

1 JERRY R. DAGRELLA, Bar No. 219948  
2 DAGRELLA LAW FIRM, PLC  
3 11801 Pierce Street, 2nd Floor  
4 Riverside, CA 92505  
5 Telephone: (951) 710-3043  
6 Facsimile: (951) 344-8372  
7 Email: dagrella@lawyer.com

8 Attorney for Defendants  
9 Mischelynn Scarlatelli, Armie Troy Isom, Shirley  
10 Isom, and "Armie Troy Isom and Shirley Isom,  
11 trustees Armie Troy Isom and Shirley Isom Family  
12 Trust u/d/t dated December 28, 2004" *erroneously*  
13 *sued as* "Isom Armie T. & Shirley Trust, a  
14 California Trust"

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES – POMONA COURTHOUSE

MARK SCARLATELLI, an individual, for  
himself and on behalf of GAMUT  
CONSTRUCTION COMPANY, INC, a  
California Corporation,

Plaintiff,

vs.

GAMUT CONSTRUCTION COMPANY,  
INC, a California Corporation;  
MISCHELYNN SCARLATELLI; an  
individual, ARMIE TROY ISOM, an  
individual; SHIRLEY ISOM, an  
individual; ISOM ARMIE T. & SHIRLEY  
TRUST, a California Trust; and DOES 1 to  
25 inclusive,

Defendants.

Case No. KC066075

Judge: Honorable Dan Thomas Oki, Dept. J

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION FOR SANCTIONS  
AGAINST PLAINTIFF MARK  
SCARLATELLI AND HIS ATTORNEYS  
DARREL C. MENTHE, ADAM I. MILLER  
AND MILLER MILLER MENTHE, LLP  
PURSUANT TO CODE OF CIVIL  
PROCEDURE SECTION 128.7**

Hearing:

Date: Oct. 1, 2013

Time: 8:30 a.m.

Dept.: J

Action Filed: June 6, 2013

Trial Date: None set

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on Oct. 1, 2013, at 8:30 a.m., or as soon as thereafter as the  
3 matter may be heard in Department J of the above-entitled Court, located at 400 Civic Center  
4 Plaza, Pomona, California 91766, Defendants Mischelynn Scarlatelli, Armie Troy Isom, Shirley  
5 Isom, and “Armie Troy Isom and Shirley Isom, trustees Armie Troy Isom and Shirley Isom  
6 Family Trust u/d/t dated December 28, 2004” *erroneously sued as* “Isom Armie T. & Shirley  
7 Trust, a California Trust” (collectively, “Defendants”) will move this Court to impose monetary  
8 and non-monetary sanctions, including striking the complaint and dismissing the action and  
9 assessing reasonable attorneys’ fees and costs, jointly and severally, against Plaintiff Mark  
10 Scarlatelli (“Plaintiff”) and his attorneys Darrel C. Menthe, Adam I. Miller and Miller Miller  
11 Menthe, LLP, in the amount of \$9,120.00 as well as such other sum and/or sanction as the court  
12 may find just and reasonable.

13 This Motion is made pursuant to *Code of Civil Procedure* section 128.7 on the ground that  
14 the Complaint is without factual or legal merit and was filed primarily for an improper purpose to  
15 harass Defendants.

16 This Motion will be based upon this Notice, Memorandum of Points and Authorities, the  
17 declarations of Jerry R. Dagrella, Mischelynn Scarlatelli, Armie Troy Isom and Shirley Isom, and  
18 the pleadings and records on file in this action, and upon such further documents and evidence as  
19 may be presented at the hearing of this motion.

20 Dated: June 26, 2013

DAGRELLA LAW FIRM, PLC

21  
22 By:

JERRY R. DAGRELLA  
Attorney for Defendants

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On December 4, 2009, defendant Mischelynn Scarlatelli (“Mischelynn”) filed for divorce  
4 against plaintiff Mark Scarlatelli (“Mark”). On September 18, 2012 and October 3, 2012, at  
5 Mark’s direction, two civil lawsuits were filed against Mischelynn’s parents, defendants Troy and  
6 Shirley Isom (“the Isoms”).<sup>1</sup> (See Dagrella Decl., ¶ 2.) The plaintiffs in those lawsuits were  
7 Gamut Construction Company, Inc. and Bella Palazzo, LLC—business entities controlled by  
8 Mark. (Ibid.) Both of those lawsuits were frivolous and filed to harass Mark’s estranged wife  
9 and in-laws during the pending divorce. (See Mischelynn Scarlatelli Decl, ¶ 3.)

