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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANIEL E. LEVY,  
Plaintiff,  
v.  
PREVACUS, INC., et al.,  
Defendants.

Case No. [4:16-cv-01555-KAW](#)

**ORDER REGARDING DEFENDANT  
VANLANDINGHAM'S MOTION FOR  
ATTORNEY'S FEES AND COSTS**

Re: Dkt. No. 64

On July 16, 2017, Defendant Jacob W. VanLandingham filed a motion for attorney's fees and costs on the grounds that he was the prevailing party based solely on the fact that he successfully moved to dismiss the First Amended Complaint's First Count for Breach of Written Contract. (Def.'s Mot., Dkt. No. 64 at 1.)

Upon review of the moving papers, the Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below, DENIES Defendant's motion for attorney's fees and costs.

**I. BACKGROUND**

Plaintiff Daniel E. Levy, Ph.D is a chemist with particular knowledge and expertise in synthesizing chemical molecules. (First Am. Compl., "FAC," Dkt. No. 27 ¶ 1.) Prevacus, Inc. is a Delaware corporation with its principal place of business in Florida. (FAC ¶ 2.) Prevacus's focus is on developing new treatments for concussions (mild traumatic brain injuries) centering on two synthetic models: one of which was created by Dr. Levy under contract with Prevacus and the other was under development by Prevacus for which Dr. Levy was retained to improve the manufacturing process. *Id.* Defendant Jake VanLandingham is a founder and President of Prevacus, and was Dr. Levy's primary contact at the company. (FAC ¶ 3.)

1 On or about March 30, 2013, Dr. Levy and Prevacus entered into a written consulting  
2 agreement (“Agreement”), in which Dr. Levy agreed to consult with Prevacus to help it synthesize  
3 and optimize synthesis of a molecule that could be used to treat concussions. (FAC ¶ 10.) Dr.  
4 Levy went on to design a second, more useful molecule for Prevacus, and directed and supervised  
5 the synthesis of that molecule. *Id.* Dr. Levy alleges that he performed all of his obligations under  
6 the Agreement, but did not receive all compensation to which he was entitled. *Id.*

7 On March 29, 2016, Plaintiff filed this lawsuit for breach of contract, quantum  
8 meruit/unjust enrichment, promissory estoppel, declaratory judgment, and fraud. On January 11,  
9 2017, Plaintiff filed the first amended complaint. After several extensions, on June 1, 2017,  
10 Defendants filed their motion to dismiss. (Dkt. No. 59.) The Court ultimately dismissed the  
11 breach of written contract cause of action against Mr. VanLandingham with prejudice. (7/6/17  
12 Order, Dkt. No. 62.)

13 On July 16, 2017, Defendant Jacob W. VanLandingham filed a motion for attorney’s fees  
14 and costs on the grounds that he was a prevailing party because he successfully moved to dismiss  
15 the first cause of action for breach of written contract. (Def.’s Mot., Dkt. No. 64 at 1.) As a result,  
16 Defendant seeks an award of reasonable attorney’s fees in the amount of \$12,072.50, and costs in  
17 the amount of \$160.95, pursuant to the Agreement’s attorney fee provision, which states that  
18 “[t]he prevailing party in any dispute or legal action regarding the subject matter of this  
19 Agreement shall be entitled to recover attorney’s fees and costs.” (*Id.*; Agreement, FAC, Ex. A §  
20 7.5.) On July 31, 2017, Plaintiff filed an opposition. (Pl.’s Opp’n, Dkt. No. 69.) On August 5,  
21 2017, Defendant filed a reply. (Def.’s Reply, Dkt. No. 74.)

22 **II. LEGAL STANDARD**

23 California law governs the right to recover attorneys’ fees pursuant to an underlying  
24 contract. *See Berkla v. Corel Corp.*, 302 F.3d 909, 919 (9th Cir. 2002) (applying Cal. Civ. Proc.  
25 Code § 1021, which requires courts to follow contractual fee-shifting provisions). In similar  
26 circumstances, courts in this district have awarded attorney's fees. *See, e.g., Nguyen v. Wells*  
27 *Fargo Bank, N.A.*, No. C-10-4081-EDL, 2011 WL 9322 (N.D.Cal. Jan. 3, 2011). California Civil  
28 Code § 1717(a) governs the recovery of attorneys' fees pursuant to an underlying contract, stating:



1 the attorney’s fees provision in a contract to which he was not a party nor whether the Agreement  
2 permits the recovery of attorney’s fees and costs on a dispute-by-dispute basis.

