

S226652

SUPREME COURT
FILED



JUN 30 2015

IN THE
SUPREME COURT OF
THE STATE OF CALIFORNIA

Frank A. McGuire Clerk

Deputy

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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

	<u>Page</u>
INTRODUCTION	1
LEGAL DISCUSSION	2
A. The Answer to the Petition Demonstrates the Need for This Court To Grant Review To Provide Necessary Guidance on the Recurring Issue Presented Here	2
B. The Federal District Court Cases Invoked by DisputeSuite Further Reinforce the Urgent Need for Review, Given That Federal Courts Have Similarly Applied Conflicting Views on the Issue Presented.....	4
C. The Remaining Arguments Raised by DisputeSuite Are Either Inaccurate or Irrelevant	5
CONCLUSION	7
CERTIFICATE OF WORD COUNT	8

TABLE OF AUTHORITIES

Page

Cases

Auto Equity Sales, Inc. v. Superior Court
(1962) 57 Cal.2d 450 1

Brown v. Desert Christian Center
(2011) 193 Cal.App.4th 733 3

City of Philadelphia v. Lead Industries Association
(3d Cir. 1993) 994 F.2d 112 4

EDCO Plastics, Inc. v. Allynce, Inc.
(C.D. Cal. July 11, 2013, No. SACV-12-01168-JVS)
2013 U.S. Dist. LEXIS 117259 5

Erie R. Co. v. Tompkins
(1938) 304 U.S. 64..... 4, 5

Estate of Drummond
(2007) 149 Cal.App.4th 46 2

Hsu v. Abbara
(1995) 9 Cal.4th 863 2

Johnson v. Myers
(9th Cir. March 7, 2014, No. 12-16428)
561 Fed. Appx. 608 [2014 U.S. App. LEXIS 4319] 5

Kandy Kiss of California, Inc. v. Tex-Ellent, Inc.
(2012) 209 Cal.App.4th 604,
review granted January 16, 2013, S206354..... 1, 7

McCallum v. McCallum
(1987) 190 Cal.App.3d 308 1

MRO Communications, Inc. v. American Tel. & Tel. Co.
(9th Cir. 1999) 197 F.3d 1276 4

PNEC Corp. v. Meyer
(2010) 190 Cal.App.4th 66 7

<i>Profit Concepts Management, Inc. v. Griffith</i> (2008) 162 Cal. App.4th 950	2, 5, 7
<i>Teece v. Kuwait Finance House (Bahrain) B.S.C</i> (N.D. Cal. May 23, 2014, No. C-13-03603-WHA) 2014 U.S. Dist. LEXIS 71297	5

Statutes

Civil Code

§ 1717	3, 6
§ 1717, subd. (b)(1)	4
§ 1717, subd. (c)	6

Rules

California Rules of Court

rule 8.25	9
rule 8.204(c).....	8

Other Authorities

<i>Watt, High Court Set to Examine Prevailing Party Attorney Fee Awards,</i> L.A. Daily J. (Feb. 6, 2013).....	7
Wegner, et al., Cal. Practice Guide, Civil Trials & Evidence (The Rutter Group 2014) ¶ 17:155.9, p. 17-145	3

INTRODUCTION

In order to downplay the direct conflict that led this Court to grant review 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, DisputeSuite claims that the cases adopting Score's view should be disregarded as "mere outliers." (APFR 10.) Attaching such a dismissive label to one line of authority in order to downplay the significance of a conflict may be understandable but such a label does not eliminate the existence of the conflict.

DisputeSuite also resorts to another flawed tactic in its Answer by arguing extensively the substantive merits of the conflicting case authorities invoked in the petition. This is not the merits-stage briefing; the issue here is whether there is a conflict. The Court of Appeal expressly confirmed the existence of the conflict. (Typed opn. 6 [acknowledging that, contrary to DisputeSuite's view, two other decisions had "reached the opposite result" by *allowing* fee shifting based on procedural victories].) Once review is granted, DisputeSuite can advance the merits arguments presented in its Answer.