10 After conducting discovery, the Isoms served 128.7 motions on Mark’s attorney, Darrel  
11 Menthe, which presented evidence demonstrating that there is no good faith basis for the claims  
12 alleged in each of the two lawsuits. (Dagrella Decl., ¶ 6.) In response, on May 7, 2013 and May  
13 22, 2013, Attorney Menthe dismissed those lawsuits, thereby avoiding a hearing on the 128.7  
14 motions<sup>2</sup>, and a June 4, 2013 trial on the Gamut case.<sup>3</sup> (Id., ¶ 7.) Then, only a few weeks later,  
15 on June 6, 2013, Attorney Menthe filed three more lawsuits, including this action, raising the  
16 same claims and allegations as the previous two lawsuits that he just dismissed!<sup>4</sup> (Ibid.)

17 In these new lawsuits, Mark is identified as the plaintiff, suing both individually and  
18 derivatively for Gamut Construction Company, Inc. and Bella Palazzo, LLC—the very same  
19 business entities that were the plaintiffs in the previous two cases. Moreover, Attorney Menthe  
20 has now added Mischelynn as an additional defendant, which means **Mark is now pursuing the**  
21 **same claims against his estranged wife in two separate courts: family court and civil court.**

22 This is completely inappropriate. Attorney Menthe is well aware of the fact that the family court  
23 has exclusive jurisdiction over these claims.

24 \_\_\_\_\_  
25 <sup>1</sup> *Gamut Construction Company, Inc. v. Isom, et al.* (LASC Case No. KC063680) and *Bella Piazza, LLC v. Isom, et al.* (LASC Case No. KC064781).

26 <sup>2</sup> *Code of Civil Procedure* section 128.7 requires 21 days advance notice before filing a motion for sanctions with the court. Mr. Menthe dismissed the aforementioned lawsuits during the 21-day safe harbor period.

27 <sup>3</sup> *Gamut Construction Company, Inc. v. Isom, et al.* (LASC Case No. KC063680).

28 <sup>4</sup> There was no reason for Mark to file three separate lawsuits with the same parties on each side, unless the intent was to compound the harassment by tripling the number of depositions and increase the cost of defense. Mark’s estranged wife and in-laws must now pay \$4,785.00 in court costs simply to file an Answer in all three actions.

1 Attorney Menthe's continued advocacy of these claims is frivolous and indicative of bad  
2 faith, warranting the imposition of sanctions under *Code of Civil Procedure* section 128.7. In a  
3 remarkably similar case, the appeals court in *Burkle v. Burkle* (2006) 144 Cal.App.4th 387  
4 affirmed a trial judge's order sanctioning the attorney under section 128.7 for filing a civil action  
5 against the spouse and other third parties while the divorce case was still pending.

6 **II. LEGAL ANALYSIS**

7 By filing and serving a complaint, and then later advocating the claims therein, an  
8 attorney certifies that the allegations and other factual contentions have evidentiary support.  
9 (Code Civ. Proc. § 128.7(b)(3).) The attorney also certifies that the matter is not being presented  
10 or pursued for an improper purpose, such as to harass or cause needless increase in the cost of  
11 litigation. (*Id.* § 128.7(b)(1).)

12 After proper notice of facts demonstrating that the complaint is without merit, if the  
13 pleading is not then withdrawn, the Court may strike the claims and award reasonable attorney's  
14 fees and costs incurred in presenting the motion. (*Id.* § 128.7(c)(1).) Continuing to advocate  
15 claims against a defendant that are manifestly without merit is abusive, grossly wasteful (to  
16 defendants, and the Court), and in direct violation of *Code of Civil Procedure* section 128.7(b),  
17 which requires an ongoing reasonable inquiry that the claims are warranted by existing law and  
18 have evidentiary support. (*Id.* § 128.7(b)(3).) Such is the case before this Court.

19 Attorney Menthe has filed a complaint containing causes of action that have no  
20 evidentiary support or legal merit and is pursuing same for the primary purpose of harassing  
21 Mark's estranged wife and in-laws during a pending divorce. The standard for violating the  
22 certification requirement of section 128.7 is an objective standard, requiring a well-founded  
23 belief. (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 82.) In this case, an objective  
24 view of the facts known to Attorney Menthe (indeed any view of the facts) reveals that there is  
25 insufficient factual or legal ground for continuing to advocate the claims in this action against the  
26 Isoms, *individually*, against their living trust, or separately against Mischelynn outside of, and  
27 simultaneous with, the pending divorce action.

