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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROYAL HAWAIIAN ORCHARDS,
L.P., a Delaware Limited
Partnership,

Plaintiff,

v.

EDMUND C. OLSON, in his
capacity as trustee of the
Edmund C. Olson Trust No.
2; THE EDMUND C. OLSON
TRUST NO. 2, erroneously
referred to as a California
business trust; and DOES 1-
50, collectively,

Defendants.

CV 14-8984 RSWL (RZx)

**ORDER re: DEFENDANT'S
NOTICE OF MOTION AND
MOTION FOR ATTORNEYS'
FEES AND COSTS [29]**

Currently before the Court is Defendant Edmund C. Olson's ("Defendant") Motion for Attorneys' Fees and Costs [29].

I. INTRODUCTION

This Action stems from an agricultural lease dispute between Plaintiff Royal Hawaiian Orchards, L.P. ("Plaintiff") and Defendant Edmund C. Olson

1 ("Defendant"), as sole trustee of the Edmund C. Olson
2 Trust No. 2. This Action has been dismissed pursuant
3 to this Court's Order [28] granting Defendant's Motion
4 to Dismiss pursuant to Federal Rule of Civil Procedure
5 12(b)(3), on the grounds of improper venue [11].

6 Defendant brings the instant Motion for Attorneys'
7 Fees and Costs [29].

8 II. BACKGROUND

9 A. Factual Background

10 Plaintiff is a Delaware limited partnership that is
11 licensed to do business in Hawaii. Compl. ¶ 3.
12 Defendant is the sole trustee of The Edmund C. Olson
13 Trust No. 2, and as such is named in this action and
14 sued in his capacity as the sole trustee of the Trust.
15 Id. ¶ 4. On or about December 22, 1986, a lease
16 agreement ("the Lease Agreement" or "the Agreement")
17 was drafted and entered into between Plaintiff's
18 predecessor-in-interest and Defendant's predecessor-in-
19 interest, by which the Plaintiff (through its
20 predecessor) leased certain parcels of real property
21 located in Hawaii from Defendant's predecessor-in-
22 interest. Compl. ¶ 9. Both Plaintiff and Defendant
23 grow, process, and market macadamia nuts and macadamia
24 nut products in Hawaii. Compl. ¶¶ 7-8. Plaintiff and
25 Defendant are direct competitors in the United States
26 marketplace. Id. ¶ 8.

27 B. Procedural Background

28 On November 20, 2014, Plaintiff filed its Complaint

1 with this Court [1], raising the following allegations:
2 (1) Breach of contract; (2) Breach of implied covenant
3 of good faith and fair dealing; (3) Unfair and
4 deceptive competition under Hawaii Revised Statute
5 ("H.R.S.") § 480-2; (4) Intentional interference with
6 prospective economic advantage; (5) Monopolization in
7 violation of Sherman Anti-Trust Act, 15 U.S.C. § 1-2 et
8 seq.; Seeking (6) declaratory relief and (7) equitable
9 relief from any alleged breach. See generally, Compl.
10 On December 31, 2014, Plaintiff filed its First Amended
11 Complaint ("FAC") [10].

12 In its original Complaint and FAC, Plaintiff
13 alleges that Defendant is a resident of Los Angeles,
14 California. However, Defendant contested this
15 assertion. Compl. ¶ 4; FAC ¶ 4; Def.'s Mot. to Dismiss
16 15:23-28. On January 14, 2015, Defendant filed his
17 Motion to Dismiss Pursuant to Federal Rules of Civil
18 Procedure 12(b)(1), 12(b)(3), and 12(b)(6), or, in the
19 Alternative, Transfer Pursuant to 28 U.S.C. § 1404
20 [11]. On June 26, 2015, this Court issued its Order
21 granting Defendant's Motion based on Rule 12(b)(3)
22 [28], finding that Plaintiff failed to establish
23 Defendant's domicile in California. Order 6:12-15,
24 6/26/2015. Rather, this Court found that Defendant was
25 domiciled in Hawaii. Id. at 6:10-12.

