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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RON KAYE, et al.,

Plaintiffs, Cross-defendants and  
Respondents,

v.

MGM EQUIPMENT LEASING, LLC,  
et al.,

Defendants, Cross-complainants and  
Appellants;

VICTORINO NOVEL, individually and as  
trustee of Advisors Trust, et al.,

Intervenors and Respondents.

G050732

(Super. Ct. No. INC084220)

O P I N I O N

Appeal from a judgment and postjudgment orders of the Superior Court of Riverside County, Randall D. White, Judge. (Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment

affirmed; postjudgment orders affirmed in part and reversed in part; motion to dismiss granted in part and denied in part.

Altman Law Group, Bryan C. Altman, Michael T. Smith, Joel E. Elkins, Jordan G. Cohen; Glassman, Browning, Saltsman & Jacobs and Steven Berkowitz for Defendants, Cross-complainants and Appellants MGM Equipment Leasing, LLC, Sun Services, Inc., and Standard Mine Company, Inc.

Mike Galam, in pro. per., for Defendant, Cross-complainant, and Appellant. Law Offices of J. Curtis Edmondson and Joseph C. Edmondson for Plaintiffs, Cross-defendants, and Respondents.

Fullerton, Lemann, Schaefer & Dominick, Wilfrid C. Lemann and David P. Colella for Interveners and Respondents.

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Plaintiffs Ron Kaye and Steve Ferraris (collectively, Plaintiffs) sued defendants Sun Services, Inc. (Sun), Standard Mine Company, LLC (SMC), MGM Equipment Leasing, LLC (MGM), and Mike Galam (collectively, Defendants) for breach of a settlement agreement and royalty agreements regarding the settlement of an earlier action over the sale of a gypsum mine. Before filing this action, Plaintiffs assigned their interest in the settlement and royalty agreements to Advisors Trust<sup>1</sup> in return for a portion of the sums it collected from Defendants.

Advisors Trust intervened in this action, asserting it was the only real party in interest with standing to pursue claims against Defendants based on the assignments. Advisors Trust sued Defendants for breach of the settlement and royalty agreements and

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<sup>1</sup> The actual interveners are Victorino Noval and Maurice C. Inman, Jr., as the current and former trustees of the Advisors Trust. Although a trust is not a legal entity that may appear in its own name (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 2:6, p. 2-3), we refer to Advisors Trust as the intervener for ease of reference.

also claimed Plaintiffs breached the assignments. Defendants cross-complained against Plaintiffs, alleging Plaintiffs fraudulently induced them to enter into the settlement and royalty agreements and also breached those agreements. Plaintiffs also cross-complained against Advisors Trust, alleging the assignments were void and unenforceable.

On the eve of trial, Plaintiffs and Advisors Trust reached a confidential settlement that purportedly rescinded the assignments. Based on the settlement, Advisors Trust dismissed not only its claims against Plaintiffs, but also the claims it alleged against Defendants based on the assignments. The trial court then conducted a bench trial that culminated in a \$1.9 million judgment for Plaintiffs against Defendants, jointly and severally. The court granted Plaintiffs' postjudgment motions for an award of contractual attorney fees and ordered Defendants to assign to Plaintiffs their interest in a judgment MGM had obtained in an unrelated action and also any of Defendants' funds held in their attorney's client trust account. Defendants appeal from both the judgment and the postjudgment orders.

We affirm the judgment. Initially, Defendants contend we must reverse the judgment because the trial court ignored their request for a statement of decision. As explained below, the record fails to show Defendants' timely requested a statement of decision, and therefore none was required.

Defendants also contend the trial court erred in entering judgment against them because substantial evidence supported their claims that Plaintiffs fraudulently induced them to enter into the settlement and royalty agreements and later breached those agreements. The issue, however, is not whether substantial evidence supports Defendants' claims, but whether substantial evidence supports the trial court's judgment. We conclude it does. Moreover, Defendants waived any challenge to the sufficiency of the evidence because their briefs summarized only the evidence favorable to them without addressing the unfavorable evidence that supports the court's judgment.

Defendants also claim Plaintiffs lacked standing in the trial court because they assigned their rights under the settlement and royalty agreements to Advisors Trust. Contrary to Defendants' contention, an evaluation of standing is not limited to the start of the action, but must be assessed throughout the litigation. Substantial evidence supports the trial court's conclusion Plaintiffs had standing at trial because Plaintiffs and Advisors Trust rescinded the assignments, and Advisors Trust dismissed its claim it was the real party in interest.

On the postjudgment orders, we affirm the trial court's attorney fees award and its assignment order regarding Defendants' funds held in their attorney's client trust account because Defendants failed to state a valid challenge to those orders. But we reverse and remand the order requiring Defendants to assign all interests they have in the judgment MGM obtained in the unrelated action. As explained below, Defendants' attorney asserts he holds a senior lien on that judgment and the trial court abused its discretion by ordering Defendants to assign their interest in the judgment before their attorney had a fair opportunity to establish the validity and amount of his lien.

Finally, Plaintiffs filed a motion to dismiss this appeal, arguing (1) Sun forfeited its right to appeal because an Oregon court found it in contempt for failing to respond to Plaintiffs' judgment debtor interrogatories, and (2) all Defendants lack capacity to appeal because their corporate status was not in good standing. We grant the motion as to SMC, but deny it as to all other Defendants. Sun has provided responses to the judgment debtor interrogatories, and therefore the equitable disentitlement doctrine on which Plaintiffs base their motion does not apply. Similarly, all Defendants other than SMC have restored their good standing and now have capacity to proceed with this appeal.

# I

## FACTS AND PROCEDURAL HISTORY

Plaintiffs and the owners of an approximately 600-acre site near the California-Arizona border (hereinafter, the Mine) entered into an agreement granting Plaintiffs the exclusive right to mine gypsum at the site and also an option to purchase the Mine. Sun later acquired the owners' remaining interest in the Mine and then agreed to purchase Plaintiffs' interest. Galam is Sun's president and owner.

When Sun failed to complete its purchase of Plaintiffs' interest in the Mine, Plaintiffs sued for breach of contract. In January 2006, Plaintiffs and Sun entered into a structured settlement agreement (Settlement Agreement) to resolve the earlier litigation. In exchange for Sun paying Plaintiffs a total of \$2.3 million, Plaintiffs agreed to assign their interest in the Mine to SMC so it could exercise the option to purchase the Mine outright from Sun. Plaintiffs also "represent[ed] and warrant[ed] that they will, and hereby do, assign and transfer any and all rights, title and interest in the approximately 5,000 tons of Gypsum which Plaintiffs mined and deposited in the Inca Siding to Sun." (Some capitalization omitted) SMC is a limited liability company that Galam formed to complete this transaction and he is its manager and owner. The Inca Siding is an area near the Mine where mined gypsum is stored before it is loaded onto trains for transport.

The Settlement Agreement established the following payment schedule for Sun: (a) one \$35,000 payment upon the parties executing the Settlement Agreement; (b) three \$5,000 payments on or before March 1, April 1, and May 1, 2006; (c) one payment of \$250,000, \$350,000, or \$450,000, depending on the loan amount Sun would obtain based on the Mine by the end of July 2006; and (d) quarterly royalty payments of \$0.80 for each ton of gypsum produced, with a minimum annual payment of \$80,000 for the year ending April 30, 2007, \$120,000 for the year ending April 30, 2008, and \$160,000 for the year ending April 30, 2009 and each year thereafter until the balance

was paid. Under the Settlement Agreement, SMC guaranteed Sun's performance and Galam agreed to provide Plaintiffs a \$2 million "Demand Promissory Note" that Plaintiffs were required to return if Sun succeeded in obtaining a loan and made the appropriate payment based on the amount of that loan. Finally, the Settlement Agreement required Sun to execute a separate royalty agreement with each Plaintiff so they could record it against the Mine and thereby provide notice of their rights to receive the foregoing royalty payments.