When there are conflicting court of appeal decisions on point, the trial court can choose to follow either one of them; it can even adopt the position taken by another district, notwithstanding a conflicting decision emanating from the trial court's own district. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 ["In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions"].) "As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so." (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) But fee recovery should not be depend on the

geographical location of the court—at least as to entitlement issues. While geography can dictate the hourly rate in evaluating the amount of fees sought based on the corresponding market rate, the threshold entitlement issues should be adjudicated in a uniform manner, whether the case is venued in Santa Monica, Santa Barbara or Santa Cruz. Therefore, review should be granted.

LEGAL DISCUSSION

A. The Answer to the Petition Demonstrates the Need for This Court To Grant Review To Provide Necessary Guidance on the Recurring Issue Presented Here.

DisputeSuite cites *Hsu v. Abbara* (1995) 9 Cal.4th 863 to support its view, claiming that *Hsu* answered the question presented here by precluding fee shifting based on a procedural victory. (APFR 4.) This is ironic, given that another appellate court has interpreted *Hsu* to authorize fee shifting where the lawsuit is dismissed on procedural grounds; e.g., due to lack of personal jurisdiction. (*Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, 956.)

While the Court of Appeal here held that our interpretation of *Hsu* “is inconsistent with the thrust of the [*Hsu*] decision” (typed opn. 8), this just reinforces the need for this Court to resolve the conflicting interpretations of *Hsu*: either the interpretation adopted by *Profit Concepts* and *Score* is correct or the interpretation adopted by the Court of Appeal and *DisputeSuite* – as originally articulated in *Estate of Drummond* (2007) 149 Cal.App.4th 46 – is correct. Only this Court can answer that question. In sum, the Answer simply reinforces the need for granting review.

DisputeSuite also selectively invokes cases that have denied contractual fees where a party successfully compels arbitration, claiming that such cases further demonstrate that procedural victories do not trigger fee shifting. (APFR 5-6.) “There is a split of authority whether the prevailing party on a petition to compel arbitration has a right to a § 1717 attorney fee award when the underlying litigation on the merits is not yet final[.]” (Wegner, et al., Cal. Practice Guide, Civil Trials & Evidence (The Rutter Group 2014) ¶ 17:155.9, p. 17-145 [collecting cases].) Given this split of authority, the Answer simply demonstrates the need for granting review.

DisputeSuite also argues that the text of the fee shifting statute answers the question presented here—whether recovery under Civil Code section 1717 requires the party seeking fees to have prevailed on the merits. The statutory language invoked by DisputeSuite merely states that “the party prevailing on the contract” is entitled to fees. (APFR 2 [quoting Civ. Code § 1717].) This “plain language” simply begs the question presented here. (APFR 2.)

As another court explained in regard to recovery of costs after a dismissal on jurisdictional grounds, “[n]othing in the wording of the statute indicates that a defendant’s right to recover costs is limited to certain types of dismissals.... Since the Legislature has not distinguished between types of dismissals in the statute, we will not read such a restriction into it.” (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 738 [authorizing cost shifting for dismissal based on lack of subject matter jurisdiction].) DisputeSuite fails to articulate why a double standard should apply as to statutory fees under section 1717.¹

¹ While it is true that the cost-shifting and fee-shifting statutes have their own prevailing party definitions and exclusions, the latter provides that the court “shall determine who is the party prevailing on the contract for

B. The Federal District Court Cases Invoked by DisputeSuite Further Reinforce the Urgent Need for Review, Given That Federal Courts Have Similarly Applied Conflicting Views on the Issue Presented.

DisputeSuite also urges this Court to abdicate its duty to resolve the conflict presented here, citing several unpublished federal district court decisions. Under DisputeSuite's view, those federal trial court decisions – “overwhelmingly uniform on this matter” – demonstrate that litigants in Score's position should not recover their fees. (APFR 7.) DisputeSuite is wrong again.

