S226652

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

OPENING BRIEF ON THE MERITS

Marvin Gelfand (SBN 53586)
Brendan J. Begley (SBN 202563)
WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN
Law Corporation
9665 Wilshire Blvd, Ninth Floor
Beverly Hills, CA 90212
T: 310.858.7888; F: 310.550.7191
mgelfand@weintraub.com
bbegley@weintraub.com

Robert Cooper (SBN 209641) *
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
555 South Flower Street, 29th Floor
Los Angeles, CA 90071
Tel: 213-443-5100
Fax: 213-443-5101
robert.cooper@wilsonelser.com

Attorneys for Defendants & Appellants
SCOREINC.COM, INC., JOEL S. PATE & JOSHUA CARMONA

S226652

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

OPENING BRIEF ON THE MERITS

Marvin Gelfand (SBN 53586) Brendan J. Begley (SBN 202563) **WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN** Law Corporation 9665 Wilshire Blvd, Ninth Floor Beverly Hills, CA 90212 T: 310.858.7888; F: 310.550.7191 mgelfand@weintraub.com bbegley@weintraub.com	Robert Cooper (SBN 209641) * **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP** 555 South Flower Street, 29th Floor Los Angeles, CA 90071 Tel: 213-443-5100 Fax: 213-443-5101 robert.cooper@wilsonelser.com

Attorneys for Defendants & Appellants
SCOREINC.COM, INC., JOEL S. PATE & JOSHUA CARMONA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Code Civ. Proc.,

Rules

Cal. Rules of Court,

Other Authorities

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.

INTRODUCTION

Plaintiff and Respondent DisputeSuite.com, LLC ("DisputeSuite"), a Florida company, sued Scoreinc.com and its principals ("Score") in Los Angeles for breach of contract and other claims. Score ultimately obtained a dismissal of the lawsuit based on a contractual forum-selection clause, resulting in a true victory given the trial court's finding that DisputeSuite's lawsuit was frivolous. (RT E-1212:22-1213-8.) Nonetheless, the trial court denied Score's motion for contractual attorneys' fees, citing the fact that the substantive issues raised in this litigation had not been adjudicated to a final determination. This holding was based on the fact that DisputeSuite filed another lawsuit in Florida after the California action was dismissed.

The Court of Appeal upheld the denial of attorneys' fees under Civil Code section 1717, affirming the trial court's rationale. The Court of Appeal's decision essentially means that a plaintiff such as DisputeSuite can congest California courts by bringing a totally unsuccessful lawsuit for breach of contract in the wrong forum, without any exposure to contractual attorneys' fees. Such a result defeats the whole purpose of section 1717 – reciprocity – by opening a hole in section 1717 that can be exploited by any plaintiff seeking to force the other side to litigate in the wrong forum. Because contract claims typically do not trigger anti-SLAPP protection, a wealthy litigant can use litigation as a means to bury its not-so-wealthy opponent by forcing the defendant to incur a ton of attorneys' fees in a

distant jurisdiction. By merely filing the action in the wrong forum and exploiting its immunity to any contractual fee recovery, the plaintiff has achieved its improper objective.

Likewise, where the defendant has had California operations but the transactional nexus is missing (due to the location of the witnesses, etc.), the plaintiff would be encouraged to file the action in the wrong forum based on its lack of contractual fee exposure, knowing that a dismissal on procedural grounds would never trigger fee shifting. Because contract claims are often uninsured (unlike garden variety tort claims that typically trigger a duty to defend by an insurer with vast resources), the defendant would be forced to litigate without any possibility of fee recovery in California. While clogging the court system, the prosecution of the lawsuit in California wastes limited judicial resources, notwithstanding the current budget crisis. Therefore, the denial of Score's fee motion should be reversed.

Finally, rather than adopting amorphous tests for fee recovery, this Court should impose a bright line test, using one of the two tests proposed here. Under the first proposed alternative, fee shifting should be allowed after an involuntary or procedural dismissal as long as the trial court has entered an appealable judgment or an appealable order in terms of its disposition of the case. Under the second proposed alternative, fee shifting should be allowed after a procedural dismissal as long as the subsequent litigation on the merits takes place in an independent action or in a discrete proceeding. Under either test, fee recovery should be allowed here.