1           **A. The Family Court Has Exclusive Jurisdiction Over The Claims Against**  
2           **Mischelynn – The *Burkle* Court Held That Re-Filing Such Claims In Civil**  
3           **Court Is Sanctionable Misconduct Under Section 128.7**

4           Mischelynn is named as a defendant in the second, third and fourth causes of action  
5 relating to Mark's claim to assets of Gamut Construction Company, Inc.—a 100% community  
6 business that is already the subject of litigation in the family court, which has exclusive  
7 jurisdiction over the division of community property. (*See* Mischelynn Scarlatelli Decl, ¶ 2.) In  
8 a remarkably similar case, the court in *Burkle v. Burkle* (2006) 144 Cal.App.4th 387 affirmed an  
9 award of 128.7 sanctions finding it inappropriate for the wife to have filed a civil action against  
10 the husband and other third parties while the divorce case was still pending:

11                     “While a marital dissolution proceeding was pending, a wife  
12 brought a separate civil action against her husband and two  
13 accounting firms... Under well-established precedent precluding  
14 parties to dissolution proceedings from engaging in "family law  
waged by other means" (*Neal v. Superior Court* (2001) 90  
Cal.App.4th 22, 27), we affirm the trial court's judgment of  
dismissal.

15                     After the trial court in the civil action sustained the husband's  
16 demurrer, the husband sought sanctions... ordering the wife to pay  
\$32,950.. under Code of Civil Procedure section 128.7. We affirm  
the trial court's order” (*Id.* at 388.)

17           In *Burkle*, as well as the cases cited by *Burkle*, it was made it clear that family law cases  
18 should not be allowed to spill over into civil law. (*Id.* at 393-394.) The courts have observed that  
19 almost all events occurring in family law litigation can be re-framed as civil law actions and that  
20 it is incumbent on courts to examine the substance of the claims and not just their nominal  
21 headings. (*Id.* at 394.) "A recurring theme in the family law opinions of this court is the  
22 disfavoring of civil actions which are really nothing more than reruns of a family law case."  
23 (*Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 25-26; see also, *Askew v. Askew* (1994) 22  
24 Cal.App.4th 942, 965-966 [trial court erred in failing to dismiss husband's civil action, which  
25 "sought to preempt the family law court from determining issues it already had jurisdiction to  
26 determine" and which "were the province of the family law court in the first place"]; *Plant*  
27 *Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal. App.3d 781, 786-788 [under the rule of  
28 exclusive concurrent jurisdiction, when two superior courts have concurrent jurisdiction over the

1 subject matter and parties, the first to assume jurisdiction has exclusive and continuing  
2 jurisdiction; the rule does not require absolute identity of parties, causes of action or remedies  
3 sought; if the first court has the power to bring before it all the necessary parties, application of  
4 the rule is not precluded merely because the parties in the second action are not identical[.]

5 In *Burkle*, the Court ordered the plaintiff's attorneys to pay \$32,950 to defendant as  
6 sanctions under section 128.7 for improperly filing a civil action seeking damages related to a  
7 family law matter. This Court should order Attorney Menthe and his firm to pay sanctions for  
8 engaging in the same misconduct that the *Burkle* court found reprehensible.

9 **B. Mark Has No Individual Claims And Is Not A Proper Plaintiff**

10 All of the causes of action in the Complaint relate to claims for damages and return of  
11 construction equipment, which are claims that belong exclusively to Gamut Construction  
12 Company, Inc., not Mark individually. (Complaint, ¶¶ 18, 20, 22, 28, 30, 34 & 38.) Nonetheless,  
13 the Complaint has Mark suing in his individual capacity. Mark's claims, filed in his individual  
14 capacity, are without merit and should be dismissed.

15 **C. The Derivative Action Was Filed In Violation Of Corporations Code § 5710**

16 *Corporations Code* § 5710 states: "No action may be instituted or maintained in the  
17 right of any corporation by any member of such corporation unless ... The plaintiff alleges in the  
18 complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff  
19 desires, or the reasons for not making such effort, and alleges further that plaintiff has either  
20 informed the corporation or the board in writing of the ultimate facts of each cause of action  
21 against each defendant or delivered to the corporation or the board a true copy of the complaint  
22 which plaintiff proposes to file."