Federal courts must follow state law, not the other way around. (*Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78.) “In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.” (*MRO Communications, Inc. v. American Tel. & Tel. Co.* (9th Cir. 1999) 197 F.3d 1276, 1282.) “When the state's highest court has not addressed the precise question presented, a federal court must predict how the state's highest court would resolve the issue[.]” (*City of Philadelphia v. Lead Industries Ass'n* (3d Cir. 1993) 994 F.2d 112, 123 [citations omitted].) This sort of interstitial decision making is consistent with the important federalism concerns underlying the rule that “federal courts may not engage in judicial activism” in diversity cases. (*Id.*) Otherwise, the arrogation of state lawmaking authority, implicitly

purposes of this section, *whether or not the suit proceeds to final judgment.*” (Civ. Code § 1717, subd. (b)(1).) This further refutes DisputeSuite's “plain language” argument (APFR 3) by focusing on the statutory phrase that “the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract.” (*Ibid.*)

suggested by DisputeSuite, is inconsistent with principles of federal-state comity and the limited role of the federal courts enunciated in *Erie*.

Accordingly, DisputeSuite's suggestion that this Court should leave the issue presented here to federal courts should be rejected. (APFR 6-8.) While some district courts have adopted DisputeSuite's view, the Ninth Circuit and other federal district courts have applied the contrary line of authority. For example, the Ninth Circuit adopted *Profit Concepts'* view that it is irrelevant whether a contract action "was dismissed based on pre-trial motions rather than litigated on the merits." (*Johnson v. Myers* (9th Cir. March 7, 2014, No. 12-16428) 561 Fed. Appx. 608, 609 [2014 U.S. App. LEXIS 4319].) Given that the conflict among California appellate courts has spread to the federal court system, as evidenced by conflicting federal district court decisions on the issue presented here,² this further reinforces the need for intervention by this Court.

C. The Remaining Arguments Raised by DisputeSuite Are Either Inaccurate or Irrelevant.

Continuing with its relentless efforts to keep this Court from resolving the confusion and the conflict perpetuated by the published decision here, DisputeSuite purports to quote the Court of Appeal's

² See, e.g., *Teece v. Kuwait Finance House (Bahrain) B.S.C.* (N.D. Cal. May 23, 2014, No. C-13-03603-WHA) 2014 U.S. Dist. LEXIS 71297 at *14-*15 ["Even though Teece is not precluded from re-filing this action, defendants achieved their objective of the dismissal of all of plaintiff's claims in this venue"; fee shifting allowed]; see also *EDCO Plastics, Inc. v. Allynce, Inc.* (C.D. Cal. July 11, 2013, No. SACV-12-01168-JVS) 2013 U.S. Dist. LEXIS 117259 at *8-*9 & fn. 6 [adopting *Profit Concepts'* view and shifting fees where the contractual claim was dismissed with prejudice, followed by dismissal of fraud claim due to lack of subject matter jurisdiction].)

decision. Having reviewed the decision several times, we have not found the quote attributed by DisputeSuite anywhere in the opinion—that “[t]he trial court ... reasonably declined Score’s invitation to follow two unpersuasive, outlier cases that are further distinguishable from the facts of this case.” (APFR 12.) In fact, given that the typed opinion is only nine pages long, it is not clear how such a quote could appear on page 18 as suggested by DisputeSuite’s citation to the opinion. (*Id.*)

Finally, DisputeSuite argues that Score’s view should be rejected because it may result in multiple, piecemeal fee motions. This argument again goes to the merits; it does not justify denying review to resolve the confusion and inconsistency in the case law. In any event, this argument is flawed on the merits because the fee shifting statute contemplates offsetting fees, when appropriate, thereby eliminating the concern raised by DisputeSuite.³ This argument also is flawed on the merits insofar as it ignores the likelihood that the number of such fee motions in California more likely would decrease if section 1717 is construed as allowing the recovery of fees in cases such as this. Indeed, such an interpretation of section 1717 would discourage litigants from filing lawsuits in California that clearly do not belong here – and cases that are not improperly filed here cannot lead to fee motions in the Golden State.