26 On July 13, 2015, Defendant filed the instant
27 Motion for Attorneys' Fees and Costs [29]. On July 28,
28 2015, Plaintiff filed its Opposition to Defendant's

1 Motion for Attorneys' Fees and Costs [30]. On August
2 04, 2015, Defendant filed its Reply in support of its
3 Motion for Attorneys' Fees and Costs [32]. The matter
4 is now before the state court of Hawaii.

5 III. DISCUSSION

6 A. Legal Standard

7 1. *Attorneys' Fees*

8 The general rule in federal courts is that "absent
9 an express statutory command, attorney's fees will not
10 be awarded in civil cases." Home Sav. Bank, F.S.B. v.
11 Gillam, 952 F.2d 1152, 1162 (9th Cir. 1991) (citing
12 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421
13 U.S. 240, 262 (1975)).

14 Under the "American Rule," each party to a lawsuit
15 is generally responsible for its own attorneys' fees.
16 Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

17 However, an award of attorneys' fees may be proper
18 where a valid contract or statute shifts fees to a
19 losing party. See, e.g., United States v. Standard Oil
20 Co. of Cal., 603 F.2d 100, 103 (9th Cir. 1979). In
21 order to award attorneys' fees to a party in
22 litigation, a court must be satisfied that both (1) the
23 party is entitled to the fees and (2) that the fee
24 award is reasonable. Garzon v. Varese, No. CV 09 9010
25 PSG PLAX, 2011 WL 103948, at *1, (C.D. Cal. Jan. 11,
26 2011).

27 If it is state law that allows for a fee award,
28 federal courts must look to that law to determine the

1 propriety of such an award. Michael-Regan Co., Inc. v.
2 Lindell, 527 F.2d 653, 656 (9th Cir. 1975).

3 2. *Costs*

4 Federal Rule of Civil Procedure 54(d)(1) provides
5 that "costs other than attorneys' fees shall be allowed
6 as of course to the prevailing party unless the court
7 otherwise directs." F.R.C.P. 54(d)(1). "By its terms,
8 the rule creates a presumption in favor of awarding
9 costs to a prevailing party, but vests in the district
10 court discretion to refuse to award costs." Ass'n of
11 Mexican-American Educators v. State of California, 231
12 F.3d 572, 591 (9th Cir. 200) (citing National Info.
13 Servs., Inc. V. TRW, Inc., 51 F.3d 1470, 1471 (9th Cir.
14 1995)).

15 **B. Analysis**

16 Defendant moves for the Court to award him
17 attorneys' fees in the amount of \$51,725 (plus taxes in
18 the amount of \$2,437.29) and costs in the amount of
19 \$325. Def.'s Mot. for Attys' Fees and Costs 4:10-12.
20 Defendant seeks an additional award of \$3,750.00
21 incurred in preparing his Reply brief, for a total
22 award of fees and costs of \$58,237.29. Def.'s Reply
23 2:12-15. Defendant seeks this award of attorneys' fees
24 and costs for obtaining dismissal of the present action
25 on the grounds of improper venue. Def.'s Mot. for
26 Attys' Fees and Costs 3:3-8.

27 1. *Defendant is not Entitled to Attorneys' Fees*
28 *Under the Terms of the Agreement*

1 Plaintiff argues that, under the terms of the
2 parties' Agreement, Defendant is not entitled to
3 attorneys' fees for successfully moving to dismiss this
4 action for improper venue. Plaintiff contends that
5 pursuant to the parties' Agreement, Defendant is only
6 entitled to attorneys' fees if Defendant was "without
7 fault" when he was sued by Plaintiff. Pl.'s Opp. To
8 Def.'s Mot. for Attys' Fees and Costs 9:15-17.

9 Plaintiff argues that because the state court of Hawaii
10 that is now hearing this matter has yet to determine
11 whether Defendant was "without fault" when he was sued
12 by Plaintiff, by the terms of the parties' Agreement,
13 Defendant is not entitled to attorneys' fees. Id. at
14 9:6-22.

