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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| GENUTEC BUSINESS SOLUTIONS, INC.,<br><br>Plaintiff, Cross-defendant, and Appellant,<br><br>v.<br><br>MICHAEL TAUS et al.,<br><br>Defendants, Cross-complainants, and Appellants;<br><br>EISNER, KAHAN & GORRY,<br><br>Objector and Appellant;<br><br>LAW OFFICES OF M. CANDICE BRYNER et al.<br><br>Objectors and Respondents. | G046062<br><br>(Super. Ct. No. 07CC07918)<br><br>O P I N I O N |

Appeal from orders of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Shulman Hodges & Bastian, Gary A. Pemberton and Kiara W. Gebhart for Plaintiff, Cross-defendant and Appellant, and Objector and Respondent Shulman Hodges & Bastian.

Law Offices of Jimmy C. Taus and Jimmy C. Taus for Defendant, Cross-complainant, and Appellant Michael Taus.

Jones Day, Paul F. Rafferty, Eric M. Kennedy and Rhianna S. Hughes for Defendant, Cross-complainant, and Appellant Lawnae Hunter.

Eisner, Kahan & Gorry; Eisner, Kahan, Gorry, Chapman, Ross & Jaffe, Timothy J. Gorry and Erica E. Hayward; Fink & Steinberg, Keith A. Fink and Keven Steinberg for Objector and Appellant.

M. Candice Bryner, in pro. per., Law Offices of M. Candice Bryner and Jong Lee for Objectors and Respondents Law Offices of M. Candice Bryner and M. Candice Bryner.

* * *

This appeal concerns two motions for sanctions made under Code of Civil Procedure section 128.7.[1] The underlying lawsuit concerns Genutec Business Solutions' (Genutec's) breach of fiduciary duty claims against its former attorneys, accountants, and board of directors, including Michael Taus and Lawnae Hunter. Believing there was no basis for a lawsuit against them, Taus and Hunter filed a section 128.7 motion for sanctions (hereafter referred to in this opinion as the Taus/Hunter sanctions motion). They sought $1,098,046.03 against Genutec and its counsel, namely, (1) the Law Offices of Candice Bryner (the Bryner Firm), and (2) Shulman, Hodges & Bastian (the Shulman Firm). In response, Genutec filed a counter motion for sanctions permitted by

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

section 128.7, subdivision (h), on the grounds the Taus/Hunter sanctions motion was filed primarily for an improper purpose (hereafter the counter motion). The counter motion sought $51,990 against Taus, Hunter, and their counsel, Eisner, Kahan & Gorry (the Eisner Firm).[2]

The court denied the Taus/Hunter motion for sanctions. It awarded the Bryner Firm $45,000 for attorney fees and costs incurred to successfully oppose this motion. The court granted the counter motion, awarding Genutec sanctions of $50,467.50.

On appeal, Taus, Hunter, and the Eisner Firm make the following arguments: (1) the court should have granted their motion for sanctions; and (2) it was an abuse of discretion to award sanctions to the Lee Firm, the Bryner Firm, and the Shulman Firm because they were all self-represented litigants. Genutec filed a cross-appeal, arguing the trial court erred in denying its request for attorney fees incurred in defending the Taus/Hunter sanctions motion. Finding no error, we affirm the trial court's orders.

## I

## FACTS AND PROCEDURAL BACKGROUND

Earlier this year, we considered Genutec's appeal from a judgment of dismissal entered after the trial court granted a summary judgment motion in favor of Genutec's former attorney Stephen A. Weiss, a partner at Gersten Savage LLP (referred to collectively and in the singular as Weiss). We affirmed the trial court's determination the one-year statute of limitations set forth in section 340.6, subdivision (a), barred Genutec's complaint alleging a single cause of action for professional negligence against

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[2] The motion listed the law firm as Eisner, Frank & Kahan, but the correct name was Eisner, Kahan & Gorry (and we recognize the firm's name was changed sometime before its reply brief was filed to Eisner, Kahan, Gorry, Chapman, Ross & Jaffe).

Weiss. (*Genutec Business Solutions, Inc., v. Stephen A. Weiss* (July 9, 2013, G044744) [nonpub. opn.] (*Genutec I*).)

The procedural background of the underlying lawsuit is described in greater detail in our *Genutec I* opinion, and we incorporate it by reference. (*Genutec I, supra,* G044744.) Suffice it to say, Genutec filed a lawsuit against anyone remotely involved in its $14 million acquisition of Smart Development Corporation (hereafter SD), which caused the company to suffer substantial financial losses.

Genutec provides emergency notification services and voice broadcasting services for businesses, charities, and other entities. Genutec generates the requested telephone calls for its customers by using sophisticated computer equipment and software. Genutec purchased SD based on representations about its lucrative customer contacts and its automatic dialing software that could potentially increase Genutec's dialing capacity and efficiency.

Genutec obtained financing for the acquisition through two hedge fund lenders (the Lenders). The SD acquisition required a substantial amount of due diligence investigation, and documentation. As discussed in *Genutec I,* Weiss was hired to represent Genutec in the merger and acquisition of SD.

Soon after the acquisition, Genutec learned there were serious problems integrating SD's software into Genutec's dialing system. Genutec determined SD's software was using unlicensed and pirated software as a part of its dialing platform. Genutec's customers began to complain of system crashes and refused to pay their bills.

In April 2006, Genutec's largest customer ceased doing business with it. In early July 2006, two board members contacted several shareholders and warned Genutec would be insolvent by the end of 2006, and the company's managers appeared incapable of addressing the crisis. The shareholders and members of the board held a telephone conference and together agreed there should be an investigation. The parties dispute whether the board thoroughly investigated the shareholders' concerns. At the end of

July 2006, the board informed the shareholders the investigation was complete and the mismanagement concerns were unfounded. However, the board members alerted the shareholders to the possibility of fraud or misrepresentations made in connection with the SD acquisition.

*A. The 2006 Fraud Lawsuit*

Genutec retained the Bryner Firm and David E. Outwater from the law firm Outwater & Pinckes to investigate the wrongdoings relating to damages arising from SD's acquisition. On December 8, 2006, these firms filed a lawsuit on Genutec's behalf against SD and its owner, Johan Hendrik Smit Duyzentkunst (referred to as "Smit" by the parties, and thus to avoid confusion and for consistency, we will adopt the same abbreviation, with no disrespect intended). The complaint alleged causes of action for fraud, breach of contract, and rescission. In 2009, the case was ordered to arbitration, and our record does not disclose the outcome of those proceedings.

*B. Restructuring of Genutec*

In February 2007, after Genutec defaulted on its loans, Genutec and the Lenders entered into a restructuring agreement authorizing the Lenders to become the primary shareholders of the company. Genutec's chief executive officer (CEO), Lee Danna, and the entire board of directors were forced to resign as a condition of the agreement.

*C. The Lender's Lawsuit*

On July 10, 2007, Genutec (now controlled by the Lenders) filed a complaint against Danna and the other officers and directors for breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing. The defendants named in the lawsuit were Genutec's former directors: Danna, Taus, Hunter, Edith Martin, Paul Abramowitz, Joseph LaTorre, Leonard Makowka, Farzad Hoorizadeh and Smit (who became a director of Genutec after the SD acquisition).

*D. Taus and Hunter's Cross-complaint*

In November 2007, Taus and Hunter filed a cross-complaint against Genutec alleging breach of contract and seeking equitable indemnification. They alleged they were "outside directors" on Genutec's board and in connection with their service they had executed written indemnification agreements with Genutec. Taus and Hunter explained Genutec's lawsuit alleged they breached their fiduciary duty by failing to (1) make reasonable inquiries regarding the SD acquisition, or (2) properly oversee and monitor Genutec's management's activities. They demanded indemnification and Genutec refused.

