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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LEGENDARY INVESTORS GROUP  
NO. 1, LLC,

Plaintiff and Appellant,

v.

DANIEL J. NIEMANN et al.,

Defendants and Respondents.

B281915

(Los Angeles County  
Super. Ct. No. BC435774)

LEGENDARY INVESTORS GROUP  
NO. 1, LLC,

Plaintiff and Respondent,

v.

DANIEL J. NIEMANN et al.,

Defendants and Appellants.

B283352

(Los Angeles County  
Super. Ct. No. BC435774)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed in part and reversed in part.

The Soni Law Firm, M. Danton Richardson and Leo E. Lundberg, Jr., for Plaintiff and Appellant.

Zimmerman, Axelrad, Meyer, Stern & Wise, Brian W. Zimmerman, Nicholas Reisch; and Ernesto F. Aldover for Defendants and Appellants.

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Plaintiff Legendary Investors Group No. 1, LLC, appeals from the judgment entered in favor of defendants and respondents Daniel J. Niemann, NPI Century City, LLC, and Neiman Properties, Inc., in Legendary's action to enforce respondents' construction loan guaranty. We affirm because the issue of Legendary's standing to sue was properly raised and adversely determined against it by the jury. We also reverse and remand the separately appealed order granting Legendary's motion to tax costs related to travel expenses incurred by respondents' counsel.

## **FACTS AND PROCEDURAL HISTORY**

### *1. The First Trial*

In 2007, East West Bank issued a \$9.3 million line of credit to DB NPI Century City, LLC (DP NPI), for the construction of a condominium complex on Beverly Glen Boulevard. The loan was secured by a deed of trust and was guaranteed by Daniel J.

Niemann, NPI Century City, LLC, and Neiman Properties, Inc.<sup>1</sup> After determining that the property's value had dropped, East West demanded that the parties put up more money. East West then issued a standby letter of credit for more than \$955,000 after that amount was deposited by Nieman Properties and a principal of DB NPI.

Construction delays prevented completion of the project by the time the loan came due in 2009, leading East West to draw on the letter of credit. East West then sold the loan documents, including the note, deed of trust, and loan guaranty, to Legendary Investors Group No. 1, LLC (Legendary) for \$4.5 million, leaving a balance due of more than \$5.4 million. DB NPI rejected Legendary's demand for payment. Legendary assigned the note and guaranty to its wholly-owned subsidiary, Legendary Century City, LLC (LCC), and LCC foreclosed on the deed of trust, buying the property for a little more than \$2 million.

Legendary, not LCC, sued respondents and DB NPI to recover the deficiency, but later stipulated to dismiss DB NPI. The matter went to trial against respondents, but the trial court granted respondents' nonsuit motion, finding that the debt had been extinguished when East West drew down on the letter of credit. We reversed that judgment and remanded the matter for a new trial. (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407.)<sup>2</sup>

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<sup>1</sup> We will refer to Daniel J. Niemann, NPI Century City, LLC, and Neiman Properties, Inc. collectively as respondents.

<sup>2</sup> Our statement of facts up to this point comes primarily from our prior decision.

## *2. The Second Trial<sup>3</sup>*

### *2.1 November 9 Proceedings*

The second trial began in November, with Legendary calling one of its principals, attorney Surjit Soni, as its only witness. On cross examination, Soni was asked whether LCC, not Legendary, had foreclosed on the property and purchased it by way of credit bid. Soni responded that title was to be held by LCC. Soni said he did not recall whether that meant the trust deed had been assigned to LCC, stating, “You would have to show it to me.”

In order to refresh Soni’s recollection, respondents’ counsel showed him Exhibit 723, a trustee’s deed upon sale, reflecting that the property had been assigned from Legendary to LCC. Legendary’s counsel made a relevancy objection when respondents’ counsel asked whether that document refreshed Soni’s recollection about the assignment. The objection was overruled, and Soni said it had refreshed his recollection to that effect.

As respondents questioned Soni further about the document, Soni said he was having trouble reading it. However, Soni said the document was a “lead sheet for a recorded document,” and acknowledged that he had signed it. When respondents offered the exhibit in evidence, Legendary made the following objection: “Relevance. 352. It wasn’t identified on the exhibit list.” Respondents countered that, because Soni said he was having trouble reading it, admitting the document was necessary in order to make a clear record of its contents.