3 Even so, the cases Defendant cites do not support his position that he is entitled to  
4 attorney’s fees at this juncture, as they are inapposite. (*See* Def.’s Mot. at 4-5.) By way of  
5 example, in *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, the court found that  
6 West Willow was a prevailing party and entitled to its attorney’s fees and costs, because it  
7 prevailed in the liability phase of the litigation despite being unable to ultimately obtain the  
8 damages sought. 2009 WL 458779, at \*9 (Del. Ch. Feb. 23, 2009). Similarly, in *Herbert v.*  
9 *Platinum Capital Partners, Inc.* an interim award of attorney’s fees and costs was affirmed based  
10 on one party obtaining a temporary restraining order, regardless of the outcome of the separate  
11 action between the parties. 122 A.D.3d 423, 423, 997 N.Y.S.2d 10, 11 (2014). The Ninth Circuit  
12 cases cited by Defendant generally require that a party prevail on the substantive merits—at trial,  
13 summary judgment, or by obtaining a preliminary injunction—to obtain a piecemeal attorney’s  
14 fees award, rather than at the pleadings stage. *See Marks v. Clarke*, 102 F.3d 1012, 1033–34 (9th  
15 Cir. 1996), as amended on denial of reh'g (Feb. 26, 1997) (attorney’s fees available to plaintiffs  
16 whose motion for summary judgment was granted in part); *Animal Lovers Volunteer Ass'n, Inc. v.*  
17 *Carlucci*, 867 F.2d 1224, 1225 (9th Cir. 1989)(appellants won a determination on the merits of  
18 their claim for declaratory relief).

19 In order to be a prevailing party under a contractual attorney’s fees provision based on a  
20 dismissal on procedural grounds, a defendant must have completely defeated the underlying  
21 federal lawsuit. *See Anderson v. Melwani*, 179 F.3d 763, 767 (9th Cir. 1999)(procedural grounds);  
22 *see also Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 888 (9th Cir. 2000)(motion to  
23 dismiss granted on all claims for lack of standing). Defendant also cited *Avaya, Inc. v. Charter*  
24 *Communs. Holding Co., LLC*, which is also of help, as that case found that fees were recoverable  
25 after the voluntary dismissal of the entire action due to improper venue, because the fees provision  
26 permitted recovery based on “any action or proceeding.” 2016 Del. Ch. LEXIS 18, at \*7 (Del. Ch.  
27 Jan. 29, 2016). Thus, even if the contractual provision permits recovery on a dispute-by-dispute  
28 basis, it must generally be on the merits rather than at the pleadings stage. Moreover, the court

1 may, in its discretion, “refuse to enforce a contractual attorney’s fees provision if an award of fees  
2 would be ‘inequitable and unreasonable.’” *Anderson*, 179 F.3d at 766. Given the nature of the  
3 allegations leveled against Mr. VanLandingham, the Court finds that an award of attorney’s fees at  
4 this juncture, or at any time before judgment is entered, would be inequitable and unreasonable in  
5 the absence of complete defeat. Thus, while the Court recognizes that Mr. VanLandingham went  
6 to some expense in filing the motion to dismiss, it did not result in the dismissal of all claims  
7 against him, rendering the instant motion almost certainly premature even if it were meritorious.  
8 (*See* 7/6/17 Order at 8.)

9 The Court is troubled that Defendant did not meet and confer with Plaintiff prior to filing  
10 the instant motion for attorney’s fees. (*See* Pl.’s Opp’n, Dkt. No. 69 at 12.) While Defendant is  
11 technically correct that Civil Local Rule 54-5(b)’s meet and confer requirement only explicitly  
12 applies to motions for attorneys’ fees that follow a judgment—which is the typical timing of such  
13 motions— the Northern District Guidelines for Professional Conduct provide that “[b]efore filing  
14 a motion, a lawyer should engage in a good faith effort to resolve the issue.” (Northern District  
15 Guidelines § 10.) There is no dispute that Defendant did not attempt to resolve the issue of  
16 attorney’s fees prior to filing the motion. Nonetheless, the Court is confident that defense counsel  
17 will follow the Guidelines in good faith in the future.

18 **IV. CONCLUSION**

19 In light of the foregoing, Defendant’s motion for attorney’s fees and costs is DENIED.  
20 IT IS SO ORDERED.

21 Dated: August 29, 2017

22   
23 KANDIS A. WESTMORE  
24 United States Magistrate Judge