*E. Proceedings Leading to the Lender's Fourth Amended Complaint*

On February 26, 2008, Genutec filed a first amended complaint raising a new claim for legal malpractice against Weiss. The complaint also set forth a cause of action against Genutec's accountants (Lewak Greenbaum & Goldstein). In response to various demurrers, Genutec filed a second amended and then a third amended complaint (TAC). Taus, Hunter, and Weiss filed motions for summary judgment based on allegations raised in the TAC.

On April 2, 2010, before the hearings on the summary judgment motions, and approximately five months before the scheduled trial date, the court granted Genutec's motion to file a fourth amended complaint (FAC) based on the discovery of additional facts regarding Smit and Weiss.

*F. Taus and Hunter's Motions for Summary Judgment Denied*

In June 2010, the court denied Taus and Hunter's two summary judgment motions. The first motion sought summary judgment or adjudication of the cross-complaint against Genutec. The court determined the motion was moot as to the equitable indemnification action because that cause of action was dismissed in January 2008. As for the breach of contract claim, the court determined Taus and Hunter failed to present sufficient evidence of their damages.

The second motion sought summary judgment or adjudication of Genutec's TAC's first and third causes of action (both alleging breach of fiduciary duty). The court determined the primary basis for the motion was Taus and Hunter's theory the business judgment rule protected them from any liability. The court observed Taus and Hunter asserted they acted in good faith and appropriately relied on the information provided by other officers, they reviewed and relied on reports and information from experts, and they responsibly discharged their duties as outside directors. However, the court determined Taus and Hunter failed "to present sufficient evidence to support this challenge and to meet their initial burden." Specifically, the court concluded their declarations to be "vague and conclusory" and Danna's deposition testimony "insufficient to establish that Taus and Hunter did anything." The court noted it "needed testimony from Taus and Hunter, either in the form of deposition testimony or adequate declarations, to establish what they actually did to discharge their duties and be entitled to protection of the business judgment rule."

*G. Weiss's Motion for Summary Judgment Granted*

As mentioned earlier in this opinion, in *Genutec I*, this court affirmed the court's September 2010 judgment dismissing Weiss from the lawsuit. (*Genutec I, supra,* G044744.) We concluded Weiss satisfied his burden of showing Genutec knew or should have discovered the alleged professional negligence as early as November 2005, but no later than December 8, 2006, triggering the one-year statute of limitations. (*Ibid.*) Consequently, Genutec's February 2008 malpractice action against Weiss was properly dismissed as untimely. (*Ibid.*)

*H. Taus and Hunter's Sanctions Motion*

On April 28, 2011, several months after the court dismissed Weiss from the action, Taus and Hunter filed a motion for section 128.7 sanctions against Genutec, the Shulman Firm, and the Bryner Firm, requesting $1,098,046.03 (hereafter referred to as the Taus/Hunter sanctions motion). In addition to monetary sanctions, they sought

dismissal of all claims raised against them. They maintained the FAC lacked evidentiary support, was frivolous in nature, and was "filed with the improper purpose of harassing Taus and Hunter[.]" They alleged the following: "[Genutec] sued virtually everyone associated with the company, without apparent regard to facts or common sense. Former outside directors . . . [Taus and Hunter] found themselves squarely within the purview of Genutec's scattershot approach to the litigation. Hiding behind vague allegations and offering no real evidence, . . . Genutec managed to string the litigation against Taus and Hunter along for more than three years. Genutec was only able to accomplish this feat by deliberately withholding from document production documents that unequivocally demonstrate . . . allegations against Taus and Hunter were pure fiction." Taus and Hunter requested the court sanction Genutec and its attorneys for their misconduct.

*I. The Counter Motion*

The following month, Genutec sought section 128.7 sanctions ($51,990) against Taus, Hunter, and their counsel, the Eisner Firm. It alleged the Taus/Hunter sanctions motion was filed for an improper purpose, to harass and delay litigation in violation of section 128.7, subdivision (h). Genutec asserted Taus, Hunter, and the Eisner Firm knew their motion was frivolous because "Genutec's claims had already withstood attack on summary judgment and that Genutec's alleged discovery misconduct [was] not the proper basis for a motion under [s]ection 128.7."

In support of its motion, Genutec included declarations from the following attorneys: (1) Skaist (its corporate counsel); (2) Outwater (hired as litigation counsel in the 2006 fraud lawsuit against Smit); (3) Bryner (also hired as litigation counsel in the 2006 fraud lawsuit and hired to defend Genutec against the Taus and Hunter's cross-complaint); (4) Gary Pemberton (a partner at the Shulman Firm); and (5) Kiara Gebhart (an associate at the Shulman Firm). In addition, Genutec submitted a declaration by James McCarthy, a computer forensic analyst hired by the Shulman Firm.

In response, Taus and Hunter filed a request for judicial notice of one document (Genutec's opposition to their motion for summary judgment of the cross-complaint). They also made evidentiary objections to the declarations submitted by Genutec.

Genutec filed a response to these objections, arguing the statements were admissible and not hearsay. In addition, Genutec filed a reply noting Taus, Hunter, and the Eisner Firm had failed to file any opposition to the counter motion. It argued the counter motion should be granted because it was unopposed.

*J. The Bryner Firm's Opposition to the Taus/Hunter Sanctions Motion*

In June 2011, the Bryner Firm opposed the Taus/Hunter sanctions motion arguing there was no basis for sanctions. The Bryner Firm was represented by the Law Offices of Jong H. Lee (the Lee Firm). The Bryner Firm presented evidence Genutec retained Bryner in October 2006, to file the fraud lawsuit *against Smit* (and the action was being arbitrated). Genutec also hired the Bryner Firm to defend it against Taus and Hunter's cross-complaint. The Bryner Firm alleged it had no authority to withdraw Genutec's complaint because Bryner was not hired to represent Genutec in its plaintiff capacity.

In addition, the Bryner Firm argued the Taus/Hunter sanctions motion failed to comply with the 21-day safe harbor provision. And finally, the Bryner Firm argued there was no evidence showing Genutec's complaint lacked evidentiary support or that the Bryner Firm acted in bad faith warranting section 128.7 sanctions.

The Bryner Firm stated that given the serious nature of the Taus/Hunter sanctions motion seeking over $1 million, it retained attorney Jong Lee to prepare the opposition. The Bryner Firm requested $91,595 in attorney fees incurred in defending the sanctions motion. The Bryner Firm's opposition was supported by Bryner's declaration.

*K. The Shulman Firm and Genutec's Opposition to the Taus/Hunter Sanctions Motion and Evidentiary Objections*

Also in June 2011, Genutec and the Shulman Firm filed an opposition, raising the same arguments contained in the counter motion. They asserted evidence supported the complaint, allegations of discovery misconduct were not a basis for a section 128.7 motion, and the motion failed to assert any specific misconduct regarding the Shulman Firm. Like the Bryner Firm, Genutec noted the Taus/Hunter sanctions motion was prematurely filed, failing to comply with the 21-day safe harbor provision. Genutec requested $28,325 in attorney fees, incurred in defending the sanctions motion.

In addition, Genutec filed evidentiary objections to Timothy J. Gorry's declaration, filed in support of the Taus/Hunter sanctions motion. Gorry is a partner at the Eisner Firm. Genutec asserted the statements contained in the declaration lacked foundation, personal knowledge, and were not relevant.