Based on these reasons, as analyzed below, this Court should reverse the denial of the fee motion in this case.

STATEMENT OF THE CASE

A. The Parties and the Claims

In July 2012, 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]

Having granted Score's motion, the trial court stayed the case for 60 days pending the filing of a new lawsuit in Florida. (5 AA 1189-1195.) Based on Score's stipulation, the court also extended 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

---

[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].) DisputeSuite, however, relied on an alleged verbal agreement to a California forum selection clause in the End User Agreement, a hotly contested point/document. (5 AA 1180-83; 1187, ¶2; APFR 2; 3 AA 609-610.)

[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.)

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) [forum-non-conveniens dismissal appealable]; subd. (a)(6) [injunctive rulings appealable].) Instead, DisputeSuite filed a new action in Florida. (APFR 9.)

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. (RT E-1201-1220.)

Denying Score's motion for attorneys' fees (6 AA 1369-1377), the trial court held that there was no final determination of the substantive merits of the case in the California action. (6 AA 1376.) Despite its finding that filing the action in California was frivolous (RT E-1212:22-1213:8), the court refused to award any attorneys' fees.

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.) The Second Appellate District, Division Two, affirmed the trial court's decision. (*DisputeSuite.com, LLC v. Scoreinc.com* (2015) 235 Cal.App.4th 1261.)

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." (*Id.* at p. 1268.) 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. (*Id.*) 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." (*Id.*)

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. (*DisputeSuite.com, LLC v. Scoreinc.com* (May 14, 2015, B248694) 2015 Cal.App.LEXIS 414 at *1 [indicating that Score had agreed to a Florida forum rather than insisting on the Florida forum].) 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.

This Court subsequently granted Score's petition for review without modifying the specification of the issues presented in the petition.

STANDARD OF REVIEW

Because "the issue here involves the interpretation of a statute" in terms of fee recovery, the standard of review is de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 [applying de novo review to evaluate cost shifting issues in terms of prevailing party determination].)

LEGAL DISCUSSION

I. When a Lawsuit Is Dismissed on the Basis of a Forum-Selection Clause, the Defendant Is Entitled to Recover Attorneys' Fees Under Civil Code Section 1717, Even If Other Substantive Merits of the Case Are Not Adjudicated to a Final Determination.

A. Denial of Fee Recovery Is Inconsistent with the Language of the Fee Shifting Statute. To Do So Would Require Revision of Civil Code Section 1717.

DisputeSuite's position – that a final determination on the merits of the entire case is required to trigger fee shifting – ignores the language of section 1717. Under subdivision (b)(1), the prevailing party is defined as "the party who *recovered* a greater relief in the action on the contract." As this Court has explained in the context of cost-shifting, "[t]he word

'recover' means 'to gain by legal process' or 'to obtain a final legal judgment in one's favor.'" (*Goodman, supra,* 47 Cal.4th at p. 1334 [citing dictionary; emphasis added].) Under this definition, satisfying the first prong by obtaining a dismissal – be it on the basis of a forum-selection clause or on procedural grounds – triggers fee shifting, even if the litigation continues in a separate forum. As a result, the lower courts erred in denying Score's fee motion based on DisputeSuite's arguments.

In this regard, *Wong v. Thrifty Corp.* (2002) 97 Cal.App.4th 261 is instructive. In that case, the appellate court rejected the argument that a contractual fee shifting provision can require the prevailing party to obtain a determination on the merits of the case as a condition precedent for fee shifting under section 1717. Refusing to enforce such a contractual provision in a case that was settled pursuant to a statutory offer to compromise, the court reasoned as follows: "By confining entitlement to attorney fees to those who prevail upon a 'determination' of liability, the attorney fee clause conflicts with the section 1717 definition of 'prevailing party.' To give it effect would thwart the statutory purpose." (*Id.* at p. 265.)

Applying *Wong* here, even if it could be said that the trial court's dismissal of the lawsuit was on purely procedural grounds, Score is entitled to recover its fees because the language of section 1717 does not require a determination on the merits as a condition precedent for fee recovery. To the extent that DisputeSuite seeks to impose such a requirement, its fight is with the legislature.