15 Upon review of the Lease Agreement, this Court
16 finds that the matter of whether Defendant was "without
17 fault" when he was sued by Plaintiff has yet to be
18 determined by the Hawaii state court. Accordingly,
19 Defendant is not entitled to attorneys' fees under the
20 terms of the parties' Agreement for obtaining dismissal
21 of the present action for improper venue.

22 2. *Hawaii Law Governs the Resolution of*
23 *Defendant's Attorneys' Fees Motion*

24 a. *Hawaii law applies pursuant to California*
25 *Civil Code section 1646 and the*
26 *Restatement (Second), Conflict of Laws*
27 *section 188.*

28 Defendant moves for the Court to award him

1 attorneys' fees in the amount of \$51,725 (plus taxes in
2 the amount of \$2,437.29) and costs in the amount of
3 \$325. Def.'s Mot. for Attys' Fees and Costs 4:10-12.
4 Defendant requests an additional \$3,750 incurred in
5 preparing his Reply brief, in support of his Motion for
6 Attorneys' Fees, for a total request of \$58,237.29.
7 Reply 2:12-15. Defendant's primary contention is that
8 such an award is reasonable and appropriate given that
9 the total fees are "in line with awards granted by this
10 district in favor of defendants at the pre-answer
11 stage." Reply 10:3-5.

12 Federal courts sitting in diversity decide
13 attorney's fees motions based on the law of the forum
14 state, which in the present case is California.
15 Klopfenstein v. Pargeter, 229 F.2d 150, 52 (9th Cir.
16 1979); Kona Enterprises, Inc. v. Estate of Bishop, 229
17 F.3d 877, 883 (9th Cir. 2000).

18 When parties to a contract have not included an
19 effective choice of law provision in their agreement,
20 California courts have employed different choice of law
21 analyses, including both California Civil Code section
22 1646 and Section 188 of the Restatement (Second) of
23 Conflict of Laws, in making a choice of law
24 determination. Rutherford v. FIA Card Services, N.A.,
25 Case No: 11-cv-04433 DDP MANX, 2012 WL 993885, at *2
26 (C.D. Cal. Mar. 23, 2012) (citing Arno v. Club Med
27 Inc., 22 F.3d 1464, 1469 n. 6 (1993)).

28 California Civil Code section 1646 requires that

1 "[a] contract is to be interpreted according to the law
2 and usage of the place where it is to be performed; or,
3 if it does not indicate a place of performance,
4 according to the law and usage of the place where it is
5 made." Cal. Civ. Code § 1646.

6 Section 188 of the Restatement (Second), Conflict
7 of Laws states that, if the parties to a contract fail
8 to make an effective choice of law, the contract will
9 be determined by the "law of the state which, with
10 respect to that issue, has the most significant
11 relationship to the transaction." Restatement
12 (Second), Conflict of Laws § 188(1) (1969). Section
13 188 provides the relevant factors to consider in
14 determining the state that has the most significant
15 relationship to the transaction: (1) the place of
16 contracting, (2) the place of negotiation of the
17 contract, (3) the place of performance, (4) the
18 location of the subject matter of the contract, and (5)
19 the domicile, residence, nationality, place of
20 incorporation, and place of business of the parties.
21 Restatement (Second), Conflict of Laws § 188(2).

22 The parties in the present case did not include a
23 choice of law provision in their Agreement. See
24 Compl., Ex. 1. Therefore, pursuant to section 188, the
25 contract is interpreted according to the law of the
26 state with the most "significant relationship to the
27 transaction," which in applying the above factors to
28 the present case is Hawaii. Here, the contract at

1 issue, the Lease Agreement, was entered into in Hawaii.
2 Id. The location of the subject matter of the
3 contract, the property over which the Lease Agreement
4 governs, is in Hawaii. Id. The place where the
5 contract was to be performed is Hawaii. Id. Plaintiff
6 conducts its business in Hawaii, id., and this Court
7 has found that Defendant is domiciled in Hawaii. Order
8 6:12-15, 6/26/2015. Therefore, the state with the most
9 significant relationship to the transaction in the
10 present case is clearly Hawaii. On June 26, 2015, the
11 Court granted Defendant's Motion to Dismiss on grounds
12 of improper venue [28], finding that "the underlying
13 issue in this case, the Lease and land dispute, all
14 concern Hawaii." Order at 2, 6/26/2015. Thus,
15 pursuant to section 188, the Court finds that Hawaii
16 law applies to the present attorneys' fees issue.