Sun immediately fell behind on its obligations under the Settlement Agreement. It was late making its payments and otherwise performing its obligations, and complied only after Plaintiffs repeatedly demanded payment. For example, the \$35,000 lump sum payment due in January 2006 was paid in installments that were not completed until April 2006. Similarly, each of the three \$5,000 payments due in March, April, and May 2006 were several weeks late, and Sun failed to make the \$250,000 lump sum payment that was due at the end of July 2006. Instead, Sun paid the sum in installments that were not completed until November 2006. Sun also did not timely execute the royalty agreements as required by the Settlement Agreement. Instead, Sun refused to sign the royalty agreements until Plaintiffs agreed to modify the payment terms and schedule.

In February 2007, six months after they were due, Sun executed two "Royalty Agreements" that modified the payment terms originally established by the Settlement Agreement. The Royalty Agreements' revised payment schedule required Sun to make royalty payments during 2006 based on the Mine's actual production without a minimum payment amount. In 2007 and 2008, the revised schedule required Sun to make \$20,000 quarterly payments plus \$0.80 per ton for each ton over 100,000 tons mined during the year. The quarterly payments increased to \$30,000 in 2009 and \$40,000 for each year thereafter, with Sun also paying Plaintiffs \$0.80 for each

ton mined over 150,000 tons during 2009 and \$0.80 for each ton mined over 200,000 tons during 2010 and each year thereafter.

The Royalty Agreements required Plaintiffs to give Sun written notice of any payment default and 15 days to cure. If Sun failed to cure within that period, Plaintiffs could accelerate all the scheduled payments and require Sun immediately to pay the outstanding balance. The Royalty Agreements also granted Sun a right of first refusal that provided, “In the event that [Plaintiffs] shall at any time during the term hereof desire to sell, assign or otherwise transfer this agreement or any rights hereunder pursuant to any bona fide offer which [Plaintiffs] shall have received, [Plaintiffs] shall offer them to [Sun] at the same price and conditions as that contained in such bona fide offer. [Sun] shall have 30 days from and after receipt thereof to decide whether or not to purchase this agreement or any rights hereunder at such price.”

After Sun executed the Royalty Agreements, Plaintiffs and Sun continued to quarrel over the timeliness of Sun’s payments. In April 2008, Plaintiffs retained Hunter Capital, LLC to help enforce Plaintiffs’ rights under the Royalty Agreements because they believed Sun was in default. Hunter Capital agreed to take the steps necessary to enforce Plaintiffs’ rights in exchange for 50 percent of Plaintiffs’ interest in the agreements. In June 2008, Plaintiffs entered into a second agreement with “Hunter Capital 1,” again assigning their rights under the Royalty Agreements to Hunter Capital in exchange for \$900,000, representing approximately 50 percent of the outstanding balance under the Royalty Agreements.<sup>2</sup> In February 2009, Plaintiffs amended this agreement to substitute Advisors Trust for Hunter Capital (hereinafter, we refer to these

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<sup>2</sup> The assignment provision in this second agreement read as follows: “[Plaintiffs] hereby assign[] to Hunter all their right, title and interest of any kind that they may have regarding [Sun], Mike Galam, Pacific Gypsum Products and [SMC], including but not limited to existing law cases, causes of action, choses in action and all other rights it may have regarding Mike Galam, [Sun], [SMC] and others regardless of the origin of said rights.”

three agreements collectively as the Assignments).<sup>3</sup> Plaintiffs did not notify Sun, Galam, or SMC about any of the Assignments or provide Sun the opportunity to acquire Plaintiffs' interests in the Royalty Agreements on the same terms. At trial, Ferraris testified the Assignments were formed to help Plaintiffs collect the sums due under the Royalty Agreements.

On July 2, 2008, Plaintiffs sent Sun written notice of its failure to make the \$20,000 quarterly payment due the previous day. When Sun failed to cure that default within 15 days, Plaintiffs sent Sun a second written notice accelerating all payments and demanding Sun pay the entire balance due. Sun failed to make that \$20,000 payment or any other payments that later became due under the Royalty Agreements.

Plaintiffs initially sought to enforce the Settlement Agreement in the earlier lawsuit under Code of Civil Procedure section 664.6. When those efforts proved unsuccessful, Plaintiffs filed this action in February 2009. Plaintiffs' operative first amended complaint alleged claims against Defendants for breach of the Settlement Agreement, breach of the Royalty Agreements, alter ego, accounting, declaratory relief, injunctive relief, and receivership. Plaintiffs alleged Galam formed MGM to operate the Mine and that Sun leased the Mine to MGM. According to Plaintiffs, Defendants are each the alter ego of one another.

Advisors Trust intervened in this action, alleging claims against Sun, SMC, and Galam, and also against Plaintiffs. Based on the Assignments, Advisors Trust claimed it was the real party in interest with standing to enforce the Settlement Agreement and Royalty Agreements, and alleged that Sun, SMC, and Galam breached

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<sup>3</sup> The assignment provision in this amendment provided as follows: “[Plaintiffs] hereby assign[] to [Advisors Trust their] position with respect to the above mention[ed] dispute involving the dispute entities and all of [their] rights in connection with the [Mine], including but not limited to the existing law cases, causes of action, choses in action and all other rights [Plaintiffs] may have regarding such dispute entities.”

the Settlement Agreement and the Royalty Agreements. Against Plaintiffs, Advisors Trust alleged claims for breach of the Assignments, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation, interference with contract, declaratory relief, and accounting. According to Advisors Trust, Plaintiffs breached the Assignments by bringing this action to recover for themselves.

Sun and Galam cross-complained against Plaintiffs and Advisors Trust, alleging Plaintiffs breached the Settlement Agreement and Royalty Agreements, breached the implied covenant of good faith and fair dealing, committed fraud, and asked the court for declaratory relief. Sun and Galam based their claims on Plaintiffs alleged failure to deliver to Sun the 5,000 tons of gypsum located at the Inca Siding, and by failing to provide Sun with its right of first refusal before Plaintiffs entered into any of the three Assignments with Hunter Capital and Advisors Trust. Sun and Galam also alleged Plaintiffs fraudulently induced them to enter into the Settlement Agreement by representing to Sun and Galam that they would be able to obtain a \$6 million loan based solely on the Mine. Sun and Galam also alleged Advisors Trust interfered with Sun's contractual relationship with Plaintiffs and Sun's prospective relationship with its gypsum customers. MGM filed a separate cross-complaint against Plaintiffs and Advisors Trust claiming they interfered with MGM's relationship with its customers who bought or sought to buy gypsum from the Mine.

Finally, Plaintiffs cross-complained against Advisors Trust, alleging claims for declaratory relief, breach of the Assignments, securities fraud, and fraud. Plaintiffs alleged they were fraudulently induced to enter into the Assignments and that the Assignments were void and unenforceable, but to the extent they were enforceable Advisors Trust breached the Assignments by failing to pay Plaintiffs the sums due.

Shortly before trial, Plaintiffs and Advisors Trust reached a confidential settlement in which they agreed to rescind the Assignments and dismiss their claims against each other. On the eve of trial, Plaintiffs dismissed their cross-complaint against

Advisors Trust, and Advisors Trust dismissed their complaint in intervention against not only Plaintiffs, but also against Sun, SMC, and Galam.

In March 2013, the trial court conducted a bench trial on (1) Plaintiffs' complaint against Defendants, and (2) Sun and Galam's and MGM's cross-complaints against Plaintiffs and Advisors Trust. At the noon recess on the third day, Galam asked for a continuance until the next morning because he wanted to hire new counsel. The trial court denied the continuance request, explaining Galam could represent himself for the remainder of the day, but that the current attorney for Sun, SMC, and MGM must continue to represent those entities until they substituted new counsel. The court emphasized the entities could not represent themselves and it would not allow them to delay the trial by switching counsel. The next morning a new attorney, Bryan Altman of the Altman Law Group, associated as counsel for Sun, SMC, and MGM while their original counsel remained as second chair. Galam continued to represent himself for the remainder of the trial.