*L. The Reply from Taus, Hunter, and the Eisner Firm*

Taus, Hunter, and the Eisner Firm asserted Genutec mischaracterized their motion as nothing more than a discovery dispute or way to force a settlement. They alleged this was untrue. They complained the FAC lacked evidentiary support and Genutec should have dismissed them long ago from the lawsuit. They pointed to the following evidentiary support: (1) "Deposition testimony of Taus and Hunter . . . demonstrates [they], as members of the [a]udit [c]ommittee, <u>did</u> undertake an investigation of the shareholder concerns[;]" (2) there is evidence Taus and Hunter took steps they considered necessary to remedy the issues; and (3) Smit and Danna concealed information about the SD dialing platform from the board members. They concluded this "exculpatory evidence" warranted their dismissal from the case.

In a separately filed reply, Taus, Hunter, and the Eisner Firm addressed the Bryner Firm's opposition to the sanctions motion. They argued the Bryner Firm's "'not me' stance with respect to its responsibility for the allegations made by Genutec" was

misplaced. They explained, "The Bryner Firm has consistently made the same allegations against Taus and Hunter that Genutec's co-counsel, [the Shulman Firm] has made, and has adopted those allegations in its pleadings against Taus and Hunter."

The Bryner Firm responded to this reply by filing evidentiary objections to Gorry's declaration and by filing supplemental declarations by Lee, Bryner, and her counsel Tumy Nguyen. The Bryner Firm filed a supplemental brief in support of its request for attorney fees. It increased the amount of requested fees to $95,375.

Genutec and the Shulman Firm filed a supplemental brief in support of its request for attorney fees for successfully opposing the Taus/Hunter sanctions motion. Genutec filed a second supplemental brief in support of its section 128.7 counter motion, increasing the amount of requested fees to $63,950.

*M. The First Hearing on the Two Sanctions Motions*

At the hearing on June 17, 2011, Gorry admitted to the court the Taus/Hunter sanctions motion was untimely filed because it was "three days off on the safe harbor period" under section 128.7. In addition, Gorry apologized to the court and counsel for not sending out the prepared opposition to Genutec's counter motion. He claimed to have "no idea why it didn't get filed and served" with the other documents. Gorry requested the hearing be continued to permit the required notice and service of the opposition.

Genutec's counsel argued the sanctions motion must be denied based on counsel's admission it was untimely filed. He noted that rather than withdrawing the motion after being alerted by opposing counsel it was untimely, Gorry filed a reply brief. Moreover, although alerted to the missing opposition, Gorry did not seek a continuance before the hearing. Genutec's counsel reminded the court that both the Bryner Firm and the Shulman Firm had requested attorney fees for opposing the motion, and that it was costly because of the amount of sanctions being requested.

The court denied the Taus/Hunter sanctions motion without prejudice. It continued the counter sanctions motion to August 5, 2011. The court stated the parties could file additional briefing, and noted the fact one motion was barred on procedural grounds potentially supplied grounds for additional sanctions.

On July 14, 2011, Taus, Hunter, and the Eisner Firm refiled their section 128.7 motion and scheduled the hearing for August 5, 2011. The motion was virtually identical to their first motion.

The following day, the Bryner Firm filed an ex parte application for an order shortening the 21-day safe harbor provision for section 128.7 counter motions, and specially setting a briefing schedule to permit the Bryner Firm to file a counter motion. The Bryner Firm alleged the *second* Taus/Hunter sanctions motion inexplicably included the Bryner Firm despite all the briefing and evidence presented showing the limited scope of the Bryner Firm's representation, and the lack of evidence the Bryner Firm was responsible for prosecuting Genutec's complaint. The Bryner Firm explained an ex parte application was required because it could not file its counter motion until it had received the refiled Taus/Hunter sanctions motion.

The Bryner Firm also filed evidentiary objections, and an opposition to the refiled Taus/Hunter sanctions motion, supported again by declarations by Bryner, Lee, and Nguyen. The Bryner Firm requested the court take judicial notice of the documents filed in response to the first round of section 128.7 motions. In addition, it submitted the declaration of Michael Fell, who leased office space in the same building as the Bryner Firm, and who found the second Taus/Hunter sanctions motion wedged between the handles of the building's front door at 5:50 p.m.

Taus, Hunter, and the Eisner Firm opposed the ex parte application. Soon thereafter, they filed and served an opposition to Genutec's counter motion.

On July 25, 2011, Genutec and the Shulman Firm filed a new opposition the Taus/Hunter sanctions motion and evidentiary objections to Gorry's supporting

declaration. In support of the opposition, they filed declarations from Outwater (attorney hired for 2006 fraud action), Roy Cox (Genutec's former chief operations officer), McCarthy (computer forensic analyst), and Skaist (corporate counsel). A few days later, Genutec filed a reply in support of its counter motion for sanctions. It also filed evidentiary objections to Gorry's declaration filed in opposition to Genutec's counter motion.

Four days before the hearing, Taus, Hunter, and the Eisner Firm filed a reply brief in support of its motion for sanctions. The court denied the Bryner Firm's ex parte application to shorten time for filing its counter motion.

*N. The Second Hearing on the Sanctions Motions*

At the second hearing on sanctions motions, Gorry discussed the evidence showing Taus and Hunter were not liable for breach of fiduciary duty. Gorry repeatedly asserted the exonerating evidence was not available until July 2010, when the trial court ordered Bryner to produce documents "'on the privilege log.'" Gorry argued Genutec has always been aware of the exonerating evidence and yet it never dismissed Taus and Hunter from the lawsuit, which warranted sanctions. He added Bryner should be sanctioned for her role of being co-counsel and withholding the privilege log.

Alternatively, Gorry requested his clients be dismissed from the lawsuit or that the court strike any allegations in the complaint alleging Taus and Hunter took no action to investigate the shareholders' concerns "because that is clearly not true."

Genutec's counsel, Pemberton, cited to evidence Taus and Hunter breached their fiduciary duty to the company. Coming to Bryner's defense, Pemberton asserted that some of the purportedly missing documents were produced in 2008, and some were available on Danna's hard drive, which was made available to the parties in January 2010. Counsel stated the forensic expert declared the information was available to the parties and was not wrongfully withheld. Counsel noted Taus and Hunter's counsel did not bother to examine the hard drive.

Pemberton maintained there was, at a minimum, a triable issue of fact with respect to liability. He noted an expert would be questioned at trial on the fiduciary duty issue. Moreover, much of the evidence was previously raised by Taus and Hunter in support of their motion for summary judgment, which the trial court denied.

Counsel for the Bryner Firm, Nguyen, concurred with Pemberton and added there was no evidence Bryner was ever authorized to dismiss Taus or Hunter from Genutec's complaint. Bryner was never retained to represent "Genutec's plaintiff capacity."

The court asked counsel to clarify the amount of fees and sanctions each party was seeking. Counsel for the Shulman Firm (Pemberton), stated his firm sought $23,575 to oppose the first Taus/Hunter sanctions motion and an additional $14,400 to oppose the second motion. Counsel for the Bryner Firm (Nguyen) stated it sought $95,300 to oppose the first motion, plus $4,620 in supplemental briefing, and $7,945 to oppose the second motion. When Gorry attacked the large amount of requested fees as being unreasonable, Nguyen noted Gorry had ample opportunity to investigate and reply to the itemized billing submitted before the hearing. Nguyen stated nothing was properly raised in Gorry's reply briefs or oppositions. The court took the matter under submission.

*O. The Bryner Firm's Counter Motion for Section 128.7 Sanctions*

One week after the hearing, the Bryner Firm filed a counter motion for sanctions, scheduling the hearing date for September 9, 2011. The grounds for the motion was the frivolous nature of the second Taus/Hunter sanctions motion. However, the Bryner Firm withdrew the motion after receiving the court's ruling on August 22, 2011, regarding the other motions.