17 Alternatively, the Court finds that Hawaii law
18 applies pursuant to California Civil Code section 1646.
19 The Lease Agreement must be interpreted "according to
20 the law and usage of the place where it is to be
21 performed," or where it was made, which in the present
22 case, as discussed above, is Hawaii.

23 b. *California Civil Code section 187 does not*
24 *apply to the Agreement, and thus section*
25 *1717 cannot be considered.*

26 Plaintiff contends that California Civil Code
27 section 1717 must apply to the present attorneys' fees
28 dispute because section 1717 represents a strongly held

1 public policy that is contrary to H.R.S. § 607-14.
2 Pl.'s Opp. To Def.s' Mot. for Attys' Fees and Costs at
3 13:11-16. Plaintiff presumably makes this argument
4 pursuant to Restatement (Second), Conflict of Laws
5 section 187(2)(b).¹ However, section 187 is
6 inapplicable to the parties' dispute in the present
7 case because the Lease Agreement does not include a
8 choice of law provision, and section 187 governs only
9 those contracts that contain an effective choice of law
10 provision.

11 H.R.S. section 607-14 allows attorneys fees to be
12 awarded without a decision on the merits. Kona Enters.
13 v. Estate of Bernice Pauahi Bishop, 229 F.3d 877, 889
14 (9th Cir. 2000); Wong v. Takeuchi, 88 Hawai'i 46, 49
15 (1988). In contrast, California Civil Code section
16 1717 has been interpreted differently as to whether
17 attorneys' fees may be awarded without a decision on
18 the merits.² In reviewing the relevant case law, it is
19

20 ¹Section 187 governs contracts in which the parties'
21 agreement contains an effective choice of law provision.
22 Restatement (Second), Conflict of Laws § 187 (1971). Section
23 187(2) provides exceptions under which the court will decline to
24 apply the state law chosen by the parties. Section 187(2)
25 provides that the law of the state chosen by the parties will be
26 applied unless "(a) the chosen state has no substantial
27 relationship to the parties or the transaction...or (b)
28 application of the law of the chosen state would be contrary to a
fundamental policy of a state which has a materially greater
interest than the chosen state." Restatement (Second), Conflict
of Laws § 187(2).

27 ²Whereas in Profit Concepts Mgmt., Inc. v. Griffith, 162
28 Cal. App. 4th 950 (2008), the court granted the movant attorneys'
fees, holding that the determination of which party is

1 clear that H.R.S. § 607-14 is contrary to section 1717.
2 Further, it is "well-established that Section 1717
3 reflects a fundamental California public policy."
4 Laurel Village Bakery, LLC v. Global Payments Direct,
5 Inc., Case No: C06-1332 MJJ, 2007 WL 4410396, at *3
6 (N.D. Cal. Dec. 14, 2007).

7 While Plaintiff is correct in contending that
8 H.R.S. § 607-14 is contrary to the "well-established"
9 fundamental California public policy of section 1717
10 regarding attorneys' fees, this conclusion is
11 irrelevant because, as discussed above, section 187
12 does not apply to the Lease Agreement in the present
13 case. Thus, H.R.S. § 607-14 should govern Defendant's
14 attorneys' fees motion. Section 187(2)(b) cannot be
15 employed to apply California Civil Code section 1717
16 instead.