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<sup>3</sup> Our statement of facts for the second trial focuses on the dispositive standing issue. When we refer to dates in November, unless otherwise indicated we refer to November of 2016.

Legendary's objections were overruled.

## *2.2 November 10 Proceedings*

The next day, November 10, the parties and the court were discussing the special verdict form. In light of Soni's testimony about LCC, respondents proposed that question No. 4 should ask whether Legendary owned all the rights and liabilities of the original East West loan documents. That prompted a discussion about whether Legendary had standing to bring the action in light of its assignment of its rights to LCC, with the trial court stating that Legendary had to prove that it acquired those rights as part of its prima facie case.

Respondents argued that Legendary did not have standing based on Soni's testimony the day before concerning the assignment to LCC. Legendary questioned why the issue was being raised for the first time at that point in the proceedings. The court responded that standing was a jurisdictional issue that could be raised at any time. The court indicated that standing was a legal issue, but also wondered whether it might be a factual issue for the jury. In any event, the court said that "standing's an issue . . . [that] has been raised," adding that "counsel will take a look at that."

Later that day the court clarified that the parties were to brief the issue, including whether a nonsuit would be proper. The parties were ordered to prepare briefs on the issues and submit them for the next court day, November 14.

The parties came back to that topic a short time later that same day. Legendary said it had been "blindsided" by exhibit No. 723, but did not request a continuance or other remedy. Legendary's lawyer said the exhibit did not address "what

happened after this.” The court responded, “[t]here’s always redirect,” to which Legendary replied, “Trust me, I will get to it,” adding that he “will be talking with my client about it over the weekend.”

### *2.3 November 14 Proceedings*

When the trial resumed on November 14, Soni testified on redirect examination that the note and guaranty had previously been transferred back to Legendary from LCC by way of an oral assignment. On recross-examination, Soni admitted that the plaintiff in this case had to own the note and guaranty before it could sue. However, he insisted that Legendary owned those rights due to the oral assignment from LCC. Soni said that as the managing member of LCC he orally assigned the rights back to parent company Legendary, but acknowledged that there was no written documentation of any kind to show that the oral assignment had taken place.

Also that day the parties filed briefs related to the standing issue. Legendary filed a brief based on Soni’s testimony that the guaranty had been assigned back to Legendary from LCC, arguing that, as a result, Legendary definitively had standing to sue. Legendary alternatively argued that if LCC had standing instead, then the court should either substitute in or add LCC as a party because respondents would not be prejudiced by that amendment . Respondents filed two briefs that did not address Soni’s new testimony.<sup>4</sup> In one, respondents argued that Soni’s earlier testimony about the assignment from Legendary to LCC

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<sup>4</sup> This comes as no surprise, because the briefs must have been prepared over the weekend before Soni’s testimony on redirect.

raised an undisputed question of law concerning the lack of standing based on that assignment. In the other, respondents moved for a nonsuit due to Legendary's lack of standing.

At the end of the morning session that day, after Legendary had rested its case in chief, the court and the parties discussed the various motions related to the standing issue. The court expressed surprise at Soni's testimony about the supposed oral assignment back to Legendary, questioning whether such an assignment might be subject to the statute of frauds. Noting that respondents' briefs had been filed before Soni testified, the court asked for further briefing on the statute of frauds issue and allowed respondents to file supplemental briefs on the standing issue in light of Soni's testimony. The court said it would take up those matters the next day.

#### *2.4 November 15 & 16 Proceedings*

When the trial court resumed on November 15, the court noted that Legendary's further briefing had not yet been filed but was on the way. The court said that the issues raised were serious, required serious consideration, and might require further research by the court. The court also said it hoped to hear argument on the nonsuit motion the following day. Later that day Legendary filed a brief arguing that an oral assignment was valid and did not need to comply with the statute of frauds, that the evidence concerning an oral assignment was undisputed, thereby posing a legal question for the court, and that, as a matter of law, Legendary had standing to pursue the action. Legendary also argued that standing was a "non issue" because the complaint could be amended to conform to proof that LCC had standing if necessary, or otherwise add LCC as a party, all

without detriment to respondents.

On November 16, the court asked the parties to submit further briefing on the statute of frauds issue on the next court day, November 17.