*P. The Court's Ruling*

The court denied the Taus/Hunter sanctions motion. It noted this was their second motion for sanctions; the first motion was heard on June 17, 2011, and deemed defective for failing to comply with the safe harbor provisions. The court stated,

"Although the documents presented in support of the motion do raise a question as to whether or not Taus and Hunter are liable to . . . Genutec for breach of fiduciary duty, they do not conclusively show Taus and Hunter are not liable . . . . That question is for determination by the trier of fact. [Citation.] The [c]ourt finds this motion was brought for an improper purpose and . . . opposing parties are entitled to an award of reasonable attorney fees incurred in defending the motion(s). The attorney fees due Genutec have been addressed in the separate motion of Genutec [for sanctions]." The court awarded the Bryner Firm $45,000 for attorney fees and costs incurred to successfully oppose this motion.

The court granted Genutec's counter motion for sanctions, concluding the evidence supported its claim the two Taus/Hunter sanctions motions "were made for an improper purpose and that they had little if no merit." It awarded $50,467.50, stating the award was reduced because Gebhart should have billed at the reasonable hourly rate of $175. Moreover, the fees included the services of Bryner ($10,400), leaving $40,067.50 for the Shulman Firm.

## II

## APPLICABLE LEGAL PRINCIPLES

"California courts have inherent power to punish for contempt and to control proceedings before the court . . . and to preclude evidence and dismiss actions in extreme situations . . . . [¶] However, courts have *no inherent power* to impose *monetary sanctions* against parties or their counsel. [Citations.]" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶ 9:1001, p. 9(III)-2; hereafter Weil & Brown.) Consequently, there are several statutes and court rules giving courts the power to impose both monetary and nonmonetary sanctions. Relevant to this appeal, section 128.7 permits sanctions for violation of the certificate of merit created by attorneys or unrepresented parties presenting pleadings, motions, or similar papers to the court.

Section 128.7, subdivision (a), provides, "Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record . . . or, if the party is not represented by an attorney, shall be signed by the party." The person signing the paper "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. [¶] (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. [¶] (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." (§ 128.7, subd. (b).)

To summarize, the scope of certification relates to whether a pleading or similar paper was filed (1) for a proper purpose, (2) has legal merit, and (3) has evidentiary support. Violation of any of these certifications may give rise to sanctions. (Weil & Brown, *supra*, ¶ 9:1157, p. 9(III)-17 to 18.) "[C]ertification is designed to create an *affirmative duty of investigation* as to both law and fact, and thus to deter frivolous actions and costly meritless maneuvers. [Citation]" (*Id.* at ¶ 9:1158, p. 9(III)-18; citing *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* (1991) 498 U.S. 533, 550 [interpreting Federal Rule 11])[3]

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[3] Section 128.7 "is based in large part on Rule 11 of the Federal Rules of Civil Procedure (as amended in 1993). Therefore, federal case law interpreting Rule 11 is likely to be instructive in construing [section] 128.7. . . ." (Weil & Brown, *supra*, ¶ 9:1139, p. 9(III)-16; *Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 14, fn. 6.)

The purpose of section 128.7 is "to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514 (*Musaelian*).) "[S]anctions under section 128.7 are not designed to be punitive in nature but rather to promote compliance with statutory standards of conduct." (*Cromwell, supra,* 65 Cal.App.4th Supp. at p. 14.) Accordingly, whether the certificate is violated is tested objectively: "The actual belief standard requires more than a hunch, a speculative belief, or wishful thinking: it requires a well-founded belief. We measure the truthfinding inquiry's reasonableness under an objective standard . . . ." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 82.)

To effectuate this purpose, sanctionable conduct under section 128.7 is *limited* to the presentation of a "'pleading, petition, written notice of motion, or other similar paper'" to the court. It cannot be used to sanction out-of-court misconduct, or misconduct occurring during trial. (Weil & Brown, *supra,* ¶ 9:1152, p. 9(III)-16.)

The statute also authorizes a party to file a counter sanctions motion. "A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated." (§ 128.7, subd. (h).)

A section 128.7 sanctions motion is a two-step process. The moving party must first serve the motion on the offending party without filing it, giving the opposition 21 days to withdraw the improper pleadings and avoid sanctions. (§ 128.7, subd. (c)(1).) At the end of the so-called "safe harbor" waiting period, the moving party may file the motion and the court impose a sanction "limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to [certain limitations], the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective

deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (§ 128.7, subd. (d).)

In addition, the court "may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." (§ 128.7, subd. (c)(1).)

"Sanctions under [section] 128.7 are discretionary. The court is *not* required to impose a monetary sanction or any sanction at all. [Citations.]" (Weil & Brown, *supra*, ¶ 9:1211, p. 9(III)-34; citing § 128.7, subd. (c); *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 421.) Unlike other statutes permitting sanctions, the focus of section 128.7 "is on deterring the offending party, not compensating the offended party. Whereas section 128.5 broadly authorizes the recovery of attorney's fees incurred as a result of an opponent's bad faith misconduct, section 128.7 directs judges to limit a fee award to 'some or all' of the fees 'incurred as a direct result of the violation,' and then only if the award is 'warranted for effective deterrence.'" (*Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 368.)

We note section 127.8 provides a different standard for counter motions. As mentioned above, if a sanctions motion is brought primarily for an improper purpose, it may itself be subject to a counter motion for sanctions. (§ 128.7, subd. (h).) In such cases, the Legislature provided, "It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter such improper conduct or comparable conduct by others similarly situated." (§ 128.7, subd. (h).) Sanctions appear to be required when a party prevails on a counter motion. (See Weil & Brown, *supra*, ¶ 9:1213, p. 9(III)-34.)

III

TAUS, HUNTER & THE EISNER FIRM'S APPEAL

The Eisner Firm filed an opening brief, which Taus and Hunter joined and adopted by reference. (For convenience and clarity these three appellants will be referred to collectively and in the singular as the Eisner Firm, unless the context requires otherwise.) The Eisner Firm raises six arguments, three of which relate to its theory the trial court was confused and misunderstood the standards and purpose of a section 128.7 sanctions motion. The other three arguments relate to alleged procedural errors. We find all the arguments lack merit, and will begin by addressing the "court confusion" arguments.

*A. Was the Court Confused?*

The Eisner Firm briefed three separate arguments all essentially premised on the same theory that the court was confused or misunderstood the nature of the hearing and the correct standards to apply. The arguments sound very similar to one another, but have subtle differences. The first argument alleges the court misunderstood the standards used for section 128.7 sanctions motions because it often "shifted focus" to the standards used for discovery motions. The second argument focuses on evidence of the court's purported "disjointed questioning," and asserts that because the court asked questions about discovery motions and summary judgment motions, it clearly misconstrued the purpose of the hearing. The third argument maintains the court improperly construed the sanctions motion to be a discovery related motion, and consequently applied the wrong standards and rules. As we will explain, the record does not support these contentions.

We begin our analysis by noting the well settled rule, "A ruling by a trial court is presumed correct, and ambiguities are resolved in favor of affirmance. [Citations.]" (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631 (*Winograd*); see e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133

[judgment or order presumed correct on appeal "and all intendments and presumptions are indulged in favor of its correctness"].) "The burden of demonstrating error rests on the appellants. [Citation.]" (*Winograd, supra,* 68 Cal.App.4th at p. 632.)

The Eisner Firm's first argument asserts the court "displayed a basic misunderstanding of the standards and purposes of the [section] 128.7 motion and the counter motion." (Original capitalization omitted.) The Eisner Firm begins the argument by boldly asserting, "An examination of the [r]eporter's [t]ranscript shows that the lower court consistently shifted focus between the standards used for determining discovery motions and the objective standard required for a motion brought under . . . [section] 128.7."

Noticeably absent from this argument are any actual citations to the reporter's transcript to demonstrate the court improperly applied the standards used for discovery motions. Moreover, in making this argument, the Eisner Firm cites to one case, *Abbett Electric Corp. v. Sullwold* (1987) 193 Cal.App.3d 708, which addressed a sanction order made under section 128.5, a different statutory provision not utilized in this case.