17 Furthermore, even if the Court were to consider
18 section 187(2)(b), California does not have a
19 "materially greater interest" in the Lease Agreement,
20 as is required by the section 187 exception. This was
21 established when this Court ruled that California was
22 an improper venue for this action. See generally,

23 _____
24 "prevailing" must be made without consideration of whether the
25 plaintiff may re-file the action, in Vistan Corp. v. Fadei, USA,
26 Inc., the court denied the movant attorneys' fees because the
27 case could be re-filed in the forum state. 2013 WL 1345023.
28 Further, the court in Vistan Corp. notes that "[f]ederal district
courts appear uniform in denying fees under section 1717 where a
non-merits decision results in dismissal of the contract claim."
Id. at 3.

1 Order, 6/26/15. For this additional reason,
2 Plaintiff's argument that California law rather than
3 Hawaii law should govern the resolution of Defendant's
4 attorneys' fees motion fails.

5 Plaintiff improperly relied on the court's decision
6 in Laurel Village Bakery, LLC v. Global Payments
7 Direct, Inc. in support of its contention that
8 California law should apply to Defendants' attorneys'
9 fees motion in the present case. Case No: C06-1332
10 MJJ, 2007 WL 4410396 (N.D. Cal. Dec. 14, 2007).

11 However, Laurel is distinguishable from the present
12 case in two significant ways. First, in Laurel, the
13 parties effectively chose Georgia as the forum for
14 resolution of their disputes. Id. at *1. Because the
15 parties in Laurel had an existing forum selection
16 clause, the court properly considered the fundamental
17 public policy of Section 1717 under section 187(2)(b)'s
18 choice of law exception. Id. at *3. Second, the court
19 in Laurel found that California had a "materially
20 greater interest than the chosen state" because the
21 agreement at issue was primarily formed and performed
22 in California, providing the court with further grounds
23 on which to apply California law under section
24 187(2)(b). Id. In the present case, as discussed
25 above, the parties did not include an effective forum
26 selection clause in their Lease Agreement and
27 California does not have a materially greater interest
28 in the transaction at issue.

1 3. *Defendant is Not Entitled to Attorneys' Fees*
2 *Under H.R.S. § 607-14*

3 a. *The Agreement is governed by H.R.S. § 607-*
4 *14 because it is an action in the nature*
5 *of assumpsit.*

6 Under Hawaii law, "[o]rdinarily, attorneys' fees
7 cannot be awarded as damages or costs unless so
8 provided by statute, stipulation, or agreement."
9 Stanford Carr Development Corp v. Unity House, Inc.,
10 111 Hawai'i 286, 305 (2006). H.R.S. § 607-14 allows
11 for attorneys' fees in all actions in the nature of
12 assumpsit.³ It is well established under Hawaii law
13 that "an action in the nature of assumpsit includes
14 'all possible contract claims.'" Leslie v. Estate of
15 Tavares, 93 Hawai'i 1, 5 (2000) (citing Healy Tibbitts
16 Constr. Co. v. Hawaiian Indep. Refinery, Inc., 673 F.2d
17 284, 86 (9th Cir. 1982)). "Assumpsit is a common law
18 form of action which allows for the recovery of damages
19 for the non-performance of a contract, either express
20 or implied, written or verbal, as well as quasi
21 contractual obligations." Schulz v. Honsador, Inc., 67
22 Haw. 433, 435 (1984).

24 ³H.R.S. § 607-14 provides, in part: "In all the courts, in
25 all actions in the nature of assumpsit and in all actions on a
26 promissory note or other contract in writing that provides for an
27 attorney's fee, there shall be taxed as attorneys' fees, to be
28 paid by the losing party and to be included in the sum for which
execution may issue, a fee that the court determines to be
reasonable...." H.R.S. § 607-14.

1 Here, Plaintiff alleged in its Complaint that
2 Defendant breached the Lease Agreement, breached an
3 implied-at-law covenant of good faith and fair dealing,
4 engaged in unfair and deceptive competition within
5 H.R.S. § 480-2(e), engaged in intentional interference
6 with prospective economic advantage, and engaged in
7 monopolistic conduct in violation of the Sherman Anti-
8 Trust Act. Compl. ¶¶ 23, 29, 34, 40, 43. Plaintiff's
9 claims all arise from alleged or prospective breaches
10 of the Lease Agreement, and therefore Plaintiff's
11 action is in the nature of assumpsit. As such,
12 Defendant's Motion is governed by H.R.S. § 607-14.