### *2.5 November 17 Proceedings*

On November 17, respondents submitted a supplemental brief on their nonsuit motion. Although they acknowledged that the statute of frauds did not apply to an oral assignment of contract rights in this case, they contended that a nonsuit was proper because Soni's testimony concerning the purported oral assignment was legally insufficient. If the trial court concluded that Soni's testimony were sufficient, then the issue concerning whether the oral assignment occurred was one of fact for the jury. Finally, respondents opposed any effort to amend the complaint because Legendary had six years to do so and because Legendary was still trying to prove that the assignment occurred and that it had standing.

At that point, the defense case was winding down and the day began with the court telling counsel that it had reconsidered its earlier unrelated decision to let the jury render advisory findings on respondents' equitable defense of unclean hands. Complicating that was the court's decision to allow evidence on that issue. The court was concerned that the jury could not reach the unclean hands issue without impermissibly engaging in contract interpretation. The trial court and counsel discussed ways to minimize the impact of that evidence on the jury's contract interpretation findings. Another factor raised by the court was the potential loss of jurors as the trial continued on.

Intertwined with this lengthy discussion was the standing



issue and how best to resolve it. Legendary wondered whether there were in fact any issues for the jury to resolve, given respondents' testimony that the loan had not been repaid, and raised the possibility of a mistrial. The standing issue, Legendary contended, was a purely legal issue that should be handled through respondents' nonsuit motion. Legendary chose not to seek a mistrial.

Legendary continued to assert that the standing issue raised a question of law for the court, while the court indicated it posed a factual question for the jury based on its determination of Soni's credibility. Ultimately it was agreed to have the jury determine whether Legendary had made out its prima facie case, leaving the unclean hands defense to the court. Most of the discussion then focused on how to instruct the jury in regard to the unclean hands evidence it had already heard.

Soni was present and personally participated in this discussion. When it came to framing the standing issue for the jury, Soni suggested that the question for the jury was "whether an assignment actually took place period. Not whether a valid assignment took place. That's for your honor to decide." The trial court agreed, and accepted Soni's suggestion that the statute of frauds issue be resolved as part of respondents' nonsuit motion. The key exchange for our purposes followed soon after:

THE COURT: *"So, it seems the parties' desire is to have the jury determine the issue of was there an . . . [¶] . . . assignment from Legendary Century City to Legendary Investors Group.*

*"And if the jury finds no, there was not, then that would—anyway, I guess that would moot out the non-suit.*

*"If the jury finds yes, at that point the jury—I mean, the*

court could decide the non-suit based on the statute of frauds issues?

“I don’t have plaintiff’s brief, I just got defendants’ brief.

*“Is that the preferred way of proceeding?”*

MR. RICHARDSON [Legendary’s counsel]: *“Yes your honor.*

MR. SONI: “Seems we have limited choices.

THE COURT: “Well, there are limited choices. But there are always limited choices.

MR. RICHARDSON: “Given where we are, I think that’s the proper course.” (*Italics added.*)

## *2.6 November 18 Proceedings*

On the morning of November 18, shortly before closing arguments were to begin, the court and counsel discussed the special verdict form that would go to the jury. Counsel for both sides agreed that the first three questions would concern contract formation and performance questions as between East West Bank and respondents. If those questions were answered in Legendary’s favor, counsel agreed that the jury would continue on to question No. 4, which asked: “Did Legendary Investors Group, No. 1, LLC, acquire all the rights under Commercial Guaranty contracts by way of oral assignment from Legendary Century City, LLC?” If the answer were yes, the jury was directed to continue on and reach issues concerning the merits of the case. If the answer were no, the jury was directed to stop and sign the verdict form. ~ (9RT 3001-3019; AA 2584-2586)~

Later that day, as the jury deliberated, the court finally took up the parties’ competing motions for nonsuit and to amend the complaint. Respondents contended that nonsuit was proper

because Soni's testimony regarding the oral assignment was conclusory and therefore legally insufficient to establish Legendary's standing. Legendary responded that Soni "said he assigned it," but went on to argue that it made no difference because LCC was its wholly-owned subsidiary that was formed solely to take title to the property and that it was a simple matter of adding in or substituting LCC as a party.

Respondents countered that it would be improper to amend the complaint to include LCC after Soni testified under oath that the assignment back to Legendary had occurred: "The court cannot all of a sudden just substitute parties to correct that because the only way the court can do that is if the court decides Mr. Soni's testimony was not true. Because, otherwise, according to [Legendary], the right party in this case is [Legendary] not [LCC]. [¶] He got up and . . . testified [LCC] assigned the note back. [¶] There are no . . . cases under those circumstances saying that it's appropriate to substitute a party in."