There is another interpretive flaw in DisputeSuite's position. While lawsuits can be terminated in numerous ways, section 1717 merely excludes two categories of dismissals from its scope: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." (Civ. Code § 1717, subd. (b)(2).) By asking this Court to add *in*voluntary

dismissals on procedural grounds to this exemption, and by asking this Court to impose a requirement that the merits of the entire case be determined under this statute, DisputeSuite is seeking judicial legislation. Therefore, its view should be rejected based on the statutory language. [3]

Other courts have adopted Score's view that section 1717 does not impose a merits determination as a precondition for fee recovery. In *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, for example, 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

[3] While inapplicable here, one wrinkle on subdivision (b)(2) is that, as illustrated in *Wong,* "a party who accepts a section 998 offer may recover attorney fees under section 1717 ... where the compromise agreement is silent on costs and fees." (*Wong, supra*, 97 Cal.App.4th at pp. 263-264.)

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.*) 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.

To summarize, section 1717 does not impose a merits determination as a condition precedent for fee shifting. Therefore, DisputeSuite's attempt to have this Court add such a requirement to this statute should be summarily rejected.

B. Fee Recovery Is Particularly Important in Cases Dismissed on Procedural Grounds in Order to Ensure Reciprocity and Fairness to the Prevailing Defendant That Was Involuntarily Hauled into Court.

It bears repeating that Score did not obtain a dismissal on mere procedural or technical grounds; e.g., lack of standing, mootness, etc. On the contrary, Score obtained the dismissal by convincing the trial court to enforce the only non-fee provision in the contract that could be enforced in California; i.e., the forum-selection clause.

Even if it could be said that Score's victory was purely procedural, the fact that there was no merits determination justifies *awarding* fees—not denying fees—because Score and similarly situated defendants would be precluded from recovering fees in a subsequent malicious prosecution case. (See, e.g., *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1592 [dismissal for lack of standing does not involve the merits of the action and cannot constitute a favorable termination to allow malicious prosecution claim]; *Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 894 [same as to mootness dismissal].) To ensure that the defendant does not end up saddled with fees caused by an improper lawsuit, it is particularly important to allow contractual fee shifting in such situations as the sole remaining ground for fee recovery. The importance of the availability of such a safety valve has been recognized in other contexts. (See, e.g., Code Civ. Proc. § 1038, subd. (c) [authorizing statutory fee shifting as an alternative to pursuing a subsequent malicious prosecution claim when meritless lawsuits for indemnity or actions against government agencies are filed].)

Otherwise, the denial of fee recovery for certain procedural dismissals would punish the defendant for plaintiffs' failure to follow the law when the case is dismissed on such grounds. (See Code Civ. Proc. §

389, subd. (b) [dismissal for nonjoinder of necessary parties]; § 583.250 [dismissal for delay in serving summons]; § 583.110 et seq. [dismissal for delay in prosecution].)

Refusing to acknowledge the importance of imposing a reciprocal and fair standard for fee shifting, DisputeSuite claims that an "interim procedural victory" should not trigger fee shifting. (APFR 3.) That argument should be rejected for two reasons. First, Score's victory was not a procedural one but a merits-based determination regarding what the contract expressly required. The enforcement of this key contractual term cannot be dismissed by merely labeling it as a procedural victory. (See *Righthaven LLC v. Hoehn* (9th Cir. 2013) 716 F.3d 1166, 1167 [discussing Abraham Lincoln's "story about a lawyer who tried to establish that a calf had five legs by calling its tail a leg"].)

Second, the procedural versus substantive dichotomy should not guide the analysis as the dispositive factor. There are various statutory grounds for involuntary dismissal, including the failure to obey discovery orders (Code Civ. Proc. § 2023.030, subd. (d)(3)) and a vexatious litigant's failure to post security when ordered (§ 391.4).[4] Although section 1717 does not exclude any of these forms of dismissal from its scope, DisputeSuite is asking this Court to exclude all such dismissals from section 1717 by merely invoking the "procedural" label attached to these forms of dismissal. This view is particularly flawed, given that some of these dismissals inherently entail some sort of merits determination.