13 b. *Defendant is not a "prevailing party"*
14 *within the meaning of H.R.S. § 607-14.*

15 "Under H.R.S. § 607-14, an action in the nature of
16 assumpsit does not need a clause in writing providing
17 for attorneys' fees in order for attorneys' fees to be
18 granted." Eastman v. McGowan, 946 P.2d 1317, 1327
19 (Haw. 1997). When H.R.S. § 607-14 applies, generally
20 "the litigant in whose favor judgment is rendered is
21 the prevailing party ... Thus, a dismissal of the
22 action whether on the merits or not, generally means
23 that [the] defendant is the prevailing party." Wong v.
24 Takeuchi, 961 P.2d 611, 614 (Haw. 1988) (citing Wright,
25 Miller & Kane, Federal Practice and Procedure: Civil 2d
26 section 2667 (1983)). "There is no requirement that
27 the judgment in favor of the prevailing party be a
28 ruling on the merits of the claim." Id. In a

1 diversity action, if state law entitles a "prevailing
2 party" to attorneys fees for "permanently
3 defeat[ing][a] lawsuit," that right is not lost by
4 obtaining judgment on procedural grounds. Kona
5 Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877,
6 888 (9th Cir. 2000) (citing Anderson v. Melwani, 179
7 F.3d 763, 766 (9th Cir. 1999)).

8 Although H.R.S. § 607-14 does permit courts to
9 award attorneys' fees to "prevailing parties" who
10 obtained judgment absent a ruling on the merits of the
11 claim, the Supreme Court and the Ninth Circuit have
12 defined and narrowed the meaning of a "prevailing
13 party."

14 The Supreme Court of the United States has held
15 that a "'material alteration of the legal relationship
16 of the parties' [is] necessary to permit an award of
17 attorneys' fees." Buckhannon Bd. and Care Home, Inc.
18 v. West Virginia Dept. of Health and Human Resources,
19 532 U.S. 598, 604 (2001) (citing Texas State Teachers
20 Association v. Garland Independent School District, 489
21 U.S. 782, 792-793 (1989)). The Supreme Court reasoned
22 that "[t]he key inquiry is whether some court action
23 has created a material alteration of the legal
24 relationship of the parties." Cadkin v. Loose, 569
25 F.3d 1142, 1148 (9th Cir. 2009) (internal quotations
26 omitted).

27 The Ninth Circuit addressed how to determine
28 whether a party is a "prevailing party" under H.R.S. §

1 607-14 in Countrywide Home Loans, Inc. v. Hoopai. 581
2 F.3d 1090 (9th Cir. 2009). The court stated that
3 "Hawaiian courts focus on which party prevailed on the
4 'disputed main issue.'" Id. at 1101 (citing Food
5 Pantry, Ltd. v. Waikiki Bus Plaza, Inc., 575 P.2d 869,
6 879 (Haw. 1978)). The Ninth Circuit examined what
7 constitutes a "disputed main issue" and stated that it
8 is "'identified by looking to 'the principal issues
9 raised by the pleadings and proof in a particular
10 case....'" Id. (citing Fought & Co., Inc. v. Steel
11 Eng'g & Erection, Inc., 951 P.2d 487, 503 (Haw. 1998)).
12 The Ninth Circuit clearly stated that "[t]hus, the
13 'prevailing party' is the party that succeeds on the
14 issue or issues that are (1) the 'principal' issues
15 raised in the litigation and (2) disputed by the
16 parties." Id. The Ninth Circuit has held that a
17 dismissal without prejudice does not alter the legal
18 relationship of the parties "because the defendant
19 remains subject to risk of re-filing." Oscar v. Alaska
20 Dept. of Educ. & Early Dev., 541 F.3d 978, 981 (9th
21 Cir. 2008). Further, the Ninth Circuit has noted that
22 "[u]nder the Supreme Court's 'generous formulation' of
23 the term 'prevailing parties,' parties 'may be
24 considered prevailing parties' for attorney's fees
25 purposes if they succeed on any significant issue in
26 litigation which achieves some of the benefit the
27 parties sought in bringing suit.'" Kona, 229 F.3d 877,
28 891, fn 10 (9th Cir. 2000) (citing Farrar v. Hobby, 506