Respondents pointed out that ". . . Mr. Soni got on the stand, testified as to actions he supposedly took to transfer this assignment. And he is the one that declared that [Legendary] is the right party. [¶] He is stuck with that testimony."

The trial court agreed with respondents and denied both the motion to amend and the nonsuit motion on the ground that there were factual issues concerning the assignment that the jury had to resolve. The court said that amending the complaint to include LCC would "not be appropriate because the principal Mr. Soni unequivocally testified that he . . . effectuated an oral assignment from [LCC] to [Legendary], who is the plaintiff that initiated this case." By granting the motion to amend the court "would essentially be saying that it was an invalid oral

assignment or the court just doesn't believe Mr. Soni. [¶] This isn't an error. There is again unequivocal testimony of an oral assignment."

The trial court went on to note the general rules that the party asserting an assignment of rights had the burden of proving the assignment and that actions may be prosecuted by only the real party in interest—the party who has the right to maintain the action. The court concluded by reiterating that there was competent evidence from Soni concerning the oral assignment, that the jury had been instructed on how to evaluate the credibility of witnesses, and that the issue was for the jury to decide.

The jury reached its verdict soon after, finding that LCC had not assigned the contract rights back to Legendary. Nothing else was said by the court or the parties concerning the standing issue, and the jury was excused.

### *3. Post-Trial Motions*

In January 2017, Legendary filed objections to the proposed judgment, along with a request for leave to amend the complaint to add LCC as a party, arguing that the standing issue had been raised too late and that the amendment would prevent a defense judgment on a mere technicality because LCC's addition as the plaintiff would not change the theory of the case, the evidence relied on, or otherwise prejudice respondents. The court denied the request and judgment for respondents was entered on January 17, 2017.<sup>5</sup>

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<sup>5</sup> The appellate record does not include the trial court's ruling. However, the court referenced its denial of the request as

Legendary then brought motions for new trial and judgment notwithstanding the verdict (JNOV), based in large part on asserted errors in connection with the standing issue.<sup>6</sup>

The JNOV motion argued that there was insufficient evidence to support the verdict because the court erred by placing on Legendary the burden of proof on the standing issue, and that the court should vacate the judgment and either: grant judgment for Legendary; add LCC as a party and grant judgment for LCC; or remand for a new trial.<sup>7</sup>

The new trial motion raised similar issues in regard to standing: (1) respondents were third parties to the assignment and therefore had no standing to challenge it; (2) Legendary was the victim of trial by ambush and was therefore unfairly surprised by the standing issue; (3) there was insufficient evidence to support the jury's finding on standing; (4) the court erred by putting the burden of proof on Legendary in regard to standing; (5) given the technical nature of the standing issue, the privity between Legendary and LCC, and the absence of any prejudice to respondents, the trial court should amend the complaint to add LCC as plaintiff and award judgment in its favor or, alternatively, vacate the judgment, allow the

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part of its ruling on Legendary's motions for new trial and judgment notwithstanding the verdict, which we describe next.

<sup>6</sup> These motions, as well as this appeal, also raised issues related to the conduct of the trial and the merits of the case apart from the standing issue. As discussed *post*, we need not reach most of those issues.

<sup>7</sup> Legendary also asked the court to declare a post-trial mistrial.

amendment, and set the matter for retrial.

The trial court, by way of a lengthy and comprehensive written order, denied both motions. The court ruled that: Legendary had the burden of proving it had standing; respondents were not prevented from raising the standing issue even though they were third parties to the assignment; Legendary could not have been surprised by evidence concerning the written assignment to LCC and the supposed oral reassignment back to Legendary where its principal, Soni, testified that he was aware of and took part in these matters; there was contradictory but substantial evidence that the assignment from LCC did not occur; the motion to amend was an improper motion for reconsideration of the trial court's previous denials of the same motion; Soni's unequivocal testimony that LCC assigned the contract rights to Legendary would make the addition of LCC as a plaintiff a "legal nullity"; and leave to amend is not a proper ground for a new trial motion.