23 Here, the Complaint does not allege that Mark made any efforts to secure relief from the  
24 board of Gamut Construction Company, Inc. or that he informed the board, in writing, of his  
25 intent to sue and the grounds for suit. (*See also* Mischelynn Scarlatelli Decl, ¶ 4.) The mere fact  
26 that approaching defendant Mischelynn—the co-owner—would be futile does not matter... the  
27 statute makes clear that no action may be maintained unless the complaint alleges "with  
28 particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the

1 reasons for not making such effort” and has informed “the corporation or the board in writing of  
2 the ultimate facts of each cause of action against each defendant.” (*Ibid.*) In comparison, the  
3 court dismissed a derivative action in *Nelson v. Anderson* (1999) 84 Cal. Rptr. 2d 753, 763,  
4 stating:

5 “A derivative action may appear to [the shareholder] to be an empty  
6 formality when there are only two shareholders, and one of them is  
7 the alleged wrongdoer. However, the law demands certain  
prerequisites to bringing a derivative action which have not been  
alleged or proven in this case.”

8 Compliance with section 5710 is mandatory, and yet no attempt was made to comply nor  
9 any reason stated in the Complaint for the noncompliance. Filing this lawsuit, all-the-while  
10 ignoring the statutory prerequisites to a derivative action, violates *Code of Civil Procedure*  
11 section 128.7.

12 **D. There Is No Merit To The Derivative Action Filed Against Troy & Shirley**  
13 **Isom In Their Individual Capacities**

14 The Isoms are not, *individually*, the owners of the property. (Isom Decls., ¶ 3.) Thus,  
15 they are not proper parties to the lawsuit. They should be named only in their capacity as  
16 trustees, but are sued individually on all cause of action. (Complaint ¶¶ 3-4; see e.g., *Burns v.*  
17 *California Fair Plan* (2007) 152 Cal.App.4th 646, 650 & fn. 1 [a trustee sued an insurer for  
18 property insurance benefits with respect to the trust's interest in property, and the court referred  
19 only to the trust as the relevant party because the trustee's involvement was only in a  
20 representative capacity.]

21 **E. There Is No Merit To The Derivative Action Against The Isoms' Living Trust**

22 **1. The Quantum Meruit Cause of Action**

23 **(i). The Claim Is Barred By Statute of Limitations**

24 According to the complaint, the parties agreed that Gamut would construct a home at 328  
25 Saddlehorn Ranch, La Verne, and after construction was complete, title to the property would be  
26 transferred to Bella Palazzo, LLC and Gamut would be repaid the balance of all construction  
27 costs. (Complaint, ¶ 17.) Construction allegedly commenced in 2005 and completed in 2010.  
28 (*Id.*, ¶ 17.)

1 Putting aside for now the fact that Defendants strenuously deny the complaint allegations,  
2 and focusing only on the legal merit, it is clear that the cause of action for quantum meruit is  
3 barred by statute of limitations. An action based upon a *quantum meruit* theory is subject to a  
4 two-year statute of limitations. (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76  
5 Cal.App. 4th 990, 996, citing *Code of Civil Procedure* § 339.) Here, the lawsuit was filed on  
6 June 6, 2013, more than two years after construction completed in 2010.<sup>5</sup>

7 (ii). **Neither The Isoms Nor Their Living Trust Were Ever Obligated**  
8 **To Pay Gamut For Construction Services**

9 "The count on *quantum meruit* alleges the performance of services or work and labor [1]  
10 for the defendant, [2] at the defendant's request, and [3] usually adds an allegation that defendant  
11 promised to pay the reasonable value." (4 Witkin, California Procedure (5th ed. 2008) Pleadings,  
12 section 566, p. 692; see also *Haggerty v. Warner* (1953) 115 Cal.App.2d 468, 475.) It was  
13 disclosed in discovery in the previous Gamut lawsuit that the construction services performed by  
14 Gamut were performed for Bella Palazzo, LLC, not the Isoms, as evidenced by the fact Gamut  
15 invoiced Bella Palazzo, LLC for all its construction services, not the Isoms. (*See* Dagrella Decl.,  
16 ¶ 3, Ex. "1".) "[I]t is well settled that there is no equitable basis for an implied-in-fact promise to  
17 pay reasonable value when the parties have an actual agreement covering compensation."  
18 (*Hedging Concepts, Inc. v. First Alliance Mortgage Company* (1996) 41 Cal.App.4th 1410,  
19 1419.) Here, the evidence produced by Gamut shows that an agreement existed to have Gamut's  
20 work paid for by Bella Palazzo, LLC, not the Isoms or their living trust.