The court announced its tentative decision by issuing a document entitled, "Tentative Statement of Decision." On Plaintiffs' claims for breach of the Settlement Agreement and the Royalty Agreements, the court ruled for Plaintiffs and awarded them nearly \$1.9 million and also found Defendants were the alter egos of one another. The court rejected Sun and Galam's claims for breach of the Settlement Agreement and Royalty Agreements because Sun and Galam did not establish Plaintiffs failed to assign and transfer their rights to the 5,000 tons of gypsum located at the Inca Siding. The court also found the Assignments did not violate Sun's right of first refusal under the Royalty Agreements because the Assignments were only for collection purposes, and therefore did not violate the Royalty Agreements. On Sun and Galam's claim for fraud in the inducement, the trial court found Galam and Sun failed to present evidence establishing the claim's essential elements and the governing three-year statute of limitations barred

the claim. Finally, the trial court found Sun and Galam failed to present evidence establishing any of their claims against Advisors Trust.<sup>4</sup>

Defendants contend they filed both a request for a statement of decision and objections to the court's tentative decision. The trial court, however, did not acknowledge either of these filings and entered judgment for Plaintiffs. The judgment repeated the findings the court made in its tentative decision and awarded Plaintiffs nearly \$1.9 million against Defendants, jointly and severally.

Plaintiffs sought a posttrial award of contractual attorney fees based on the attorney fee provisions in the Settlement Agreement and the Royalty Agreements, and an assignment order in aid of Plaintiffs' efforts to enforce the judgment. The court granted both motions, awarded Plaintiffs nearly \$912,000 in attorney fees, and ordered Defendants to assign to Plaintiffs their rights to (1) "any and all personalty [*sic*] extracted from the [Mine]," (2) any funds held in the client-trust account of their attorneys, the Altman Law Group, "which are directly related to defendant Mike Galam[']s representation," and (3) funds obtained from the judgment entered in MGM's favor in that action entitled *MGM Equipment Leasing Company, LLC v. Vermeer Manufacturing Company, et al.*, Los Angeles Superior Court Case No. BC403095 (*Vermeer*).

In *Vermeer*, MGM obtained a judgment against Vermeer Manufacturing Company for breach of express warranty concerning a terrain leveler MGM purchased for use at the Mine. The judgment was entered in May 2012—nearly a year before the judgment in this action—and awarded MGM almost \$1.4 million in damages. Vermeer appealed, however. After the parties completed briefing in this action, the Court of

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<sup>4</sup> Sun and Galam do not challenge the trial court's ruling on their claims against Advisors Trust.

Appeal affirmed the judgment for MGM on liability, but reduced the amount of damages to approximately \$450,000.<sup>5</sup>

After granting Plaintiffs' posttrial motions, the trial court amended the judgment to include the contractual attorney fee award and both prejudgment and postjudgment interest awards. The amended judgment also awarded Plaintiffs nearly \$13,000 in postjudgment attorney fees, but the record does not include either a motion seeking those fees or an order awarding them.

Defendants timely appealed from the judgment and postjudgment orders.

## II

### DISCUSSION

#### A. *Plaintiffs' Motion to Dismiss Defendants' Appeal*

##### 1. The Disentitlement Doctrine Does Not Warrant Dismissal

Plaintiffs filed a motion to dismiss Defendants' appeal based on the disentitlement doctrine, arguing Sun forfeited its right to appeal because an Oregon court has held Sun in contempt for failing to respond to Plaintiffs' judgment debtor interrogatories served to help them collect on the judgment. According to Plaintiffs, the other Defendants' appeals also must be dismissed based on Sun's conduct because the judgment found the Defendants were alter egos of one another. We conclude the disentitlement doctrine does not apply on the facts presented.

Under the disentitlement doctrine, "[a]n appellate court has the inherent power . . . to dismiss an appeal by a party that refuses to comply with a lower court order." (*Stoltenberg v. Ampton Investments* (2013) 215 Cal.App.4th 1225, 1229

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<sup>5</sup> We judicially notice the opinion the Second District Court of Appeal issued in *MGM Equipment Leasing Company, LLC v. Vermeer Manufacturing Company* (Feb. 11, 2015, B239253). (Evid. Code, §§ 452, subd. (d), 459, subd. (a); see *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1171.)

(*Stoltenberg*).) As the Supreme Court has explained, “A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state.” (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277; *Stoltenberg*, at p. 1230.)

Dismissal under the disentitlement doctrine ““is not ““a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court’s inherent power to use its processes to induce compliance”” with a presumptively valid order. [Citation.]” [Citation.] . . . [¶] Appellate disentitlement “is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction . . . .” [Citation.]’ [Citation.] No formal judgment of contempt is required; an appellate court ‘may dismiss an appeal where there has been *willful disobedience or obstructive tactics*. [Citation.]”’ (*Stoltenberg, supra*, 215 Cal.App.4th at p. 1230.)

The doctrine may be applied not only to a party’s disobedience of California court orders, but also the orders of our sister states’ courts. (*Stoltenberg, supra*, 215 Cal.App.4th at pp. 1233-1234.) An appellate court’s authority is not limited to dismissing the appeal; the court also may stay an appeal until the party complies with the order, or the court may reinstate an appeal it previously dismissed if the party complies with the order before the court loses jurisdiction. (See *Stoltenberg*, at p. 1234 [dismissing appeal, but allowing appellant to seek reinstatement if it complies with court order before court loses jurisdiction]; *In re Marriage of Hofer* (2012) 208 Cal.App.4th 454, 459 [“doctrine enables appellate court to stay or to dismiss the appeal”]; *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1691 (*Alioto Fish*) [staying appeal for 30 days to allow appellant time to comply with order].)

The doctrine also is not limited to disobedience of the order from which the appellant has appealed, but rather may be applied based on the disobedience of any order. (*In re E.M.* (2012) 204 Cal.App.4th 467, 477.) For example, the doctrine has been

applied to dismiss an appeal from the underlying judgment when the appellant disobeyed a court order to appear for a judgment debtor exam or respond to judgment debtor interrogatories. (See, e.g., *Stoltenberg, supra*, 215 Cal.App.4th at pp. 1228, 1232 [appeal dismissed when appellant failed to respond to judgment debtor discovery after being served with subpoena, trial court ordered appellant to comply with subpoena, and trial court held appellant in contempt for failing to comply with its order]; *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 380 (*TMS*) [appeal dismissed after appellant moved to another country and refused to respond to judgment debtor interrogatories despite court order to respond]; *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 94 (*Say & Say*) [appeal dismissed after appellant refused to appear for judgment debtor examine despite court order to appear]; *Stone v. Bach* (1978) 80 Cal.App.3d 442, 444, 448 (*Stone*) [same].)

In each of these cases, the appellant did not simply fail to respond to judgment debtor discovery requests. Rather, the appellants refused to respond after the trial court specifically ordered them to do so and in the face of a motion to dismiss their appeal. (*Stoltenberg, supra*, 215 Cal.App.4th at pp. 1228, 1232; *TMS, supra*, 71 Cal.App.4th at p. 380; *Say & Say, supra*, 22 Cal.App.4th at p. 94; *Stone, supra*, 80 Cal.App.3d at pp. 444, 448.) Those facts are not present here.

Plaintiffs registered the judgment in Oregon, Sun's state of incorporation, and served judgment debtor interrogatories on Sun because Defendants did not post a bond to stay enforcement of the judgment during this appeal. Sun initially refused to respond to the interrogatories because it claimed Plaintiffs failed to properly serve them. Plaintiffs then filed a motion to hold Sun in contempt for failing to respond and Sun did not oppose that motion. An Oregon court granted the motion, declared Sun in contempt for failing to respond to the interrogatories, and ordered Sun to pay Plaintiffs' attorney fees, any damages caused by Sun's failure to respond, and \$500 for each day the interrogatories remained outstanding. The court also ordered Sun to post a \$1 million

bond to be applied to the judgment. After obtaining the contempt order in Oregon, Plaintiffs promptly filed their motion to dismiss in this court.