#### *4. The Motion To Tax Costs For Travel Expenses*

For the first two years of this litigation, respondents were represented by a Los Angeles area law firm. Since that time, respondents employed as co-counsel and lead counsel a Texas law firm. In February 2017, respondents submitted a costs memorandum seeking, among other things, reimbursement for Texas counsel's travel expenses, including food and lodging, as follows: To attend depositions, \$12,541.69; to attend trial and other proceedings, \$61,848.76. Legendary moved to tax those costs on the ground that the use of out-of-state counsel was not reasonably necessary when local counsel was available. The trial court agreed with Legendary and taxed those costs. Respondents

filed a separate appeal from that order, and on June 22, 2018, we ordered that both appeals were to be heard and decided concurrently.

## DISCUSSION

### 1. *Legendary's Contentions Regarding Standing*

In keeping with the issues raised in its post-trial motions, Legendary raises several challenges as to how the standing issue was resolved on several grounds. It contends that: (1) a new trial was warranted on the ground of surprise (Code Civ. Proc., § 657, subd. 3); (2) respondents' delay in raising the issue amounted to a trial by ambush; (3) the trial court erred by placing the burden of proof on this issue on Legendary; (4) there was insufficient evidence to support the jury's finding that the oral assignment to Legendary did not occur because Soni's testimony was uncontradicted; (5) respondents lacked standing to challenge the assignment because they were third parties to that agreement; and (6) the trial court erred by denying its motion to amend the complaint because the standing issue was a mere technicality, and because there would have been no prejudice to respondents where the plaintiff's theories and evidence remained unchanged.

### 2. *General Principles Relating To Standing*

"Standing is a threshold issue, because without it no justiciable controversy exists. [Citation.]" (*Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445 (*Iglesia Evangelica Latina*).) "Every action must be prosecuted in the

name of the real party in interest, . . .” (Code Civ. Proc., § 367.) In general, the person possessing the right sued upon is the real party in interest. (*Iglesia Evangelica Latina*, at p. 445.) In order to have standing a party must be beneficially interested in the controversy and have some special interest to be served or some particular right to be protected. However, this interest “must be concrete and actual, and must not be conjectural or hypothetical.” (*Ibid.*, citations omitted.) “A party who is not the real party in interest lacks standing to sue because the claim belongs to someone else.” (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 690.)

A general guaranty passes with the transfer of the note it is securing. (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1501.) One suing as an assignee must plead and prove the assignment to recover on the assigned claim. (*Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1091.)

### *3. Denial Of The Motion To Amend Was Not An Abuse Of Discretion*

Under Code of Civil Procedure sections 473, subdivision (a)(1) and 576, the trial court has broad discretion to permit amendments to pleadings that, among other things, add or strike out the names of parties when it is in the furtherance of justice to do so. Courts must liberally permit such amendments at any stage of the proceedings, including during trial, when no prejudice to the opposing party is shown. (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 701, 706 (*Eng*)). This rule of liberality applies where the plaintiff has been determined to lack standing, or has lost standing during the trial. (*Branick v. Downey Savings*



& *Loan Assn.* (2006) 39 Cal.4th 235, 243.)

In ruling on a motion to amend, the trial court should be guided by two general principles: Whether the facts or legal theories will change as a result of the amendment, and whether the opposing party will be prejudiced. If the facts do not change, there is no prejudice even if the legal theory changes. (*Eng, supra*, 21 Cal.App.5th at p. 700.) Among the factors to be considered are the conduct of the moving party and the belated presentation of the amendment. Unwarranted delay in seeking an amendment may, by itself, be a valid reason for denial. (*Id.* at p. 707.) The appellant has the burden of showing that the trial court's ruling on such a motion was an abuse of its discretion. (*Ibid.*)

In the ordinary case, the denial of Legendary's motion to amend might have been an abuse of discretion. It appears undisputed that neither the facts nor the theories supporting Legendary's action would have changed had its wholly-owned subsidiary, LCC, become the plaintiff. However, this was no ordinary case.

As we read the record, after the standing issue was brought up on November 10, Legendary decided that Soni would testify to the purported oral assignment, and then raised the prospect of amending the complaint on the next court day, November 14, contending that the issue presented a question of law for the trial court. However, Legendary did not press for an immediate ruling on the standing issue, and the trial court did not reach the issue until after the jury had begun deliberating four days later.

During this period, Legendary instead: insisted that Soni, acting as a principal of LCC, had orally assigned the guaranty rights back to Legendary; agreed to submit the issue to the jury;

and approved a verdict form that stopped the jury from reaching the merits of the case and instead required a verdict for respondents if the jury found against Legendary on the standing issue.