³ “In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.” (Civ. Code § 1717, subd. (c).) The same approach can be applied to offset fees against fees, just as fees can be offset against damages.

CONCLUSION

While the Court of Appeal expressly acknowledged the existence of a conflict (typed opn. 6), DisputeSuite’s unusual response is one of denial, essentially asserting that the Court of Appeal erred in confirming the conflict but correctly upholding the denial of fees. DisputeSuite’s other tactic—attaching an “outlier” label to the line of authority adopting Score’s view—is equally futile. If the Court of Appeal had adopted Score’s view, it would have “follow[ed] other appellate court decisions awarding attorney fees for procedural knockouts”—e.g., *Profit Concepts* and *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66. (Watt, *High Court Set to Examine Prevailing Party Attorney Fee Awards*, L.A. Daily J. (Feb. 6, 2013) [discussing *Kandy Kriss*].) Given the dismissal of review in *Kandy Kriss*, this case presents the perfect opportunity to resolve this conflict once and for all.

The petition should be granted.

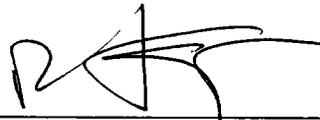
Respectfully submitted,

Dated: June 29, 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 1,998 words.

Dated: June 29, 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.

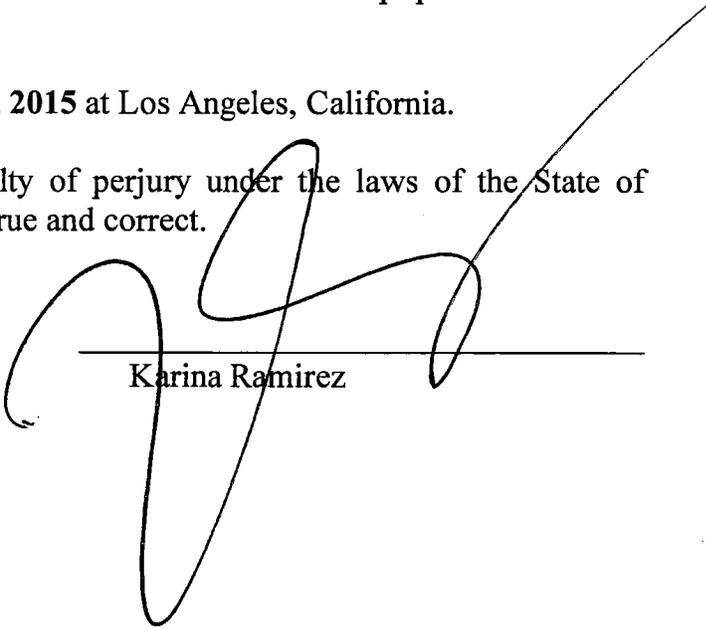
On **June 29, 2015**, I caused the foregoing document described as **REPLY TO ANSWER TO PETITION FOR REVIEW** to be served on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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 **June 29, 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

<p>James J. Little J.J. Little & Associates 13763 Fuji Way - Suite EU-4 Marina Del Rey, CA 90292</p>	<p>Attorneys for Disputesuite.com, LLC Plaintiff and Respondent</p>
<p>Marvin Gelfand Brendan J. Begley Weintraub Tobin Chediak Coleman Grodin Law Corporation 9665 Wilshire Blvd Ninth Floor Beverly Hills, CA 90212</p>	<p>Co-counsel for Defendants- Appellants</p>
<p>Supreme Court of California 350 McAllister Street San Francisco, CA 94102 Original and thirteen copies</p>	
<p>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</p>	<p>No. B248694</p>
<p>Honorable James Chalfant Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012</p>	<p>Case No: BC489083 Trial Judge</p>