At that point, Sun ceased ignoring the interrogatories and attempted to negotiate a stay with Plaintiffs to avoid its obligation to respond until this appeal was decided. When those efforts proved unsuccessful, Sun served responses to the interrogatories. Although Sun initially did not answer the interrogatories, it did not refuse to comply with a court order. Plaintiffs cite no authority to support the conclusion that failing to respond to judgment debtor discovery requests alone amounts to disobedience of a court order warranting dismissal under the disentitlement doctrine. Once the Oregon court issued its order finding Sun in contempt and requiring Sun to respond to the interrogatories, Sun complied with that order and provided responses. As explained above, courts apply the disentitlement doctrine to induce compliance, and Sun now has complied with the order and the underlying discovery. (See *Stoltenberg, supra*, 215 Cal.App.4th at p. 1230; *Alioto Fish, supra*, 27 Cal.App.4th at p. 1685 [“The right to appeal ‘must not be lightly forfeited . . . where a doubt exists as to a litigant’s conduct being contumacious or willful’”].)

Whether Sun’s interrogatory responses are adequate and discharged its obligations under Oregon law is for the Oregon court to decide, not us. Moreover, we cannot evaluate the adequacy of Sun’s responses because neither side has provided us with the relevant documents. Plaintiffs’ remedy for Sun’s failure to pay the attorney fees, costs, and penalties the Oregon court imposed for Sun’s delays is also an issue for that court to decide. Plaintiffs have not cited any case that dismissed an appeal based on an appellant’s failure to pay sanctions after the appellant otherwise complied by providing the requested discovery.

To justify dismissal, Plaintiffs also point to findings the Oregon court made in its contempt order that Sun failed to maintain its status as an active corporation in good standing and Galam registered a false address as Sun’s agent for service of process. As

with the interrogatory responses, Sun and Galam have corrected these failings. Moreover, those actions do not amount to willful disobedience of a court order. Rather, they are simply a failure to comply with statutory duties for operating a corporation.

We therefore deny Plaintiffs' motion to dismiss Sun's appeal because the disentitlement doctrine does not apply on the facts presented. Plaintiffs contend the other Defendants' appeals should be dismissed based on Sun's conduct, but we deny that request as well because Sun's conduct does not warrant dismissal.<sup>6</sup>

2. A Lack of Capacity Requires the Dismissal of SMC's Appeal, but Not Sun's or MGM's

Plaintiffs also move to dismiss Sun's, SMC's, and MGM's appeals because each of those entities is not in good standing in its state of formation, and therefore lacks capacity to pursue this appeal. We grant the motion as to SMC, but deny it as to Sun and MGM because they have restored their active corporate status.

In California, the corporate powers, rights and privileges of a domestic taxpayer may be suspended if a corporation fails to pay its taxes.<sup>7</sup> (Rev. & Tax. Code, § 23301; *Bourhis v. Lord* (2013) 56 Cal.4th 320, 324.) "In general, a 'corporation may

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<sup>6</sup> Plaintiffs made several requests for judicial notice in support of their motion to dismiss. We grant the requests as to documents from the Oregon court proceedings regarding the judgment debtor interrogatories, including the contempt order, Plaintiffs' opposition to Sun's motion to vacate that order, and a notice of continuance of the hearing on Sun's motion. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We deny the requests as to the amended judgment and a writ of execution in this action because those documents already are part of the record on appeal. We also deny the requests as to a quitclaim deed showing Sun transferred the Mine and a 1999 opinion from the California Public Utilities Commission adopting a settlement agreement involving Galam. These later two documents are irrelevant to whether the disentitlement document applies to Sun's appeal. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

<sup>7</sup> This suspension of corporate powers applies to both a corporation and a limited liability company. (Rev. & Tax. Code, § 23305.5, subd. (a).)

not prosecute or defend an action, nor appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes.” (*Bourhis*, at p. 324.) “Suspension of corporate powers results in a lack of capacity to sue, not a lack of standing to sue.” (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603-1604, italics omitted.) “Once the delinquent taxes are paid, the corporation’s powers are restored, thus ‘reviving’ its capacity to sue and defend.” (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 563.) If the corporation does not revive its corporate powers, its action or appeal must be dismissed. (See *Cal-Western Business Services, Inc. v. Corning Capital Group* (2013) 221 Cal.App.4th 304, 306-307.)

A foreign corporation similarly lacks capacity to prosecute or defend an action in California when its powers are suspended in its state of formation and that state’s laws would not allow the corporation to prosecute or defend an action. (*CM Record Corp. v. MCA Records, Inc.* (1985) 168 Cal.App.3d 965, 969 [corporation “has no greater capacity to sue in California than in its home state”].) Whether a foreign corporation’s revival of its corporate powers in its home state revives its capacity to prosecute or defend an action in California depends on that state’s laws. (*Id.* at pp. 968-969.) In *CM Record Corp.*, the Court of Appeal affirmed a judgment of dismissal against a foreign corporation even though the corporation had revived its corporate powers in its home state because the laws in that foreign state did not revive corporate capacity to press the particular claims the corporation asserted in the California action. (*Ibid.*)

Here, SMC is a California limited liability company. It is undisputed the California Franchise Tax Board has suspended SMC’s corporate powers for failing to pay taxes and SMC has done nothing to revive its corporate powers. Accordingly, we grant Plaintiffs’ motion to dismiss because SMC lacks capacity to pursue this appeal.

Sun is an Oregon corporation and MGM is a Nevada limited liability company. When Plaintiffs filed their dismissal motion, Oregon had administratively

dissolved Sun for failing to make required annual filings and Nevada had placed MGM in default because its agent for service of process resigned and MGM failed to name a replacement. All parties concede, however, that both Sun and MGM have cured these defects and are presently in good standing in their states of formation. Plaintiffs cite no authority from either Oregon or Nevada that deprive Sun or MGM of capacity to pursue this appeal after reviving their corporate status. Accordingly, we deny Plaintiffs' motion to dismiss as to Sun and MGM.<sup>8</sup>

B. *The Trial Court Did Not Prejudicially Error In Denying Sun's Summary Adjudication Motion*

Defendants contend the trial court erred in denying Sun's motion for summary adjudication on its claim that Plaintiffs breached the Royalty Agreements' provision granting Sun a right of first refusal. According to Defendants, the undisputed evidence established that Plaintiffs entered into each of the three Assignments regarding their interests in the Royalty Agreements without first offering Sun the opportunity to acquire those interests on the same terms, and therefore Plaintiffs breached the Royalty Agreement as a matter of law. This argument fails.

As with an appeal from any other order or judgment, an appellant challenging an order denying a summary adjudication motion must show the trial court's ruling amounted to prejudicial error, that is, a miscarriage of justice. "In general, an order denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the *same question* was subsequently decided adversely to the moving party after a trial on the merits." (*Federal Deposit Ins. Corp. v. Dintino*

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<sup>8</sup> Plaintiffs requested us to judicially notice records from the California, Oregon, and Nevada Secretaries of State showing the corporate status of SMC, Sun, and MGM. Defendants do not oppose the requests and we therefore grant them. (Evid. Code, §§ 452, subd. (h) [Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy], 459, subd. (a).)

(2008) 167 Cal.App.4th 333, 343; see *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1410-1411 [“As a general rule, the denial of summary judgment is harmless error after a full trial covering the same issues”]; *Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1011 [““A decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial)””].)

Here, after the trial court denied Sun’s summary adjudication motion, the court conducted a bench trial on all parties’ claims, including Sun’s claim for breach of the Royalty Agreements based on the right of first refusal. Sun presented its evidence on that claim and the trial court again ruled in Plaintiffs’ favor. We address Defendants’ challenges to that ruling below. But the trial on the merits of Sun’s claim makes any error the trial court allegedly committed when it denied Sun’s summary adjudication motion harmless. Defendants offer no authority allowing them to challenge the trial court’s summary adjudication ruling following a complete trial on the same claim and issues.