Our characterization of the facts is based on the sequence of events set forth in section 2 of our Facts and Procedural History, particularly by: (1) the colloquy on November 17 where Legendary's counsel, in the presence and with the apparent acquiescence of Soni, agreed with the court that the "parties' desire" and the "preferred way of proceeding" was to have the jury determine whether the purported oral assignment by LCC occurred, and that a negative finding would "moot out" respondents' non-suit motion on the standing issue; (2) Legendary's next-day agreement to the verdict form that inexorably required a verdict for respondents if the jury were to find that the LCC assignment had not taken place; and (3) leaving a ruling on Legendary's motion to amend until the jury was deliberating its fate on the standing issue.<sup>8</sup>

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<sup>8</sup> Legendary's statement of facts in its appellate briefs does not mention or address these critical facts. When questioned about these facts at oral argument, Legendary disputed that it had agreed to let the jury decide the standing issue, pointing to its earlier assertions that the issue was one of law for the trial court. Regardless of what had transpired before, however, Legendary did not renew the argument when the court confirmed that the parties desired to proceed in the manner we have described. Instead, taking the record at face value, Legendary manifested a clear agreement at trial with that procedure. As a result, Legendary cannot complain on appeal about a ruling that it agreed to. (*Astorga v. Retirement Bd. of Santa Barbara County Employees Retirement System* (2016) 245 Cal.App.4th 386, 390.)

As a result of this procedural arrangement, Legendary found itself making the following requests: (1) to amend the complaint to conform to proof that LCC had standing because it had not assigned the guaranty rights back to Legendary, but doing so while Legendary was still trying to prove the exact opposite; and (2) adding LCC as a plaintiff while its standing was in dispute, pending the outcome of the verdict. Neither was legally tenable. (See e.g., *Kimball v. Swenson* (1921) 51 Cal.App. 361, 364 [motion to amend answer to raise new issue properly denied “because the evidence was directly contrary to the allegations of the proposed amendment.”]; Code Civ. Proc., § 367 [“Every action must be prosecuted in the name of the real party in interest”]; *Iglesia Evangelica Latina, supra*, 173 Cal.App.4th at p. 445 [in general, the person possessing the right sued upon is the real party in interest].)

It seems to us that Legendary had two courses of action available to it. The first would have been to timely concede that LCC was the proper plaintiff and seek leave to amend on the ground that the amendment would in no way prejudice respondents. The second would have been to submit the issue to the jury, but request bifurcation of the standing issue so that Legendary could then seek an amendment to conform to proof if necessary. Under either scenario, there would have been a

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Our analysis would not change even if we considered Legendary’s assertion that it had preserved its objection to letting the jury decide the issue. First, as set forth in section 4 of our Discussion, *post*, the issue was one of fact that the jury properly decided. Second, the record still shows that Legendary painted itself into a corner when it took its chances on the jury’s verdict without making adequate procedural provisions in case the jury found against it on the standing issue.

strong case for amending the complaint, but Legendary did neither. Instead, it left the issue for the jury to resolve, with no escape hatch in case of an adverse finding, and improperly sought to amend while the factual issue was still before the jury. On this unique record, we hold that the trial court did not abuse its discretion in denying the motion to amend.

#### 4. *The Verdict Is Supported By Substantial Evidence*

Legendary contends there is insufficient evidence to support the jury's finding on the standing issue because the only evidence introduced was Soni's uncontradicted testimony that the oral assignment took place. We disagree.

We review a challenge to the sufficiency of the evidence under the substantial evidence test. "Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible, and of solid value." (*San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 740.) We view the evidence in the light most favorable to the judgment and accept as true all evidence tending to support the judgment, including facts that reasonably can be deduced from the evidence. (*Ibid.*)

The trier of fact may reject uncontroverted testimony if there is a rational basis to do so. (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 518; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 12.)

When first asked about the assignment from Legendary to LCC on cross examination, Soni testified that he did not recall it until being shown a document reflecting the assignment. When trial resumed after the weekend recess, Soni testified that, acting as a principal of LCC, he had previously transferred the guaranty

rights back to Legendary by way of an oral assignment. That was done so Legendary could bring this action, Soni testified. However there were no documents reflecting or memorializing that the assignment occurred, and Soni could not recall whether he had ever mentioned the oral assignment to his primary business associate.