In light of the lack of record references and applicable case authority, we deem the argument waived. "'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.' [Citations.] If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. [Citation.]" (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

The Eisner Firm's second argument, asserts evidence of "disjointed questioning" proves the court did not apply the correct procedural and legal standard for the sanctions motions. It contends the court's questions demonstrate it "misconstrued the purpose" of a sanctions motion. To support this theory, the Eisner Firm provided a few

record citations but no case authority or legal analysis. As we will explain, when the court's statements and questions are viewed in context we find nothing suggesting the court was too confused about the legal proceedings and failed to apply the correct standard.

The Eisner Firm begins its argument by citing pages 21 through 23 of the reporter's transcript as supporting its observation the court "appeared to be confused by the correct standard to apply, and seemingly thought that bringing the [section] 128.7 [m]otion on a stand-alone basis was improper." However, we discovered these pages of the reporter's transcript actually do not contain any statements or questions made by the court. It is comprised entirely of argument presented by Gorry. The Eisner Firm offers no reasoned analysis to support its theory the *argument* of counsel may be attributed to the court without any other direct evidence of the court's acquiescence to the argument. In other words, just because counsel believes the court is mistaken or confused does not make it so.

Gorry's discussion on those pages of the record related entirely to his belief the court made a mistake with respect to its tentative decision prepared for the second hearing. (A copy of the tentative ruling was not included in our record.) Gorry asserted the tentative decision incorrectly noted the counter motion was granted at the first hearing. After considering argument from opposing counsel on the issue, the court stated on page 27 of the reporter's transcript that the parties could proceed and begin with argument on the Taus/Hunter sanctions motion. It made no express ruling with respect to the alleged mistake. And even if we were to assume, simply for the sake of argument, the court did make a mistake on the tentative decision, the mistake would not prove the court also misunderstood the applicable standards for determining the Taus/Hunter sanctions motion. We found nothing in the transcript suggesting the court misunderstood a section 128.7 motion must be made separately, or on a "stand-alone basis." The court's final order provides strong evidence to the contrary. The court's order reflects it

considered and ruled on the Taus/Hunter sanctions motion *separately* from the counter motion. As noted previously, the trial court's ruling is presumed correct, and all ambiguities are resolved in favor of its correctness. (*Winograd, supra,* 68 Cal.App.4th at p. 632.)

Citing to pages 59 through 62, and pages 66 and 67 of the reporter's transcript, the Eisner Firm paints a very grim picture of a trial court so utterly confused about the nature of the proceedings that it could not remember if it was deciding a discovery motion, a motion for summary judgment, or a sanctions motion. In particular the Eisner Firm is highly critical of the court's statements and questions regarding whether there was evidence of discovery abuse or whether Taus and Hunter could have discovered the exonerating evidence sooner.

For example, the Eisner Firm maintains, "[The court] repeatedly kept focusing on the 'red herring' arguments advanced by [Genutec's] counsel that the [section] 128.7 [m]otion was, in fact, [an improper] discovery motion." It speculates the trial court "got swept up by the . . . 'discovery' argument, and repeatedly focused on the red-herring argument that Taus and Hunter 'always' had access to the documents that formed the basis for [their m]otion." The Eisner Firm criticizes the trial court for engaging in "a classic case of 'missing the forest for the trees" by asking the question about Taus's and Hunter's access to hard drives and other sources for discovery of the exonerating evidence. It asserts the timing of the production was "of no import" for purposes of the sanctions motion.

Unlike its prior arguments, this particular contention is supported by several record references in which the court asked questions about the discovery process to uncover the alleged exonerating evidence. However, we disagree with the Eisner Firm's conclusion the court's inquiry into discovery matters suggests it was confused about the nature of the sanctions motion.

The statements and questions must be read in context of the entire hearing, which we will briefly summarize as follows: After argument about whether the court's tentative was incorrect (which was unresolved), the court directed the parties (on page 34 of the reporter's transcript) to present their arguments on "the Taus/Hunter motion for sanctions." The next 12 pages of transcript contain Gorry's arguments regarding the sanctions motion. He brought up a number of points, including a lengthy recitation of the allegations in the complaint. He discussed evidence and argued the facts exonerated Taus and Hunter from liability. Additionally, Gorry was given an opportunity to discuss each exhibit supporting the sanctions motion. He repeatedly asserted the exonerating evidence was wrongfully withheld by Genutec, and he spent a great deal of time criticizing all of Genutec's attorneys for failing to provide the documents earlier and not dismissing his clients from the case. Gorry also reminded the court that "as we pointed out in our motion for summary judgment" there was a presumption in favor of the directors.

Beginning at page 46 of the transcript, the court permitted Genutec to present its arguments. Pemberton argued the evidence at best created a triable issue of fact regarding whether Taus and Hunter breached their fiduciary duty. Pemberton also refuted Gorry's accusations of discovery misconduct and noted the exonerating documents could have been found on a different computer.

After Pemberton concluded his argument, the court asked Gorry questions (on pages 57 to 59) about whether there was a difference between Genutec's first and third causes of action. Next, the court asked a series of questions relating to Pemberton's assertion the purported exonerating evidence was not wrongfully withheld, asking questions about Hunter's computer and why she threw it away.

The exchange which followed (pages 59 through 62, and pages 66 through 67), represents the portion of the transcript the Eisner Firm finds most disturbing. It asserts these pages show the court was completely befuddled and unreasonably got "swept away" by irrelevant discovery issues. We disagree.

During this part of the hearing, the parties were engaged in a spirited dispute about whether the evidence was available to Taus and Hunter at an earlier time. The Bryner Firm and the Shulman Firm vehemently disputed Gorry's repetitive and offensive accusations of discovery misconduct. Pemberton explained the documents were initially withheld because the United States District Court for the Northern District of Illinois had issued a preliminary injunction regarding the disclosure of any documents concerning Smit. Bryner did not want to get in trouble with the district court, and therefore requested a court order to produce the documents. Pemberton added there was never a motion to compel and the documents were turned over through a "meet and confer process." Not surprisingly, Gorry disputed this version of events, sticking to his argument he won the discovery dispute.

Although this discussion was somewhat tangential to the basis for the sanctions motion, the court's questions and statements about the "discovery argument" is certainly understandable when viewed in the context of what was being discussed at the time. The court reasonably wished to understand if Gorry was being truthful in his representation the evidence was wrongfully withheld. The argument is related and relevant to the primary issue of whether Genutec purposefully kept Taus and Hunter in the litigation knowing they were not liable. We found nothing in the discussion from which it could be inferred the court got swept away by discovery issues and forgot it was considering a sanctions motion. This record simply does not support the contention that the court misunderstood the difference between discovery and sanctions motions.

In addition, it cannot be overlooked that earlier in the hearing Gorry disclosed Bryner's purported discovery violations were the *primary basis* for the sanctions motion against her firm. Gorry explained Genutec must have known about the exonerating evidence because Bryner possessed it. Gorry argued, "Bryner was the one who was in possession of these documents, that is why . . . Bryner is here.

[Section] 128.7 is not just the person who signs the complaint, but anyone who acts [in] concert. Bryner was one of the outside counsel for Genutec. . . . [¶] . . . The only improper purpose here, your honor, was withholding of these documents. It was not . . . looking at these documents prior to filing the complaint." For this additional reason, we conclude the court's questions regarding discovery issues was appropriate and relevant to the issues raised by Taus and Hunter's counsel.