C. *Defendants Failed to Timely Request a Statement of Decision*

Defendants contend we must reverse the judgment and remand the matter because the trial court ignored their timely request for a statement of decision. The record, however, does not support Defendants’ contention they timely made their request.

“Upon a party’s timely and proper request, [Code of Civil Procedure] section 632 requires a trial court to issue a statement of decision following ‘the trial of a question of fact by the court.’ The statement must explain ‘the factual and legal basis for [the court’s] decision as to each of the principal controverted issues at trial. . . .’ [Citations.] . . . No statement of decision is required if the parties fail to request one.” (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970 (*Acquire II*); see Code Civ. Proc., § 632.)

Whether a party timely requested a statement of decision has a significant impact on the scope of appellate review. A trial court's failure to provide a statement of decision when a party timely requests one is reversible error per se and requires the appellate court to remand for the trial court to issue the requested statement of decision. (*Wallis v. PHL Associates, Inc.* (2013) 220 Cal.App.4th 814, 825; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530-1531.) "A party's failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence." (*Acquire II, supra*, 213 Cal.App.4th at p. 970.)

Here, it is undisputed the trial court stamped "filed" on Defendants' request for a statement of decision one day after the time for filing a request had expired. Defendants nonetheless contend they timely requested a statement of decision because the trial court received their request a day earlier, but initially refused to file it because the court mistakenly believed the attorney filing the request was not Defendants' counsel of record. According to Defendants, the trial court improperly refused to file the request because Bryan Altman and the Altman Law Group associated as counsel of record during the trial, and therefore had authority to file the request for a statement of decision on Defendants' behalf. In support, Defendants cite an entry in the register of actions that shows the trial court refused to file a document on the last day for filing a request for a statement of decision. The record, however, fails to show the document the court refused to file was a request for a statement of decision by all Defendants.<sup>9</sup>

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<sup>9</sup> Defendants also contend the date on the proof of service and their counsel's signature date show they timely filed their request for a statement of decision. Although those dates may show when Defendants' counsel signed and served the request, they do not show when Defendants attempted to file the request.

For April 15, 2013, the register of actions states, “REJECTED DOCUMENT OBJECTIONS submitted by Mike GALAM AN INDIVIDUAL [¶] The court is unable to process the enclosed document(s) for the reason(s) indicated below: THE ALTMAN LAW GROUP IS NOT SHOWING AS ATTORNEY OF RECORD.” The next day, the register of actions shows Defendants filed two documents, a “Request for Statement of Decision” and “Objections to TENTATIVE STATEMENT OF DECISION.” Copies of these two documents included in the record show the Altman Law Group filed both of them on Defendants’ behalf.

Accordingly, although the register of actions shows Galam attempted to file “OBJECTIONS” on the last day to request a statement of decision, the register does not show he or any other Defendant attempted to file a request for a statement of decision or that Sun, SMC, and MGM attempted to file any other document on that date. Moreover, the register entry stating the court refused to “process” a document is accurate. The Altman Law Group was not Galam’s counsel of record, and therefore lacked authority to file any document on his behalf. During trial, Galam sought to terminate the attorney who was representing him and the other Defendants. The trial court explained Galam could terminate his counsel and proceed as his own attorney, but the court would not allow Sun, SMC, and MGM to terminate their counsel in the middle of trial without substituting new counsel. The next day, Altman and the Altman Law Group associated as counsel for Sun, SMC, and MGM, but Galam stated he would continue to represent himself. Nothing in the record shows Altman ever associated as Galam’s counsel of record.

Defendants had the opportunity to correct any error regarding the request for a statement of decision in the trial court, or at least to make a clear record supporting the contention they timely requested a statement of decision. For example, after the trial court ignored Defendants’ request and entered judgment, Defendants could have moved for a new trial or sought to vacate the judgment. (Code Civ. Proc., §§ 657, 663.) When

ruling on a new trial motion in an action tried without a jury, the trial court has broad authority to change its statement of decision, vacate its judgment, or “vacate and set aside the statement of decision and judgment and reopen the case for further proceedings.” (*Id.* at § 662; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 899-902; *Concerned Citizens Coalition of Stockton v. City of Stockton* (2005) 128 Cal.App.4th 70, 79.) Defendants did not avail themselves of any of these procedures and have failed to provide an adequate record to support the contention they timely requested a statement of decision.

Accordingly, Defendants waived any objection to the trial court’s failure to make findings and we must imply all findings necessary to support the court’s judgment that are supported by substantial evidence. (*Acquire II, supra*, 213 Cal.App.4th at p. 970.)

Defendants cite *Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, to support their contention the timeliness of their request is measured from the date on which the court received the request, not the date on which the court filed it. *Gordon* does not support Defendants’ argument. There, the Court of Appeal used the date the trial court received the request for a statement of decision because the record clearly established that date. The court clerk had made a notation in the margin of the request recording the date and time on which the court received the request, but nonetheless did not file the request until a few days later. (*Id.* at p. 167.) The request was timely when it was received by the court clerk. Here, as explained above, the record fails to support Defendants’ contention the trial court timely received their request for a statement of decision.

We note the tentative decision the trial court issued before entering judgment may not be treated as a statement of decision and may not be used to either impeach or support the trial court’s final judgment. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1756.) In a case tried without a jury, the court’s tentative or intended decision merely starts the statement of decision process. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).) The court is not bound by its tentative decision, and it properly may enter a wholly different judgment than the one described in

the tentative decision. (*Wurzl*, at p. 1756.) Once the parties receive the tentative decision, the onus is on them to properly and timely request a statement of decision on any controverted issue on which they believe the trial court erred. Regardless how lengthy or detailed a tentative decision may be, it does not constitute a statement of decision and may not be treated as one unless the trial court expressly states in its tentative pronouncement that it will become the statement of decision. (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 526, 551-552 [trial court's 11-page tentative decision could not be treated as statement of decision]; Cal. Rules of Court, rule 3.1590(c) [court's tentative decision may state it constitutes proposed statement of decision or will become statement of decision if parties do not timely request one].) Here, the trial court's tentative decision included no such statement and therefore we may not treat it as a statement of decision.

D. *Defendants Failed to Establish a Lack of Substantial Evidence to Support the Judgment*

Defendants contend the trial court erred in entering judgment for Plaintiffs on Sun and Galam's claims for fraud in the inducement and breach of the Settlement Agreement and Royalty Agreements. According to Defendants, Sun and Galam presented substantial evidence establishing every element of these claims and the trial court erred as a matter of law in disregarding that evidence. We disagree.

Under the substantial evidence standard, the question is not whether the record includes substantial evidence to support the appellant's factual assertions, but whether the record includes substantial evidence to support the trial court judgment: “[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . .” [Citations.] [¶] So long as there is “substantial evidence,” the appellate court *must affirm* . . . even if the reviewing justices personally would have ruled differently had they presided over the proceedings

below, and even if other substantial evidence would have supported a different result. Stated another way, when there is substantial evidence in support of the trial court's decision, the reviewing court has *no power to substitute its deductions*. [Citations.]' [Citation.]" (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5 (*Rupf*).)

"An appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such evidence is insufficient as a matter of law. [Citations.] An appellant who fails to cite and discuss the evidence supporting the judgment cannot demonstrate that such evidence is insufficient. The fact that there was substantial evidence in the record to support a contrary finding does not compel the conclusion that there was no substantial evidence to support the judgment. An appellant . . . who cites and discusses only evidence in her favor fails to demonstrate any error and waives the contention that the evidence is insufficient to support the judgment." (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408 (*Rayii*); see *Stewart v Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 34 (*Stewart*).)