We conclude that the jury was free to view Soni's testimony with suspicion. The jury could have simply refused to believe that Soni, as an attorney, would have made an oral assignment in order to allow Legendary to pursue this action instead of LCC, and that he would have made no record of the transaction or corroborated it in some way. As a result, we hold that there was sufficient evidence to support the jury's verdict.<sup>9</sup>

*5. Legendary's Remaining Contentions Regarding  
Standing Lack Merit*

Legendary also contends that: (1) respondents should not have been allowed to raise the standing issue so late in the proceedings; (2) respondents lacked standing to challenge the oral assignment; (3) the trial court erred by giving it the burden of proof on the standing issue; and (4) a new trial motion and concomitant amendment of the complaint should have been granted on the ground that the late-raised standing issue amounted to surprise. None is well taken.

In order for a lawsuit to continue, "standing must exist at

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<sup>9</sup> Because there were disputed fact issues concerning standing, it was a question of fact for the trier of fact to resolve. (*Stofer v. Shappell Industries, Inc.* (2015) 233 Cal.App.4th 176, 189–190; *Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1510 [standing is question of law *when the facts are undisputed*].)

all times until judgment is entered and not just on the date the complaint is filed.” The issue of standing is jurisdictional and may be raised at any time in the proceedings. (*Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 232–233.) Therefore, respondents were free to raise the standing issue when they did.

Legendary cites several decisions for the proposition that a third party to an assignment may not challenge the validity of that assignment. However, none concerns the precise issue here—whether or not a plaintiff has standing to pursue an action based on a purported assignment. Therefore, none is applicable.

As for who bore the burden of proof, “[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. [Citations.] At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.”” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 327, citations omitted.) In short, the burden of proof belonged to Legendary.

Finally, assuming for the sake of argument that the standing issue constituted surprise for purposes of a new trial motion, the right to a new trial on that ground is waived if the issue is not called to the court’s attention by way of a motion for continuance or other relief. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432; *Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 742.) Legendary does not contend, and the record does not show, that Legendary ever requested a continuance when the standing issue

was raised.

*6. Legendary Was Not Prejudiced By Any Other Asserted Errors*

Legendary also raises on appeal several other issues not related to the standing issue. These include: (1) the trial court's failure to bifurcate the equitable defense of unclean hands; (2) the admission of supposedly prejudicial evidence of bad acts by the original lender; (3) certain misconduct by respondents' counsel during closing argument; (4) the denial of its motions for summary judgment and summary adjudication of issues; and (5) the trial court's rulings on various motions in limine.

As to the first three, each relates to evidence of bad faith by original lender East West, along with a sympathetic appeal about Neiman's virtues as a family man. To the extent Legendary asserts that misconduct occurred during closing argument, it objected to only two such instances, but did not request a curative admonition. It has therefore waived all of its misconduct claims. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794–795.) As to each of the first three, we also find speculative Legendary's assertion that the jury was misled to find against Legendary on the standing issue because it heard evidence of bad conduct by East West.

That leaves Legendary's contentions concerning the in limine and summary judgment and summary adjudication rulings. Because we affirm based on Legendary's lack of standing, however, these asserted errors are harmless and we need not reach them. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1525, 1526 [in action to recover brokers' commission, trial court's grant of nonsuit based on error in

disregarding plaintiffs' evidence that they procured the sale was harmless because plaintiffs lacked standing to sue defendant sellers].)

*7. The Trial Court Erred By Categorically Taxing  
Travel Costs Incurred By Out-of-State Counsel*

As the prevailing party, respondents were entitled to recover their costs. (Code Civ. Proc., § 1032, subds. (a)(4), (b).) Those costs listed in subdivision (a) of Code of Civil Procedure section 1033.5 (section 1033.5) are recoverable as a matter of right. (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 737–738.) Among these are travel costs to attend depositions. (Code of Civ. Proc., § 1033.5, subd. (a)(3)(C).) Certain categories of expenses are not recoverable as costs except when expressly authorized by law. (*Id.* at subd. (b).) Expenses not listed in either subdivision (a) or (b) are allowable in the court's discretion. (*Id.* at subd. (c)(4).) Travel expenses other than for depositions are not listed in either subdivision (a) or (b), and are therefore allowable within the court's discretion.

