which they agreed" so the sentence now reads:

> But defendants cannot be heard to complain about a forum to which they agreed.

There is no change in the judgment.

Appellants' petition for rehearing is denied.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen. I am not a party to this action; my business address is 555 South Flower Street, 29th Floor, Los Angeles, California 90071.

On **May 26, 2015**, I caused the foregoing document described as **PETITION FOR REVIEW** to be served on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **(BY OVERNIGHT DELIVERY)** The attached document is being filed and served by delivery to a common carrier promising overnight delivery as shown on the carrier's receipt pursuant to CRC 8.25.

Executed on **May 26, 2015** at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Michelle Kang

SERVICE LIST

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Honorable James Chalfant Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012	Case No: BC489083 Trial Judge