For example, the bond requirement cannot be imposed on a vexatious litigant unless the court makes a factual determination that such a plaintiff has no likelihood of success after holding a hearing and examining

[4] Other grounds include a party's failure to comply with local court rules (§ 575.2); failure to pay transfer costs after change of venue (§ 399, subd. (a)); and failure to amend the complaint after a motion to strike is granted with leave to amend (§ 581, subd. (f)(4)).

the evidence presented by both sides. (Code Civ. Proc. § 391.3, subd. (a).) Likewise, when discovery abuse results in terminating sanctions (e.g., when the plaintiff refuses to furnish even the most basic discovery concerning the facts underlying his claim), the plaintiff effectively admits that he has no facts to support his claim. Therefore, attaching the "procedural" label to carve out fee recovery in such cases provides no basis for dictating the availability of fee recovery.

Finally, consistent with Score's position, if a lawsuit is dismissed based on other procedural grounds (e.g., lack of subject matter jurisdiction), that does not necessarily preclude recovery of litigation costs. (See, e.g., *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733 [dismissal of lawsuit based on the exclusive jurisdiction of the workers' compensation system did not preclude cost recovery by the prevailing defendant because the court's jurisdiction to decide its own jurisdiction necessarily included an award of costs incidental to a jurisdictional dismissal].) Because the denial of attorneys' fees in such a context yields an unfair result – by limiting the unsuccessful plaintiff's exposure to a relatively nominal cost recovery – the Court should reject DisputeSuite's position. [5]

In sum, to ensure reciprocity and fairness, contractual fees should be recoverable by a defendant when a lawsuit is dismissed, even if the dismissal is based on procedural grounds.

---

[5] While it is true that the cost shifting statute and the attorneys' fee shifting statute are not interpreted in identical ways (*Goodman, supra,* 47 Cal.4th at p. 1335, fn. 3), Civil Code section 1717 and Code of Civil Procedure section 1032 can "inform and reinforce one another." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1156 (maj. opn.).)

II. Adopting DisputeSuite's Arguments Will Have Various Negative Implications in Different Contexts. Those Negative Consequences Will Adversely Impact the Parties and the Legal System as a Whole.

While DisputeSuite seeks to escape liability for unsuccessfully forcing Score to incur attorneys' fees in the California action – one that was found by the trial court to be frivolous (RT E-1212:22-1213:8) – DisputeSuite understandably fails to acknowledge the practical repercussions of adopting its view in other cases. Based on those negative repercussions, as discussed below, the Court should reject DisputeSuite's position.

For example, DisputeSuite's view will adversely impact debt collection cases by encouraging "'distant forum abuse,' the practice of collecting consumer obligations by suing debtors in distant locations to deprive them of the opportunity to defend themselves." (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 305.) Under DisputeSuite's view, unscrupulous creditors will be encouraged to file consumer collection actions in the wrong forum, knowing that a dismissal based on forum non conveniens will never trigger contractual fee shifting. Furthermore, the absence of contractual fee shifting would shrink the limited pool of attorneys that may be willing to defend such collection cases on a contingency. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1139, fn. 4 [noting the impracticality of finding a lawyer to represent an impecunious defendant against a plaintiff with large resources in the absence of fee shifting].) [6]

[6] While such consumers can try to find a contingency lawyer to bring a subsequent lawsuit for abuse of process, UCL or FDCPA violations, there is absolutely no reason to trigger such satellite litigation. By simply

In addition to minimizing access to the legal system by defendants with limited resources, DisputeSuite's approach entails negative consequences on the legal system as a whole. For example, a defendant may defeat a breach-of-contract lawsuit by invoking a variety of procedural motions, including demurrer, motion to strike, motion for judgment on the pleadings, and/or motion for summary judgment. While some of these motions are often used to challenge a claim on the merits, others may or may not entail a challenge on the merits. Adopting DisputeSuite's view would result in satellite litigation regarding which of these forms of dismissal are on the merits for purposes of fee recovery, thus adding more burdens on the courts. For example, if a breach-of-contract lawsuit is dismissed based on res judicata or the statute of limitations, the parties will have to subsequently litigate whether such dismissals are deemed to be on the merits for purposes of fee recovery. In addition to generating more and more appeals, the result would be a proliferation of case law – and inevitably perceived or actual conflicts in published decisions – seeking to distinguish the resolution of this issue in the fee shifting context from other contexts.