In their cross-complaint, Sun and Galam alleged a claim against Plaintiffs for fraudulently inducing them to enter into the Settlement Agreement and the Royalty Agreements. According to Defendants, Kaye induced Sun and Galam to enter into these agreements by falsely representing Sun could obtain a \$6 million to \$7 million loan based solely on the Mine's value and Kaye would help Sun obtain a loan if it had any difficulties. To support this claim, Defendants point to Galam's testimony about the representations Kaye allegedly made to him and an e-mail Plaintiffs' attorney sent Galam before the parties entered into the Settlement Agreement. Defendants, however, do not acknowledge, let alone summarize, any of the evidence supporting the trial court's judgment that Sun and Galam were not fraudulently induced to enter into these agreements.

For example, Defendants ignore Kaye's testimony that he never said anything about Sun obtaining a loan or that Plaintiffs could not obtain financing for the Mine's operations and therefore were willing to sell. Similarly, Defendants ignore testimony from Plaintiffs' attorney that he denied making the settlement contingent on Sun's procurement of a loan. Accordingly, not only have Defendants waived their challenge to the sufficiency of the evidence by failing to summarize the evidence unfavorable to their position (*Rayii, supra*, 218 Cal.App.4th at p. 1408; *Stewart, supra*, 190 Cal.App.4th at p. 34), but that unfavorable evidence constitutes substantial evidence supporting the judgment (see *Rupf, supra*, 85 Cal.App.4th at pp. 429-430, fn. 5).

Sun and Galam's cross-complaint also alleged Plaintiffs breached the Settlement Agreement and Royalty Agreements by (1) failing to deliver to Sun the 5,000 tons of gypsum located at the Inca Siding, and (2) failing to provide Sun its right of first refusal before entering into each of the three Assignments transferring Plaintiffs' interests in the Royalty Agreements to Hunter Capital and Advisors Trust. According to Defendants, these contract breaches made Plaintiffs liable to Sun for damages and also excused Sun's nonperformance under these agreements. In support, Defendants again point only to the favorable evidence without acknowledging contrary evidence.

Regarding the 5,000 tons of gypsum, Galam testified Plaintiffs never "actually provide[d Sun] with the Inca siding material" because when Sun went to the Inca Siding the police stopped it from removing the gypsum. Defendants, however, offered no evidence regarding why the police stopped Sun from taking the gypsum, and their briefs ignored that the Settlement Agreement's plain language did not require Plaintiffs to "provide" Sun with the gypsum. Rather, the Settlement Agreement states, "Plaintiffs represent and warrant that they will, and hereby do, *assign and transfer any and all rights, title and interest* in the approximately 5,000 tons of Gypsum which Plaintiffs mined and deposited at the Inca Siding to Sun." (Italics added.) The Settlement Agreement does not state what right, title, and interest Plaintiffs held.

Defendants also failed to acknowledge Plaintiffs' expert testimony that over 5,000 tons of gypsum was located at the Inca Siding in 2006 when the parties signed the Settlement Agreement and that material remained there for some time, but had been removed by the time of trial.<sup>10</sup> The judgment explains the trial court found there was no breach regarding this provision in the Settlement Agreement because the evidence showed the gypsum was located at the site and there was no evidence Plaintiffs had any role in preventing Sun from removing it. We must defer to the trial court's resolution of this conflict in the evidence. (See *Rupf, supra*, 85 Cal.App.4th at pp. 429-430, fn. 5.)

Regarding the right of first refusal, Defendants point to Ferraris's testimony that Plaintiffs never offered to transfer their interests in the Royalty Agreements to Sun before entering into the Assignments, and also Galam's testimony that he never received notice of Hunter Capital's and Advisors Trust's offers to acquire Plaintiffs' interests before Plaintiffs entered into the Assignments. According to Defendants, this evidence established that Plaintiffs violated Sun's right of first refusal as a matter of law. Defendants, however, ignore Ferraris's testimony that Plaintiffs made the Assignments strictly for collection purposes because Plaintiffs were experiencing difficulty in getting Sun to make timely payments. Defendants also failed to acknowledge the trial court's finding the Assignments did not trigger Sun's right of first refusal because they were made for collection purposes, and therefore did not constitute bona fide offers of which Plaintiffs were required to give Sun notice.

California law distinguishes between the assignment of a contract and the assignment of a chose in action arising from the breach of the contract. A chose in action is freely assignable unless it is for wrongs done to the person, reputation, or feelings of an injured person, such as an action for personal injuries arising out of a tort. (*Baum v.*

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<sup>10</sup> In their reply brief, Defendants for the first time acknowledge the testimony of Plaintiffs' expert regarding the gypsum located at the Inca Siding. That is too late.

*Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 64-65.) Based on this distinction, a contractual provision requiring the other contracting party to consent to an assignment is limited to an assignment of the right to receive performance under the contract; it does not extend to an assignment of a chose in action for a breach of the contract. (*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 187-188 (*Balfour*) [assignment of right that already has accrued under contract is not barred by contractual provision prohibiting assignment of contract]; *Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 682-684 (*Greco*) [existing claim under insurance policy assignable without insurer's consent despite policy provision requiring insurer to consent to any assignment].) Moreover, when a contracting party assigns a chose in action for breach of an agreement to a third party for collection purposes, the assignor retains an equitable interest in the chose in action even though he or she assigned legal title to allow the assignee to bring an action for damages.<sup>11</sup> (*Fink v. Shemtov* (2012) 210 Cal.App.4th 599, 610-611.)

By failing to address the contrary evidence, the basis for the trial court's judgment, and the law supporting the trial court's judgment, Sun and Galam waived their challenge based on the sufficiency of the evidence to support the trial court's judgment. (See *Rayii, supra*, 218 Cal.App.4th at p. 1408; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956-958 [appellant must affirmatively challenge trial court's ruling and demonstrate error by providing legal argument and authority].)

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<sup>11</sup> In their reply, Defendants for the first time address the *Balfour* case and contend it does not apply, but Defendants cannot attack the basis for the trial court's ruling for the first time in the reply. In any event, Defendants failed to convincingly explain why the general rule in *Balfour* does not apply.

E. *Substantial Evidence Supports the Trial Court's Denial of Defendants' Nonsuit Motion*

Defendants contend the trial court erred by denying their nonsuit motion brought after Plaintiffs presented their evidence at trial. According to Defendants, Plaintiffs lacked standing to bring any of their claims based on the Settlement Agreement and Royalty Agreements because the Assignments transferred all of Plaintiffs' rights under those agreements to Advisors Trust, and therefore Advisors Trust was the only real party in interest with standing to bring this action at the time it was filed. We disagree.

“A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] “In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give ‘to the plaintiff[’s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor.’” [Citation.]” (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 262 (*Adams*).

“In reviewing the denial of a motion for nonsuit . . . appellate courts, like trial courts, must evaluate the evidence in the light most favorable to the plaintiff. [Citation.] Reversal of the denial of a motion for nonsuit . . . is only proper when no substantial evidence exists tending to prove each element of the plaintiff's case.” (*Adams, supra*, 68 Cal.App.4th at p. 263; see *Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 351.)

Code of Civil Procedure section 367 requires every action to be prosecuted in the name of the real party in interest. If the plaintiff is not the real party in interest, he or she lacks standing to proceed with the action. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004 (*Cloud*)). “For a lawsuit properly to be allowed to

continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed.”<sup>12</sup> (*Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 232-233 (*Mervyn’s*); see *Medraza v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 11.) But California courts liberally allow an amendment of the complaint to substitute the real party in interest if the named plaintiff lacks standing. (*Cloud*, at p. 1005.) Lack of standing is a jurisdictional defect that may be raised at any time, including for the first time on appeal. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751.)