Regardless of whether an expense is recoverable as a matter of right under subdivision (a) of section 1033.5 or recoverable in the court's discretion under subdivision (c), the expense must be both reasonable in amount and reasonably necessary to the conduct of the litigation, rather than merely beneficial or convenient. (Code Civ. Proc., § 1033.5, subd. (c)(2); *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1558 & fn. 5 (*Seever*).)

The court in *Thon v. Thompson* (1994) 29 Cal.App.4th 1546 (*Thon*) refused to interpret section 1033.5, subdivision (a)(3)(C) to exclude the recovery of travel expenses by counsel who travelled



from Bakersfield to San Diego to attend depositions: “Plaintiffs ask us to read into the statute a provision it does not contain, i.e., limitation of travel expenses incurred in taking a deposition to local travel. We may not construe a statute to add a restriction it does not contain. [Citation.] Section 1033.5, subdivision (a)(3) does not limit reimbursement for deposition travel to travel by attorneys practicing in the court’s jurisdiction. The trial court did not err in awarding costs incurred by Bakersfield attorneys to attend depositions in San Diego County.” (*Thon*, at p. 1548.) This rule has been followed and applied by other courts. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 59–60 [travel by California lawyers to out-of-state depositions]; *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 541 [allowed meal expenses by out-of-state attorneys who traveled to depositions]; *Seever, supra*, 141 Cal.App.4th at p. 1560 [mileage expenses for San Diego attorneys driving to depositions in Los Angeles].)<sup>10</sup>

Respondents sought to recover more than \$12,500 in travel expenses for their Texas lawyers to attend depositions and more than \$61,800 for travel expenses they incurred to attend the trial and other proceedings. Legendary moved to tax those costs because Los Angeles based lawyers, such as those who continued to serve respondents as co-counsel, could have represented respondents at those proceedings. Legendary’s motion made no attempt to single out any particular travel expense. Instead, Legendary contended that none of the claimed travel expenses

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<sup>10</sup> By contrast, meal expenses are not allowed for *local* counsel attending *local* depositions because those expenses are not reasonably necessary. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 774–775.)

were reasonably necessary to the conduct of the litigation, but were instead merely convenient and beneficial.

In ruling on the motion to tax costs, the trial court first addressed respondents' request to recover \$3,550 incurred in filing the pro hac vice applications of Texas counsel. In its written decision, the trial court denied costs for those applications, stating that it "agrees with Plaintiff, that Plaintiff should not have to finance Defendants' decision to use out of state attorneys in this action." The court then went on to find that the disputed travel expenses were not reasonably necessary to the conduct of the litigation and had instead been merely convenient and beneficial. Respondents contend that the trial court erred by its blanket denial of their travel expense requests. We agree.

We review the trial court's ruling under the abuse of discretion standard. (*See* *ever, supra*, 141 Cal.App.4th at p. 1556.) Based on the authorities mentioned above, the trial court must award deposition travel expenses to non-local counsel, and may award expenses to such counsel for other travel, so long as the court determines that the expenses were reasonably necessary to the conduct of the litigation and reasonable in amount. If a trial court were to deny such expenses because it believed that it did not have the discretion to do so, then we would reverse because the court did not understand the scope of its discretion. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.) In other words, if a trial court's decision is based on an erroneous understanding of applicable law or reflects that the trial court is unaware of the full scope of its discretion, it cannot be said that the court has properly exercised its discretion under the law. (*Ibid.*)

The trial court's ruling here reflects an erroneous

understanding of the scope of its discretion. Legendary argued that the decision to use out-of-state and not local counsel was a choice that parties were free to make, and that the decision to forego local counsel rendered the travel expenses of non-local counsel merely beneficial and convenient. In other words, Legendary argued, the travel expenses of non-local counsel can never be considered reasonably necessary to the conduct of litigation. As already discussed, that is not a correct statement of the law. However, it is one the trial court seems to have adopted by stating that it accepted Legendary's argument.

We therefore reverse the trial court's order taxing costs solely as it relates to the disputed travel expenses of Texas counsel and remand for further proceedings consistent with our decision. We stress, however, that although the trial court should exercise its discretion with full awareness of its scope, we do not intend to indicate how the trial court should rule upon remand.

## **DISPOSITION**

For the reasons set forth above, the judgment is affirmed in case No. B281915, and the order taxing costs is reversed and remanded for further proceedings consistent with this decision in

case No. B283352. Respondents shall recover their appellate costs in both matters.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MICON, J.\*

We concur:

MANELLA, P.J.

WILLHITE, J.

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\*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.