The inevitability of such a systemic problem is beyond dispute as evidenced by the existence of such conflicts in the malicious prosecution context. (See 1 Mallen & Rhodes, Legal Malpractice (2015 ed.) § 6:27 ["If there was no adjudication of the merits, there are divergent views about what kind of conclusion is a favorable termination"].) For example, courts have held that while "[r]es judicata, as the statute of limitations, is a defense that does not go to the substantive merits of the claim" in evaluating a malicious prosecution claim (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1525), "[f]avorable terminations

---

allowing fee shifting in the underlying case, the incentive to engage in such misconduct is eliminated.

for purposes of malicious prosecution and for res judicata are different." (*Id.*) Rather than creating the opportunity for the proliferation of such technical distinctions or conflicts, this Court should adopt a bright-line rule so that lower courts will not be entangled in disputes regarding whether a particular form of dismissal is deemed to be on the merits for purposes of contractual fee recovery.

Otherwise, just as an example, if a contract lawsuit is dismissed after the plaintiff fails to amend the complaint to plead the terms of the contract (in response to a demurrer), the prevailing defendant would then have to litigate whether such a dismissal is technically on the merits. If the plaintiff comes up with a facially valid excuse for failing to amend (e.g., loss or destruction of its copy of the operative contract, etc.), the parties would spend two years on appeal litigating the fee recovery. As a result, it is particularly important to adopt a bright-line rule by allowing fee recovery, whether the dismissal is based on the merits or otherwise. After all, whether the lawsuit is dismissed on procedural or substantive grounds, the defendant is subject to the same burdens of litigation in terms of discovery and motion practice until the case is dismissed.

DisputeSuite's counter-argument is that fee shifting before the final resolution of the merits of the case is premature. It is true that there may be a major gap between the time the fees are awarded in California and the finality of the litigation. For example, if a trial court, ruling on an administrative writ of mandamus, remands the case for an administrative hearing, the final determination of the case could conceivably take a few years. Under DisputeSuite's view, the mere possibility that the plaintiff may ultimately prevail on remand – no matter how remote – would preclude fee recovery, forcing the defendant to wait years before the conclusion of the administrative proceedings on remand, in order to seek fees. But the same possibility of reversal-of-fortune-on-the-merits exists for

post-trial victories that are appealed. Nonetheless, the rules of court require the party prevailing in the trial court to file a fee motion immediately, even if the trial victory may be erased on appeal two or three years later. (See Cal. Rules of Court, rule 3.1702(b).) Therefore, the excuse offered by DisputeSuite does not withstand scrutiny.

In sum, in order to eliminate the negative repercussions discussed above, DisputeSuite's view should be rejected.

III. In Shaping the Law on Contractual Fee Recovery, the Court Should Consider Two Alternatives in Formulating the Test for Fee Shifting. Under Either Proposed Test, Score Is Entitled to Recover Its Fees Here.

A. First Alternative: As Long As an Appealable Judgment or An Appealable Order Is Entered, the Defendant Is Entitled to Seek Fees, Even If the Substantive Merits of the Case Have Not Been Finally Determined.

In order to maximize judicial efficiency while adopting a bright-line rule that minimizes unnecessary disputes regarding the timing of contractual fee motions, the Court should adopt the following rule: when litigation results in a judgment or an order that is deemed to be appealable, the prevailing party may file its fee motion at that time. Our proposal, in addition to promoting efficiency, is fully consistent with the time parameters set forth in the rules of court governing fee motions. (See Cal. Rules of Court, rule 3.1702(b)(1) [matching the fee motion deadline with the appeal deadline].)