1 U.S. 103, 109 (1992)).

2 In Kona, the Ninth Circuit affirmed the district
3 court's holding that defendants were "prevailing
4 parties" for purposes of H.R.S. § 607-14. 229 F.3d 877
5 at 891 (9th Cir. 2000). The district court dismissed
6 plaintiffs' claims with prejudice and entered judgment
7 for the defendants. 229 F.3d 877, 888 (9th Cir. 2000).
8 The Ninth Circuit held that "[t]herefore, under Wong,
9 the district court correctly deemed defendants to be
10 'prevailing parties.'" Id. (citing Wong v. Takeuchi,
11 961 P.2d 611, 614 (1998)). The Ninth Circuit reasoned
12 that defendants were "prevailing parties" within the
13 meaning of H.R.S. § 607-14 because "[t]he doctrine of
14 res judicata bar[red] all plaintiffs from re-litigating
15 any of their claims..." and "[t]herefore, defendants
16 clearly succeeded in 'permanently defeating' all direct
17 claims arising out of this lawsuit and the derivative
18 claims of Kona." Id. at 888. In affirming the
19 district court's ruling that defendants were
20 "prevailing parties" within the meaning of H.R.S. §
21 607-14, the Ninth Circuit further reasoned that
22 Defendants were "prevailing parties" because "Kona
23 could never bring this action again on behalf of the
24 Companies." Id. at 891, fn 10.

25 Similarly, in Wong, the Supreme Court of Hawaii
26 held that the defendant was a "prevailing party" for
27 purposes of H.R.S. § 607-14. 961 P.2d 611, 614 (Haw.
28 1998). The circuit court granted defendant's motion

1 for summary judgment on the defense of laches and the
2 applicable statute of limitations. The Supreme Court
3 of Hawaii held that although the dismissal of
4 plaintiff's claim was not a determination on the
5 merits, plaintiff was rendered unable to re-litigate
6 his claim and thus the defendant was a "prevailing
7 party" for purposes of H.R.S. § 607-14. 961 P.2d 611,
8 614 (Haw. 1998).

9 Defendant cites Kona for the proposition that a
10 party may recover fees under Hawaii law even if there
11 has been no determination on the merits. Def.'s Mot.
12 8:4-6. Plaintiff contends that Defendant is not a
13 "prevailing party" within the meaning of H.R.S. § 607-
14 14, and thus is not entitled to attorneys' fees,
15 because Plaintiff's action was not dismissed with
16 prejudice and thus the Court's holding does not have
17 *res judicata* effect. Pl.'s Opp. at 13:18-14:5.

18 Plaintiff cites Kona and Wong to support its premise
19 that a court must enter judgment with prejudice for the
20 moving party to have "prevailing party" status. Id.

21 Defendant is correct in asserting that Hawaiian
22 courts have granted attorneys' fees without a final
23 resolution on the action's merits. However, as
24 discussed above, courts have largely limited such a
25 holding to cases in which the movant has "permanently
26 defeated" his opponent's claims, or where there has
27 been a "material alteration of the legal relationship
28 of the parties," such as the parties being unable to

1 re-litigate the disputed issue. Therefore, the key
2 inquiry as to whether Defendant can be deemed a
3 "prevailing party" is not whether the action was
4 dismissed with or without prejudice, as Plaintiff
5 contends. Rather, the key inquiry is whether the
6 movant has "succeeded on a significant issue on the
7 litigation," or whether the parties' claims have been
8 "permanently defeated" by judicial action such that
9 they cannot be further litigated.