21 **2. The Claims For Conversion And Trespass To Chattels Are Without Merit**

22 First, the equipment has been on the subject property for more than three years prior to  
23 filing suit. (*See* Isoms Decls., ¶ 2.) (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th  
24 906, 915 ["Code of Civil Procedure section 338, subdivision (c) provides for a three-year statute

25 \_\_\_\_\_  
26 <sup>5</sup> In what appears to be an attempt to plead around the statute of limitations, the complaint suggests that the obligation  
27 to pay Gamut did not arise until Mark made a written demand on November 15, 2011. (Complaint, ¶ 19.) However,  
28 to suggest that the obligation did not arise until a written demand is made, more than a year after construction was  
completed is disingenuous. By that logic, if Mark never made a demand, then the Isoms would never have had an  
obligation to pay. In truth, an obligation to pay arises when the promise is made or the consideration/benefit is  
conferred on the recipient. (*See Civil Code* § 1589.)



1 of limitations for actions alleging conversion.”] The three year statute begins to run the day the  
2 wrongful taking occurred. (See, e.g., *Bennett v. Hibernia Bank* (1956) 47 Cal. 2d 540, 561 [“the  
3 statute of limitations applying in conversion actions (Code Civ. Proc., § 388, subd. 3 [now  
4 subdivision (c)]) begins to run from the date of the conversion even though the injured person is  
5 ignorant of his rights”]; *Coy v. E.F. Hutton & Co.* (1941) 44 Cal. App. 2d 386, 390 [plaintiff’s  
6 cause of action accrued the day of the alleged conversion of his stock and suit against stockbroker  
7 filed more than four years later was time-barred]; *First National Bank v. Thompson* (1943) 60  
8 Cal. App. 2d 79 [suit to recover shovel from person who purchased it from one who had not  
9 satisfied the terms of his conditional sales contract barred because filed more than three years  
10 after conversion].)

11 Second, a judgment creditor has placed a \$2 million lien against the construction  
12 equipment, which would morph any value that Gamut could possibly receive from a return of the  
13 equipment, which means Gamut sustained no damage due to the fact the equipment is stored—or  
14 converted—at property owned by the Isoms’ living trust. (See Isoms Decls., ¶ 2.) In fact, the  
15 action by the judgment creditor to seize and sell the equipment in repayment of Gamut’s debts  
16 renders Gamut’s quest for equipment in court moot.

17 Third, Gamut is a *non-operating entity* and Mischelynn, as a 50/50 shareholder and board  
18 member, has as much right as Mark to determine how to manage and store Gamut’s assets until a  
19 division and allocation of their affairs in family court. (See Mischelynn Scarlatelli Decl, ¶ 5.)  
20 There can be no conversion to the extent that Mischelynn consented to allow the Gamut  
21 equipment be stored on the Isoms’ trust property until the judgment creditor forecloses on same  
22 or the family court decides division of community assets. (See Isoms Decls., ¶ 2.) Indeed, there  
23 is no law that grants Mark a superior interest than his wife in deciding how to store the assets of a  
24 *non-operating entity* until a final judgment is reached in the family court.<sup>6</sup> Such especially holds  
25 true in this situation where it is alleged that Mark has absconded with money and assets of the

26 \_\_\_\_\_  
27 <sup>6</sup> To the extent Mark claims an exclusive right to control Gamut’s affairs, he arguably abandoned the equipment by  
28 leaving it at the property site for a significant period prior to making any attempt to retrieve it. After more than a  
year, Mark offered, purportedly on behalf of Gamut, to pay past storage fees in exchange for return of the equipment.  
Ultimately, however, Mark failed to pay the fees and his creditor placed a lien on the equipment.

1 family businesses and wasted them away; Mark simply cannot be trusted at this point with  
2 maintaining exclusive possession of any assets of the family business. (See Mischelynn  
3 Scarlatelli Decl, ¶ 5.) This goes back to the fundamental premise that the family court has  
4 exclusive jurisdiction over these issues and it is improper for Mark to circumvent the exclusive  
5 jurisdiction of the family court by filing a separate civil action.

6 **III. CONCLUSION**

7 As set forth *supra*, Mark and his attorneys have pursued a frivolous lawsuit against  
8 Defendants, which has caused them to incur unnecessary fees and costs. Defendants request  
9 monetary sanctions in the amount of \$9,120.00 and nonmonetary sanctions in the form of striking  
10 the complaint and dismissing this unmeritorious action. (See Dagrella Decl, ¶¶ 8-9.)

11 Dated: June 27, 2013

DAGRELLA LAW FIRM, PLC

12  
13 By:

JERRY R. DAGRELLA  
Attorney for Defendants