Adoption of this proposal would also eliminate any surprises by either side as to the timing of fee motions, given that the law on

appealability is relatively well-settled despite the occasional conflicts. (See, e.g., *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1136 [the procedural facts establishing appealability "also establish the propriety of the fee award under Civil Code section 1717"].) Finally, applying the appeal deadline eliminates the need to decide on a case-by-case basis whether the fee motion is premature.[7]

In this case, for example, the filing of a signed order of dismissal constituted a judgment. (See Code Civ. Proc., § 581d; 5 AA 1279-1280.) As such, the order dismissing the action was appealable. (See Code Civ. Proc., § 904.1, subd. (a)(3) [appeal may be taken from "a written order of dismissal under Section 581d following an order granting a motion to dismiss the action on the ground of inconvenient forum" or an order staying the action on this ground].) While DisputeSuite never appealed the order dismissing its action (thus precluding the argument that there is no final determination as to the validity of the dismissal order), section 1717 requires the court to decide the fee motion "whether or not the suit proceeds to final judgment." (Civ. Code § 1717, subd. (b)(1).)

The need for the bright-line rule proposed here is illustrated by a case heavily relied upon by DisputeSuite—*Estate of Drummond* (2007) 149 Cal.App.4th 46. In that case, 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

[7] The appealability analysis often provides guidance in resolving other issues such as the enforceability of the judgment/order and the accrual of post-judgment interest.

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 section 1717. (*Id.* at pp. 49-50.) Upholding the denial of fees, the appellate court found there was no prevailing party under this statute. (*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, 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.*) Given that the fact pattern in *Drummond* did not fit this description, the court upheld the denial of attorneys' fees. (*Id.* at pp. 53-54.)

Because *Drummond* has been widely misread as implementing an amorphous test for fee recovery, its holding will continue to yield result-oriented decisions, making it impractical for litigants to evaluate whether or when they may seek attorneys' fees after a procedural or contract-based dismissal. Therefore, it should be disapproved. (See, e.g., *Cel–Tech Comms. Inc. v. L.A. Cellular Tel. Co.* (1999) 20 Cal.4th 163, 185 [rejecting proposed test that was "too amorphous" in defining UCL violations].)

By contrast, applying the bright-line rule presented in the first alternative proposed here, Score is entitled to recover its fees because there was an appealable order associated with the dismissal of this lawsuit.

B. Second Alternative: As Long As the Future Litigation Takes Place In An Independent Action or In a Discrete Proceeding, the Defendant Is Entitled to Seek Its Fees.

If the Court is not inclined to adopt the bright-line rule articulated above – by tying the timing of the fee motion to the appealability issue – the Court should adopt the following rule: notwithstanding future litigation between the parties, fee shifting should be allowed under section 1717 as long as the future litigation takes place in an independent action or in a discrete proceeding. This can be easily ascertained by comparing the docket number of the initial action/proceeding with the number assigned in the subsequent case. The advantage of this alternative is that it minimizes the possibility of satellite litigation regarding which types of subsequent litigation qualify as "independent" actions or as discrete proceedings.

In this case, for example, if the trial court had transferred the case to another county in California, such a transfer would have triggered fee shifting under this test as long as a new case number was assigned. While this dispositive factor (the assignment of a new case number by a neutral third party clerk) may sound somewhat unorthodox, it is a controlling factor that is beyond the parties' control, thus eliminating the possibility of party manipulation to maximize the likelihood of fee recovery. Likewise, applying the "discrete proceeding" standard, if a motion to compel arbitration is granted in a lawsuit, such a prevailing party would be able to seek its fees because the private arbitration will necessarily proceed in an independent forum.

This approach was essentially applied in *Turner v. Schultz* (2009) 175 Cal.App.4th 974. In that case, the plaintiff filed a lawsuit in Contra Costa County which was sent to arbitration. (*Id.* at pp. 977-978.) In order to forestall the arbitration, the plaintiff filed a second lawsuit in San

Francisco, seeking an injunction against the arbitrator and the defendants. (*Id.*) After the San Francisco case was dismissed, the defendants sought attorneys' fees under section 1717 for defending the San Francisco case. (*Id.* at pp. 978-979.)