10 In the present case, this Court granted Defendant's
11 Motion to Dismiss on the grounds of improper venue
12 under F.R.C.P. 12(b)(3) [28]. The parties are
13 currently litigating their claims in Hawaii state
14 court. In contrast to Kona and Wong, the parties'
15 litigation of the underlying claims is ongoing
16 following this Court's dismissal. Furthermore, in
17 obtaining dismissal for improper venue, Defendant
18 clearly did not succeed in "permanently defeating"
19 Plaintiff's claims. Kona, 229 F.3d at 888 (9th Cir.
20 2000). Defendant simply obtained dismissal of the
21 action for improper venue and, as such, the parties had
22 not even begun to litigate their claims in this Court.

23 Additionally, this Court's dismissal of the present
24 action for improper venue did not cause a "material
25 alteration of the legal relationship of the parties",
26 which the Supreme Court has emphasized as the "key
27 inquiry" in determining whether a party may be deemed a
28 "prevailing party". Buckhannon, 532 U.S. at 604

1 (2001); Cadkin, 569 F.3d at 1148 (9th Cir. 2009).

2 Rather, the legal relationship of the parties in the
3 present action is largely unchanged because the parties
4 will continue to litigate Plaintiff's claims in Hawaii
5 state court. Accordingly, this Court will not confer
6 "prevailing party" status on Defendant at this
7 juncture.

8 The Court should find that the Defendant has not
9 yet succeeded on the disputed main issue in the case,
10 and as such, cannot be deemed a "prevailing party"
11 within the meaning of the statute. As per the Ninth
12 Circuit's "prevailing party" analysis in Countrywide
13 Home Loans, because this action was dismissed for
14 improper venue and thus this Court did not address the
15 "principal issues raised by the pleadings". Again, the
16 principal issues are yet to be determined by the Hawaii
17 state court. In considering the relevant Hawaiian,
18 Ninth Circuit, and Supreme Court definitions and
19 analyses of what constitutes a "prevailing party" under
20 H.R.S. § 607-14, this Court finds that Defendant is not
21 a "prevailing party" and accordingly Defendant's Motion
22 for Attorneys' Fees and Costs [29] is **DENIED**.

23 4. *This Court need not address whether the*
24 *attorneys' fees sought are "reasonable".*

25 Because this Court finds that Defendant is not a
26 "prevailing party" within the meaning of H.R.S. § 607-
27 14, and thus the Defendant is not entitled to
28 attorneys' fees under the statute, this Court need not

1 address whether Defendant's request for attorneys' fees
2 is "reasonable".

3 5. *Defendant is not Entitled to Costs*

4 Defendant seeks \$325.00 in costs for his
5 Application for attorney Paul Alston to Appear Pro Hac
6 Vice [15]. Def.'s Mot. for Attys' Fees and Costs 4:10-
7 12. Federal Rule of Civil Procedure 54(d)(1) provides
8 that "costs other than attorneys' fees shall be allowed
9 as of course to the prevailing party unless the court
10 otherwise directs." F.R.C.P. 54(d)(1). Although Rule
11 54(d)(1) creates a presumption in favor of awarding
12 costs to a "prevailing party", this Court has
13 discretion to refuse to awards costs. Ass'n of
14 Mexican-American Educators v. State of California, 231
15 F.3d 572, 591 (9th Cir. 200); National Info. Servs.,
16 Inc. V. TRW, Inc., 51 F.3d 1470, 1471 (9th Cir. 1995).
17 In accordance with this Court's finding that Defendant
18 is not a "prevailing party" in the present action at
19 this juncture, the Court declines to awards costs to
20 Defendant. Defendant's request for costs is **DENIED.**

21 **IV. CONCLUSION**

22 Based on the foregoing, the Court **DENIES**
23 Defendant's Motion for Attorneys' Fees and Costs [29].

24
25 **IT IS SO ORDERED.**

26 DATED: October 15, 2015

S/ RONALD S.W. LEW

27 **HONORABLE RONALD S.W. LEW**
28 Senior U.S. District Judge