Moreover, a sanctions motion should be served promptly after the purported violation is discovered. "Although there is no time limit on a party's motion for sanctions, the court may consider whether the moving party exercised 'due diligence.' [Citation.]" (See Weil & Brown, *supra*, ¶ 9:1187, p. 9(III)-26; § 128.7, subd. (c) ["In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence"].) As applied to this case, if Taus and Hunter could have discovered the exonerating evidence earlier (on their own computers) due diligence would be an issue. Whether the motion was unreasonably delayed was an appropriate factor for the court to consider and question the parties about.

And finally, it should not be overlooked that Genutec's opposition asserted the Taus/Hunter sanctions motion was actually a poorly disguised and belated discovery motion seeking sanctions. The Eisner Firm concedes the argument was raised in the briefing but argues it lacked merit because Taus and Hunter had already prevailed in the discovery dispute. That may be true, but nevertheless, we will not construe the court's consideration of an issue raised in the opposition as a sign it was confused.

As further evidence of "disjointed questioning" the Eisner Firm points to the part of the reporter's transcript where the court briefly focused on Bryner's role in representing Genutec, and then changed focus and asked "'aren't you trying to do another shot at a motion for summary judgment.'" (Original capitalization omitted.) The Eisner Firm asserts that when counsel tried to explain the nature of its motion, "the court again defaulted to the discovery arguments advanced earlier." Based on this seemingly odd and

disjointed sequence of events, the Eisner Firm concluded, "Once again, it was readily apparent that the lower court did not understand the nature or purpose" of the sanctions motion. The contention is belied by the record.

First, one need only look at the record references supplied by the Eisner Firm–they are not in sequential order. The court's discussion about Bryner's representation was contained on pages 84 and 85 of the reporter's transcript, and the court's one question about Taus and Hunter getting a second shot at a summary judgment motion occurred much earlier in the proceedings at page 62 of the reporter's transcript. The Eisner Firm broadly referred to pages 59 to 62, and pages 66 to 67, as relating to the "'discovery'" arguments, but nevertheless these exchanges occurring long before the court's remarks about Bryner's representation of Genutec on pages 84 and 85.

Second, it is important to understand the context in which the court made the allegedly disjointed and random statements about (1) Bryner, (2) a second summary judgment motion, and (3) discovery arguments. At pages 84 and 85, the court asked Bryner's counsel to articulate the amount of fees the Bryner Firm would request if deemed the prevailing party on the sanctions motion. Bryner's counsel stated her fees were higher than the Shulman Firm's fees. She explained Bryner's opposition involved additional investigation and research about whether Bryner ever represented Genutec in its plaintiff capacity. The court commented Bryner was listed on the face of the complaint, but then it immediately returned to the issue at hand, i.e., the amount of fees being requested. A discussion about the amount of fees continued until page 87 of the transcript. We found nothing in this exchange to suggest the court was confused or unaware of the purpose of the sanctions motion. To the contrary, attorney fees may be awarded as section 128.7 sanctions to the prevailing party who successfully opposed a sanctions motion. (Weil & Brown, *supra*, ¶¶ 9:1220 & 9:1222, p. 9(III)-34.2; citing § 128.7, subds. (c) & (d).)

Contrary to the Eisner Firm's argument, during the discussion about the amount of fees recoverable the court did not abruptly shift its focus "to another completely unrelated type of motion, namely a motion for summary judgment." As we will now explain, the court's question about whether the sanctions motion was really a belated summary judgment motion occurred much earlier in the hearing and was reasonably related to the issues being discussed at that time.

Indeed, we find disingenuous the Eisner Firm's suggestion the court failed to focus on the sanctions motion and instead asked random questions about summary judgment motions and discovery motions throughout the hearing. Beginning at page 34 and ending at page 57, the court focused entirely on arguments from both sides about the merits of the sanctions motion. Starting at page 57 of the transcript, the parties and the court spent some time exploring the basis for Gorry's contention exonerating evidence was wrongfully withheld. Gorry repeatedly stated the evidence proved Taus and Hunter were not liable. It was in this context that the court asked Gorry, "Aren't you trying to do another shot at a motion for summary judgment?" Gorry replied he was not but "the effect ultimately is the same." He added there was insufficient time to file a second motion for summary judgment before the trial date. The court then asked counsel if there was any further argument. Both sides presented additional argument on the merits of the Taus/Hunter sanctions motion.

Thus, when considered in context, the summary judgment question did not come out of left field. Gorry raised an argument generally reserved for summary judgment motions, i.e., there was no triable issue of fact regarding Taus and Hunter's liability. He did not appear surprised by the court's observation it appeared his clients were seeking a second shot at summary judgment. To the contrary, Gorry admitted the relief he was seeking though the sanctions motion was "effectively the same" and he indicated that if there had been more time before trial, he could have filed a second motion for summary judgment. We have no reason to suspect the court's question

signaled it was confused about the purpose of a section 128.7 motion or the appropriate standards to apply. We conclude the court's question suggests it understood exactly the basis for the sanctions motion, i.e., the complaint was filed for an improper purpose because it lacked evidentiary support.

The third and final "confused court" argument is based on the theory the court improperly accepted the argument Taus and Hunter filed a discovery-related motion. The Eisner Firm provided this court with ample case authority explaining different standards apply for discovery sanctions versus section 128.7 sanction motions. The Eisner Firm concludes the court imposed sanctions applying the standards used in discovery motions. It adds, the court "appeared unaware" section 128.7 sanction motions do not apply to "disclosures and discovery requests, responses, objections or motions."

As with the Eisner Firm's prior arguments, we find no support in the reporter's transcript for this contention. The court did not say anything that could be construed as evidence it believed it was deciding a discovery motion. The Eisner Firm provides one citation to the clerk's transcript, focusing on a fragment of one sentence contained in the court's final order. Based on this fragment, it argues the record shows the court "accepted [Genutec and the Bryner Firm's] argument that [the Taus/Hunter sanctions motion] was actually a discovery motion, and in fact signed a proposed order which stated that 'Genutec's and the Bryner Firm's alleged <u>discovery misconduct</u> is not a basis for a motion under [s]ection 128.7." (Original underline.) In other words, the Eisner Firm construes the court's ruling as evidence the court believed it was deciding a discovery motion rather than a sanctions motion. Nonsense!

Apparently, the Eisner Firm was under the mistaken impression this court would not take the time to read the entire final order (prepared by counsel). The order begins by recognizing Taus and Hunter filed two identical sanctions motions. The court concluded, "[both m]otions were made for an improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation or to force Genutec

and [the Shulman Firm] to dismiss Genutec's claims against [Taus and Hunter] under threat of sanctions in excess of [$1 million]. [Citation.] Specifically the Eisner Firm filed [the Taus/Hunter sanctions motions] without any reasonable belief in their merit against Genutec, [the Shulman Firm], or the Bryner Firm. Moreover, [Taus, Hunter,] and the Eisner Firm caused the [m]otions to be filed despite knowing the legal and factual arguments contained therein are frivolous, that Genutec's claims had already withstood summary judgment, that *Genutec's and the Bryner's Firms alleged discovery misconduct is not a basis for a motion under [s]ection 128.7*, and the Bryner Firm has never represented Genutec as a plaintiff with respect to Genutec's claims against [Taus and Hunter] and has never had any authority or responsibility to dismiss those claims." (Italics added.)

The italicized statement cannot be viewed in a vacuum. The order clearly reflects the court applied the standards relevant to section 128.7 motions and concluded the Taus/Hunter sanctions motions lacked merit and was brought for an improper purpose. The italicized statement is a proper interpretation of the rules. (See Weil & Brown, *supra*, ¶ 9:1152, p. 9(III)-17 [sanctionable conduct under section 128.7 is *limited* to the presentation of a "'pleading, petition, written notice of motion, or other similar paper'" and not discovery misconduct].) It also served to answer Gorry's assertion at the hearing that the Bryner Firm could be sanctioned under section 128.7 for Bryner's role in helping Genutec withhold exonerating evidence. We find no error.