Rejecting the plaintiff's argument that there had been no ruling on the merits, the Court of Appeal reasoned that "defendants' entitlement to attorney fees in this legal action is independent of the outcome of the arbitration of the merits of the underlying dispute[.]" (*Id.* at p. 983.) Distinguishing the cases invoked by plaintiff, the court held that those cases "involve an interim ruling, where further proceedings *in the same litigation* were contemplated, rather than discrete legal proceedings." (*Id.* at p. 984 [emphasis in original].) The court concluded that "even if [plaintiff] prevails on some or all of his claims in the course of the arbitration, and that award is confirmed in the Contra Costa action, it would not be in derogation of defendants' independent right to attorney fees in this, the San Francisco action... It was [plaintiff] who initiated both actions; he must accept the consequences of forcing defendants to fight on two fronts." (*Id.* at pp. 984-985 [ellipses and brackets added]; accord *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807 [cases holding "that a procedural victory does not qualify as the type of win for a mandatory attorney fee award are inapposite because these cases did not involve the final resolution of a discrete legal proceeding"].)

The view adopted by *Turner* was originally applied by this Court in *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778. In *Christensen,* this Court held that section 1717 fees may be recovered where a party seeking to arbitrate a dispute files and dismisses an action without prejudice, followed by another action seeking to compel arbitration. Allowing fee recovery for defendants' defeat of the petition to compel arbitration filed in the second case, this Court

"concluded that, under section 1717, the defendants were the prevailing parties in the second lawsuit, which was a discrete proceeding involving only the petition to compel arbitration." (*Roberts v. Packard, Packard & Johnson* (2013) 217 Cal.App.4th 822, 835 [summarizing *Christensen*].) [8]

Applying the second alternative proposed here to this case, Score is entitled to seek its fees because the Florida litigation between the parties, by its nature, entails an independent action or a discrete proceeding.

[8] Some courts have held that "a petition to compel arbitration filed in a *pending lawsuit*" does not yield fee shifting. (See *Roberts,* at p. 835; accord, *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 536 [pointing out this distinction].) Those cases do not help DisputeSuite here. As compared to the pending Florida lawsuit between DisputeSuite and Score, the California action dismissed by the trial court is an independent action filed in a separate case/forum.

CONCLUSION

DisputeSuite's view, if adopted, 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.

Based on the grounds discussed above, the lower courts' decisions denying Score's motion for attorneys' fees should be reversed.

Respectfully submitted,

Dated: October 28, 2015

WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN
Marvin Gelfand
Brendan J. Begley

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

By 
Robert Cooper
Attorneys for Defendants/Appellants SCOREINC.COM, INC., JOEL S. PATE & JOSHUA CARMONA

CERTIFICATE OF WORD COUNT

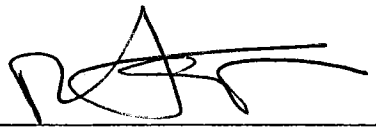
Cal. Rules of Court, rule 8.204(c)

This document was generated by Microsoft Office, Word 2007. According to the word-counting feature in this program, the text of this document contains 6,489 words.

Dated: October 28, 2015

WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN
Marvin Gelfand
Brendan J. Begley

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

By 
Robert Cooper
Attorneys for Defendants/Appellants SCOREINC.COM, INC., JOEL S. PATE & JOSHUA CARMONA

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 **October 28, 2015**, I caused the foregoing document described as **OPENING BRIEF ON THE MERITS** 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 **October 28, 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.

Karina Ramirez

SERVICE LIST

James J. Little J.J. Little & Associates 13763 Fuji Way - Suite EU-4 Marina Del Rey, CA 90292	Attorneys for Disputesuite.com, LLC Plaintiff and Respondent
Marvin Gelfand Brendan J. Begley Weintraub Tobin Chediak Coleman Grodin Law Corporation 9665 Wilshire Blvd Ninth Floor Beverly Hills, CA 90212	Co-counsel for Defendants-Appellants
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 Original and thirteen copies	
Court of Appeal Second District, Division Two Ronald Reagan Bldg. 300 South Spring Street Second Floor, North Tower Los Angeles, CA 90013 Telephone: 213.830.7000	No. B248694
Honorable James Chalfant Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012	Case No: BC489083 Trial Judge