“The purpose of the real party in interest requirement is to assure that any judgment rendered will bar the owner of the claim sued upon from relitigating. “It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of some other claimant to the same demand.” [Citations.]” (*O’Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1094.) When a claim has been assigned it generally is the assignee that has standing to bring an action on the claim, not the assignor, because the assignee is the one that holds the claim. (*Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807, 814.) “The plaintiff in a suit upon a chose in action, to qualify as the real party in interest, must have such a title thereto that a judgment against the defendant will protect the latter from future annoyance or loss.” (*Greco*,

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<sup>12</sup> Citing *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 570, fn. 5, Defendants contend “[s]tanding is assessed as of the time the action was commenced.” Defendants are mistaken. As explained above, standing is assessed throughout the action. The *Lujan* decision applied federal standing principles that arise from Article III of the U.S. Constitution and have no application in state court. (*Asarco Inc. v. Kadish* (1989) 490 U.S. 605, 617 [“the state judiciary here chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts. That result properly follows from the allocation of authority in the federal system. We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . .”].)

*supra*, 191 Cal.App.2d at p. 687.) “However, if an assignee consents that the suit be brought by his assignor, an objection that the plaintiff is not the real party in interest will not be ground for reversal because the defendant is fully protected from future action, and the purpose of any objection to the suit upon that ground has been served.” (*Ibid.*)

Here, the settlement between Plaintiffs and Advisors Trust, and their dismissal of all claims regarding the Assignments, constitute substantial evidence supporting the trial court’s decision to deny Defendants’ nonsuit motion. Before filing this action, Plaintiffs entered into the Assignments and transferred their right to bring this action to Advisors Trust. Nonetheless, Plaintiffs filed this action in their own name, prompting Advisors Trust to file a complaint in intervention asserting the Assignments made it the real party in interest on the claims Plaintiffs alleged against Defendants. Advisors Trust alleged identical claims against Defendants as Plaintiffs and also alleged claims against Plaintiffs for breach of the Assignments and various torts. In response, Plaintiffs filed a cross-complaint against Advisors Trust alleging the Assignments were void and unenforceable based on fraud and other misconduct by Advisors Trust.

On the eve of trial, Plaintiffs and Advisors Trust reached a settlement regarding their dispute over the Assignments. Based on the settlement, Advisors Trust dismissed its complaint in intervention, including not only its claims against Plaintiffs but also its claims against Defendants based on the Assignments. Plaintiffs also dismissed their cross-complaint against Advisors Trust. At trial, Plaintiffs and Advisors Trust represented to the court that they had rescinded the Assignments as part of their settlement.

Accordingly, throughout the trial Plaintiffs were the real parties in interest with standing to pursue the causes of action against Defendants because Advisors Trust had abandoned the claim it was the real party in interest and the Assignments had been rescinded. It is irrelevant whether Plaintiffs had standing when they filed this action or at any other time before trial because the record shows Plaintiffs had standing when

Defendants challenged their standing and when the trial court entered judgment. As explained above, standing is assessed throughout the action, and leave to amend to substitute the real party in interest must be liberally granted. (*Mervyn's, supra*, 39 Cal.4th at p. 233; *Cloud, supra*, 67 Cal.App.4th at p. 1005.) Moreover, before Advisors Trust dismissed its complaint in intervention, the purpose of the real party in interest rule was served because all parties claiming to be the real parties in interest were joined in this action and Defendants were protected from anyone bringing a future action based on the same causes of action. (See *Greco, supra*, 191 Cal.App.2d at p. 687.)

Defendants contend there is no admissible evidence in the record establishing the Assignments were rescinded because Plaintiffs and Advisors Trust refused to introduce a copy of their settlement agreement into evidence and the trial court sustained Plaintiffs' objections to all questions regarding the settlement terms and the Assignments' purported rescission. Assuming without deciding that counsel's representation is not sufficient to establish the Assignments were rescinded, the record still includes substantial evidence supporting the trial court's decision to deny Defendants' nonsuit motion.

By intervening in this action and asserting that it was the real party in interest based on the Assignments, and then dismissing all of its claims based upon the Assignments and allowing Plaintiffs to proceed to trial against Defendants on the causes of action it previously claimed it held, Advisors Trust at a minimum consented to allow Plaintiffs to bring those causes of action against Defendants. Defendants therefore are protected from a future action by Advisors Trust based on those same causes of action. We conclude the purpose underlying the real party in interest rule has been served. (*Greco, supra*, 191 Cal.App.2d at p. 687.)

F. *The Trial Court Properly Awarded Plaintiffs Contractual Attorney Fees*

Defendants contend the trial court erred in awarding Plaintiffs contractual attorney fees based on the attorney fee provisions in the Settlement Agreement and Royalty Agreements. According to Defendants, Plaintiffs are not prevailing parties entitled to attorney fees because they breached these agreements by failing to provide Defendants with the 5,000 tons of gypsum located at the Inca Siding and by assigning their rights under the agreements without providing Defendants their right of first refusal. These are the same grounds on which Defendants challenged the trial court's judgment against them on their claim against Plaintiffs for breach of the Settlement Agreement and Royalty Agreements. Defendants do not state any new or additional challenges to either Plaintiffs' entitlement to attorney fees or the amount of fees the trial court awarded. Accordingly, we reject Defendants' challenge to the trial court's attorney fee award for the same reasons we rejected their challenges to the underlying judgment.

G. *The Trial Court Abused Its Discretion By Granting an Assignment Order Regarding the Vermeer Judgment, But Not in Granting an Assignment Order Regarding The Funds in the Client Trust Account*

Defendants contend the trial court erred in granting Plaintiffs' motion for an assignment order regarding the judgment MGM obtained in the *Vermeer* action and any funds Defendants had in their attorney's client trust account. Although we agree the trial court abused its discretion in granting an assignment order regarding the *Vermeer* judgment, we disagree the trial court abused its discretion in ordering the assignment of any other right to payment.<sup>13</sup>

Under Code of Civil Procedure section 708.510, a trial court "may order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment

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<sup>13</sup> Defendants do not challenge the portion of the assignment order directing them to assign to Plaintiffs their rights to "any and all personalty [*sic*] extracted from the [M]ine."

due or to become due, whether or not the right is conditioned on future developments.” (Code Civ. Proc., § 708.510, subd. (a).) Payments subject to assignment include wages, royalties, rents, accounts receivable, general intangibles, and judgments. (*Ibid.*; Leg. Com. com., 17 West’s Ann. Code Civ. Proc. (2009 ed.) foll. § 708.510, p. 383.)

The trial court has broad discretion in determining whether to order an assignment and in fixing the amount. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2015) ¶ 6:1440, p. 6G-45.) In exercising that discretion, the court must consider a variety of factors including the existence and amount of any senior liens or assignments regarding the right to payment that is the subject of the motion for an assignment order. (Code Civ. Proc., § 708.510, subd. (c); *Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 334-335 (*Brown*.) We review the trial court’s decision for abuse of discretion. (*Brown*, at p. 334.)

Here, Defendants contend the trial court abused its discretion in granting an assignment order regarding the *Vermeer* judgment because their attorney also represented MGM in that action, and he holds a lien on the *Vermeer* judgment that was created well before Plaintiffs obtained their assignment order. According to Defendants, their attorney’s senior lien prevented the trial court from ordering them to assign their right to payment under the *Vermeer* judgment.<sup>14</sup> We agree in part.

“A lien in favor of an attorney upon the proceeds of a prospective judgment in favor of his client for legal services rendered . . . may be created either by express contract . . . or it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgment for payment of his fee

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<sup>14</sup> Plaintiffs contend Defendants’ attorney lacks standing to appeal from the assignment order regarding the *Vermeer* judgment, but Defendants’ attorney does not purport to appeal in his own name. Rather, the appeal is brought in Defendants’ name and they are aggrieved parties with standing to appeal because the assignment order directs them to assign a judgment that was entered in their favor. (See *Brown, supra*, 116 Cal.App.4th at pp. 334-335.)

[citations].’ [Citation.] ‘An attorney’s lien is created and takes effect at the time the fee agreement is executed.’ [Citation.] ‘Unlike a judgment creditor’s lien, which is created when the notice of lien is filed [citation], an attorney’s lien is a “secret” lien; it is created and the attorney’s security interest is protected even without a notice of lien. [Citations.]’” (*Brown, supra*, 116 Cal.App.4th at p. 327.)