*B. Was There Procedural Error?*

The Eisner Firm asserts the court abused its discretion by (1) improperly ruling on the counter motion before ruling on the Taus/Hunter sanctions motion and, (2) refusing to consider its opposition to the counter motion during the second hearing. As to the first contention, we discovered the record regarding the court's sequence of rulings with respect to the counter motion is very unclear. With regard to the second contention, we found no evidence in the record, and the Eisner Firm points to none,

directly proving the court refused to consider the issues raised in its opposition. In any event, as to both contentions we conclude any procedural error would not be prejudicial in this case and would not warrant a reversal.

Unfortunately, the trial court did not provide a clear ruling on the counter motion. Based on our review of the record, it appears the court intended to grant the counter motion at the first hearing and continue the matter for additional briefing on the limited issue of the amount of sanctions to impose. However, at the second hearing the parties hotly disputed whether the counter motion had been granted because the court had accepted an opposition relating to the merits of the motion and supplemental briefing. Rather than clarify its prior ruling, the court took the matter under submission and issued a written ruling again granting the counter motion. The court did not indicate in its ruling whether it had considered the later filed opposition to the motion or not.

If we assume, as the Eisner Firm contends, the court granted the counter motion at the first hearing before ruling on the Taus/Hunter motion, we find no procedural error. There is no rule, and the Eisner Firm cites to none, holding the motions had to be decided in a particular order. Nowhere does section 128.7 provide a certain ruling on one motion is a prerequisite to prevailing on the other. The counter motion is a stand-alone motion, filed to sanction a party who has filed a sanctions motion for an improper purpose. After receiving the counter motion, Taus and Hunter had 21 days to withdraw the improper motion. They did not. After the 21 days had passed, Genutec was entitled to a ruling on its counter motion on the merits. (See *Banks v. Hathaway, Perrett, Webster, Powers & Chrisman* (2002) 97 Cal.App.4th 949, 954 [order sustaining demurrer without leave to amend does not bar 128.7 sanctions motion unless order reduced to judgment before sanctions motion served and filed].)

In any event, we construe the record as showing the court granted the counter motion after the first hearing, and again after the second hearing. Although the rulings are somewhat unusual, we conclude the court did not commit reversible error.

Before the first hearing, Taus and Hunter failed to file an opposition to the counter motion. The court's tentative ruling stated the court had considered the *unopposed* motion on the merits, concluding it should be granted because the Taus/Hunter sanctions motion was meritless and made for an improper purpose.

What is peculiar about this ruling is the court did not also deny the Taus/Hunter sanctions motion on the merits. It denied the motion on the grounds it lacked jurisdiction to consider it on the merits. After the first hearing, the court permitted Taus and Hunter to refile their sanctions motion and comply with the 21-day safe harbor waiting period. They did so, and also filed an opposition to the counter motion. The sanctions motion and the opposition necessarily raised the same argument, i.e., the sanctions motion was meritorious.

At the second hearing, the court considered and denied the Taus/Hunter sanctions motion on the merits. This should not have come as a shock to anyone because Taus and Hunter refiled the exact same sanctions motion as before. As for the counter motion, the court did not discuss or ask questions about it, or the newly filed opposition attacking the counter motion's merits. Gorry offered some argument at the hearing in this regard, but the court remained silent on the issue.

The court's final ruling suggests the court took a second look at the merits of the counter motion in light of the refiled motion and opposition. The ruling stated the counter motion "matter was continued for further briefing" and after hearing "extensive oral argument" the court took the matter under submission and "now rules" the counter motion is granted. In the final ruling, the court reasoned, "The evidence submitted supports [Genutec's] claim that the underlying [section] 128.7 motions were made for an improper purpose and that they [lacked merit]." The court's reference to plural "motions" suggests the court applied the existing counter motion to the refiled sanctions motion. Similarly, we can construe the court's conclusion they lacked merit to mean the court applied the counter motion to both Taus/Hunter sanctions motions.

We fail to see how Taus and Hunter were prejudiced by the court's actions. "A defendant must also show that the error was prejudicial (. . . § 475) and resulted in a 'miscarriage of justice' (Cal. Const., art. VI, § 13). [Citation.] '"[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."' [Citation.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

Thus, although it is difficult to decipher the sequence of rulings, it appears the court decided Genutec did not have to file a second counter motion in response to the refiled Taus/Hunter sanctions motion. The underlying motion was not different, and thus the counter motion did not require additional arguments. The Eisner Firm's fear that its opposition was not considered is unfounded. The issues, arguments, and evidence supporting the Taus/Hunter sanctions motions were exactly the same as those raised in the opposition to the counter motion. Thus, in deciding the Taus/Hunter sanctions motion on the merits, the court determined the motion lacked evidentiary support and was filed for an improper purpose. Specifically, the evidence did not conclusively prove Taus and Hunter should have been dismissed and they had no basis to request sanctions based on the theory the complaint was brought to harass or delay the proceedings. The court's consideration of and ruling on the Taus/Hunter sanctions motion necessarily answered all the same issues raised in opposition to the counter motion. Stated another way, to defeat the counter motion, the opposition, like the original sanctions motion, asserted the same arguments, i.e., the sanctions motion was filed for a proper purpose and was meritorious.

The record shows the court considered Taus and Hunter's opposition to the extent it alleged the counter motion requested unreasonably and grossly inflated attorney fees sanction requests. At the hearing, the court asked both parties many questions about the attorney fees bills. And the court did not award the total amount of attorney fees requested when it imposed sanctions. The Bryner Firm requested over $100,000 to

oppose the Taus/Hunter sanctions motion. It was awarded less than half of this sum ($45,000). The Shulman Firm sought $51,900 sanctions in their counter motion, and approximately $38,000 to oppose the Taus/Hunter sanctions motion for a total of over $89,000. It was awarded significantly less ($50,467.50).

*C. The Sanctions Award*

On appeal, the Eisner Firm does not attack the amount of sanctions awarded, but maintains the court erred in awarding attorney fees to the Bryner Firm and the Schulman Firm because they were self represented attorneys. He misconstrues the record.

We find *Musaelian, supra,* 45 Cal.4th 512, instructive. The Supreme Court held attorney fees should not be awarded as a sanction under section 128.7 to an attorney litigating pro se. The court recognized section 128.7 provides sanctions for filing abuses "may consist of, or include, . . . reasonable attorney[] fees and other expenses incurred as a direct result of the violation." (§ 128.7, subd. (d).) The Supreme Court determined section 128.7's "primary purpose is to deter filing abuses, not to compensate those affected by them" and the statute's language demonstrates an intent to reimburse for expenses, not to compensate for a party's time and effort. (*Musaelian, supra,* 45 Cal.4th at p. 519.) It also noted that the sanctions are limited to what is sufficient to deter repetition of the unwanted conduct. The court concluded the purpose of the statute would not be defeated if attorney fees were not allowed to attorneys representing themselves. (*Ibid.*)

In *Musaelian,* the court pointed out that in other cases upholding awards, the "attorney fees were 'incurred' in the sense that there was an attorney-client relationship, the attorney performed services on behalf of the client, and the attorney's right to fees grew out of the attorney-client relationship." (*Musaelian, supra,* 45 Cal.4th at p. 520.) The court determined those cases did not apply when a party is litigating his or her own case. (*Ibid.*)

On appeal, the Eisner Firm concedes the Shulman Firm was representing Genutec but they "also chose to defend themselves, and presented [a] 'bill' for the attorneys' fees allegedly incurred by [the Shulman Firm] to the lower court in support of its sanctions request in the [c]ounter [m]otion." It notes, the Shulman Firm defended itself against the Taus/Hunter sanctions motion and "in practical effect brought the [c]ounter [m]otion on its own behalf, and for that reason, could not properly recovery attorney fees." Simply stated, the record does not support this contention. It is undisputed there is an attorney client relationship between Genutec and the Shulman Firm. Because Genutec incurred a fee obligation to the Shulman Firm in these proceedings, the logic of the *Musaelian* case does not apply. The only party named in the caption and notice of motion for the counter motion is Genutec. The Shulman Firm did not file the counter motion representing itself. Moreover, the court awarded sanctions solely to Genutec, not jointly to Genutec and its counsel. We conclude the argument lacks merit.