Because an attorney is not a party to an action in which he or she represents a client, the trial court in that action lacks jurisdiction to determine the validity or amount of any lien the attorney claims in the prospective judgment, even if a third party seeks to establish an interest in the same judgment. (*Brown, supra*, 116 Cal.App.4th at pp. 328-329.) To establish a lien’s existence and amount, an attorney must bring a separate, independent action against the client even if the client does not dispute the lien. (*Id.* at p. 329.) An attorney’s duty of loyalty, however, prevents the attorney from bringing an action against his or her client while the attorney continues to represent the client. The attorney therefore may not bring an action to establish or enforce a lien on a client’s judgment until the representation is complete or it has been terminated by either the client or attorney. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548-549, overruled by statute on other grounds as stated in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077; Rules Prof. Conduct, rule 3-310.)

Although third parties may not have notice of an attorney’s lien if the attorney fails to file a notice of lien, the lien still has priority over any other lien or assignment created after the attorney’s lien because priority is based on the time of creation. (*Brown, supra*, 116 Cal.App.4th at p. 328; Civ. Code, §§ 955.1, 2897.) “[P]ublic policy favors th[is] conclusion. . . . If an attorney’s claim for a lien on the judgment based on a contract for fees earned prior to and in the action cannot prevail over the lien of a subsequent judgment creditor, persons with meritorious claims might well be deprived of legal representation because of their inability to pay legal fees or to assure

that such fees will be paid out of the sum recovered in the latest lawsuit. Such a result would be detrimental not only to prospective litigants, but to their creditors as well.”” (*Brown*, at p. 328.)

When the trial court issued its assignment order, the foregoing rules prohibited Defendants’ attorney from taking any action to establish the existence or amount of his lien in the *Vermeer* judgment because he still represented MGM on the pending appeal challenging that judgment. *Brown* presented a similar situation. There, an attorney claimed a lien in a judgment he obtained for his client, but he had not brought an action to establish the validity or amount of that lien. Another of the client’s creditors also claimed a lien on the same judgment and successfully applied for an order directing the judgment debtor to pay the judgment to the creditor, although the creditor’s lien was junior to the attorney’s lien if the attorney’s lien was valid. (*Brown, supra*, 116 Cal.App.4th at pp. 324-326.) The *Brown* court reversed the order, finding it was “an abuse of discretion for the trial court to direct payment of the judgment proceeds to [the creditor] without giving [the attorney] a fair opportunity to first litigate the validity of his lien claim in a separate action.” (*Id.* at p. 335.) The Court of Appeal emphasized that the attorney could not “hold the . . . judgment hostage indefinitely,” and therefore remanded for the trial court to determine whether the attorney had been given a fair opportunity to establish his lien because a significant amount of time had passed since the judgment was entered and the attorney had not brought an action to establish and enforce his lien. (*Id.* at pp. 335-336.)

Accordingly, contrary to Defendants’ contention, the lien their attorney claims in the *Vermeer* judgment does not prohibit the trial court from granting an assignment order regarding that judgment. *Brown*, however, compels the conclusion the trial court abused its discretion by granting the assignment order regarding the *Vermeer* judgment before Defendants’ attorney had a fair opportunity to bring an action to establish the existence and amount of his lien. As explained above, Defendants’ attorney

could not bring an action to establish the validity and amount of his lien before the trial court issued its assignment order because the attorney continued to represent MGM on the pending *Vermeer* appeal. In reaching this decision, we do not express any opinion about the validity of the lien Defendants' attorney claims, nor do we decide whether the attorney has had a fair opportunity to bring a separate action now that the judgment in *Vermeer* has become final.<sup>15</sup>

Defendants also contend the trial court abused its discretion in granting an assignment order regarding any funds their attorney held in his client trust account that "directly related to defendant Mike Galam[']s representation." According to Defendants, granting Plaintiffs any interest in funds held in their attorney's client trust account violates not only the attorney-client privilege existing between Defendants and their attorney, but also between their attorney and his other clients. Defendants misconstrue the nature of the assignment order.

As explained above, an assignment order simply requires a judgment debtor to assign to a judgment creditor the debtor's "right to payment due or to become due, whether or not the right is conditioned on future developments." (Code Civ. Proc., § 708.510, subd. (a).) Nothing in the trial court's order purported to require Defendants' attorney to disclose any attorney-client communications between Defendants and their attorney, let alone Defendants' attorney and his other clients. Similarly, the order does

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<sup>15</sup> Defendants also contend the *Vermeer* judgment is not assignable because it currently is on appeal and one of the issues presented is whether the trial court erred in granting nonsuit on MGM's tort claims. According to Defendants, the continued existence of these tort claims renders the entire judgment nonassignable. We need not address this contention for two reasons. First, we reverse the assignment order based on the trial court's failure to give Defendants' counsel a fair opportunity to establish his lien. Second, the Court of Appeal has affirmed the trial court's judgment in *Vermeer* and that judgment is now final. As Defendants concede, even personal tort claims are assignable once they are reduced to a final judgment. Moreover, the final judgment is for breach of an express warranty only, which is not a personal tort.

not require any sort of accounting regarding the attorney's client trust account that may disclose privileged information. Rather, the order simply requires Defendants to assign to Plaintiff the right to receive any funds held in their attorney's client trust account that belong to Defendants rather than the attorney.

It is common practice for attorneys to require some clients to maintain a balance with the attorney to cover future work. As the attorney performs that work, he or she either withdraws the funds from the client trust account after the work is performed or after the client fails to pay a bill in a timely manner. (See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 6-7.) Advanced fees such as these remain the property of the client until they are earned, and the client is entitled to a refund on any unearned fees. (See Rules Prof. Conduct, rule 3-700(D)(2); *Matthew v. State Bar* (1989) 49 Cal.3d 784, 787-788.) Sometimes a client also will have an attorney simply hold funds for the client for a variety of reasons. Again, these funds belong to the client even though the attorney is holding them. (See *T & R Foods*, at pp. 6-7.) Here, the assignment order simply requires Defendants to assign to Plaintiffs their right to receive any funds that may be deposited in their attorney's client trust account, but which they are nonetheless entitled to receive. Defendants cite no authority and provide no explanation how this violates the attorney-client privilege or is an impermissible use of an assignment order.

H. *Defendants Waived Any Challenge to the Trial Court's Award of Postjudgment Attorney Fees*

Defendants contend the trial court erred in awarding Plaintiffs postjudgment attorney fees, but they fail to provide any of the papers or orders regarding Plaintiffs' motion for those fees. The register of actions reveals Plaintiffs filed a motion seeking an award of postjudgment attorney fees, presumably the fees they incurred in seeking to enforce the judgment through the assignment order and other means. The register of actions also shows that Defendants filed an opposition to that motion, Plaintiffs filed a reply, and the court conducted a hearing at which it awarded nearly

\$13,000 in postjudgment attorney fees. Defendants, however, failed to include any of these documents in the appellate record. Indeed, we only learned the trial court awarded postjudgment attorney fees after consulting the register of actions and the amended judgment.

As the appellants, Defendants bore the burden to provide an adequate record that enables us to review the trial court's award of postjudgment attorney fees. "Having failed to do so, the [award] must be affirmed. [Citation.] This is so because "[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . ." [Citation.]" [Citations.]" [Citation.] "The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court [erred]." (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 ["Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]"].)

Without any of the papers relating to the motion for postjudgment attorney fees, we have no information about what authority Plaintiffs relied on in seeking fees, the number of hours for which the court awarded fees, or the tasks for which the court awarded fees. Without this and other information, we cannot evaluate whether the trial court erred, and therefore Defendants waived any challenge to this fee award.

III  
DISPOSITION

The motion to dismiss the appeal is granted as to SMC, but denied as to all other Defendants. The judgment is affirmed in its entirety. The postjudgment orders are reversed and remanded as to the assignment order regarding the *Vermeer* judgment, but affirmed in all other respects. Plaintiffs shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.