The Eisner Firm contends the Bryner Firm is not entitled to fees because Bryner did not really hire the Lee Firm to represent her in the sanctions matter. The Eisner Firm asserts there is evidence Nguyen, who appeared on behalf of the Lee Firm at the sanctions hearing, also appeared at some proceedings in the underlying Genutec case as Bryner's associate. It argues Nguyen's employment at the Lee Firm "is, at best, an artificial construct and at worst a deliberate misrepresentation to the lower court in an attempt to circumvent the rule set forth in *Musaelian*."

As aptly stated by the Bryner Firm on appeal, this issue was never raised in the trial court. It noted that in all the briefing in connection with the Bryner Firm's request for fees, the Eisner Firm never mentioned it believed the Bryner Firm was representing itself in these proceedings and therefore was not entitled to collect fees. "Hence, [the self-representation issue] was neither considered nor ruled upon by the trial court. It is axiomatic that arguments not asserted below are waived and will not be

considered for the first time on appeal. [Citations.]" (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

In its reply brief, the Eisner Firm asserts the issue was not waived because Nguyen "admitted" on the record (at pages 55 and 86 of the reporter's transcript) that she was Bryner's associate and had appeared in the case on Bryner's behalf. This is simply not true. There is no such admission in the transcript. We do not appreciate counsel's falsification of the record. A lawyer's duty of zealous advocacy is not a defense to acts misleading judicial officers by misrepresenting matters of public record.

*D. The Reply Brief*

The Eisner Firm's reply brief completely ignores basic rules of appellate procedure. It filed a reply brief and a "reply appendix" asking this court to take judicial notice of the trial court's statement of decision and judgment in its favor in the underlying lawsuit. California Rules of Court, rule 8.252(a)(1) mandates requests for judicial notice must be made by a separate formal noticed motion pursuant to California Rules of Court, rule 8.54. Moreover, the information contained in the request for judicial notice relates to testimony and rulings that were not presented or considered by the trial court before ruling on the sanctions motions. "Generally, "'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." [Citation.]' [Citations.] It is a fundamental principle of appellate law that our review of the trial court's decision must be based on the evidence before the court at the time it rendered its decision. [Citations.] [The Eisner Firm has] not cited any exceptional circumstances that would justify a deviation from this rule in this appeal." (*California School Bds. Assn. v. State of California* (2011) 192 Cal.App.4th 770, 803.)

We grant Genutec and the Shulman Firm's motion to strike the reply appendix and brief to the extent it discusses matters that were not part of the record at the

time the judgment was entered. Specifically, we strike the entire "reply appendix" and pages 2, 3, 4, 5, and 13 of the reply brief.

*E. Genutec and the Shulman Firm's Request for Judicial Notice*

Genutec and the Shulman Firm followed the California Rules of Court, and separately filed a request that this court take judicial notice of the pleadings and declarations filed in Taus and Hunter's professional negligence action against its former counsel (Gorry and the Eisner Firm). We must deny the motion. As stated in the moving papers, these documents were not presented to the trial court. The malpractice case was filed in Los Angeles *after* the trial court entered the sanction orders that are the subject of these appeals.

IV

GENUTEC AND THE SHULMAN FIRM'S APPEAL

Genutec and the Shulman Firm raise one issue in their cross appeal. They complain the court was required to award attorney fees (as sanctions), as a matter of law, for the successful defense of the Taus/Hunter sanctions motion. We disagree.

The court recognized Genutec was making two requests for attorney fees as sanctions. It first addressed the counter motion and awarded Genutec attorney fees totaling over $50,000 under section 128.7, subdivision (h). Second, it addressed the sanctions request made by the prevailing parties to the Taus/Hunter sanctions motion permitted under section 128.7, subdivision (c)(1). The court awarded the Bryner Firm fees as sanctions but determined "the attorney's fees due Genutec have been addressed in the order regarding Genutec's [counter motion] and the order thereon above." In other words, the trial court determined Genutec would not receive any additional fees as a prevailing party.

Genutec asserts the court erred because the court's $50,000 award plainly reflected only the attorney fees incurred with respect to the counter motion, and not the additional $23,750 in fees incurred to defend the Taus/Hunter sanctions motion. It

asserts "sanctions are mandatory" when a party prevails on a counter motion. It concludes Genutec should be awarded fees for its efforts opposing the baseless Taus/Hunter sanctions motion.

We found no legal authority, and Genutec cites to none, holding attorney fees as sanctions are mandatory. "Under the explicit language of section 128.7, subdivision (c), the trial court retains the discretion, upon the finding of a violation of subdivision (b), to determine whether a sanction is warranted in the first instance; and, if so, the type and amount of sanctions warranted." (*Kojababian*, *supra*, 174 Cal.App.4th at p. 422 [trial court has discretion to impose sanctions for frivolous filings].) Also under section 128.7, subdivision (c)(1), the court retains the discretion "[i]f warranted" to award expenses and attorney fees to the party prevailing on the sanctions motion. We found no language in the statute providing for mandatory sanctions to a prevailing party under section 128.7, subdivision (c). Contrary to Genutec's contention, our review of the amount of fees awarded is reviewed under the abuse of discretion standard.

We recognize section 128.7, subdivision (h), regarding counter motions, is strongly worded to encourage trial courts to "vigorously use its sanctions authority to deter" improperly filed sanctions motions. Some treatises suggest sanctions are essentially mandatory when a party prevails *on a counter motion*. (Weil & Brown, *supra*, ¶ 9:1213, p. 9(III)-34 ["[S]anctions seem required"].) But in this case the court awarded Genutec sanctions for prevailing *on the counter motion* under section 128.7, subdivision (h). Genutec's complaint relates to the court's refusal to award additional attorney fees for prevailing in its defense of the Taus/Hunter sanctions motion as permitted under section 128.7, subdivision (c). However, section 128.7, subdivision (c), does not contain the same strongly worded language as subdivision (h), and under subdivision (c), a prevailing party may not always be entitled to a monetary sanction or any sanction at all. (Weil & Brown, *supra*, ¶ 9:1211, p. 9(III)-34 [courts "*not* required to impose" sanctions].)

We conclude it was reasonable for the trial court to conclude its imposition of over $95,000 in sanctions was sufficient to deter repetition of the sanctionable conduct. (See *Musaelian, supra,* 45 Cal.4th at p. 519 [purpose of sanctions to deter filing abuses].) Moreover, absent a showing of arbitrariness, we will presume the correctness of the trial court's decision not to award additional sanctions under section 128.7, subdivision (c), to Genutec as a prevailing party. (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at p. 1133.)

V

DISPOSITION

The judgment is affirmed. For the reasons stated earlier in this opinion, we grant the motion to strike the Eisner Firm's reply appendix and brief to the extent it discusses matters that were not part of the record at the time the judgment was entered. Specifically, we strike the entire "reply appendix" and pages 2, 3, 4, 5 and 13 of the reply brief. Additionally, for grounds already stated, we deny Genutec's and the Shulman Firm's request for judicial notice filed March 22, 2013.

In the interests of justice, each party shall bear their own costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.