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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RONALD HOGAN, et al.,

Plaintiffs and Appellants,

v.

DEANGELIS CONSTRUCTION, INC., et  
al.,

Defendants and Appellants.

A128451, A130351

(Sonoma County  
Super. Ct. No. SCV230846)

**I. INTRODUCTION**

This is the second round of appeals in this case arising out of the rescission of a May 2000 contract to purchase a home on Gardenview Place in Santa Rosa (the Gardenview purchase agreement). Ronald and Victoria Hogan (the Hogans) completed their unilateral rescission of the Gardenview purchase agreement when they filed an August 2002 complaint against two sets of defendants, (1) the sellers and developers of the Gardenview property, DeAngelis Construction, Inc., Marvin DeAngelis and Gary Pope (collectively the Developers), and (2) the real estate agents for the sale, Clayton and Mary Engstrom (the Engstroms). Thereafter, during pre-trial proceedings, the Developers made a formal concession that the rescission was valid and offered to restore the Hogans' consideration. Accordingly, in May 2004, the superior court filed an order confirming that the Gardenview purchase agreement was rescinded.

The rescission of the Gardenview purchase agreement became the linchpin of the lengthy litigation that followed; it was an established fact at a jury trial to determine the

Hogans' consequential damages, and it was an integral component of a June 2007 amended judgment that was reviewed by this court in *Hogan, et al. v. DeAngelis Construction, Inc., et al.* (A117321, A118257, A120840, May 20, 2009) [nonpub. opn.] (*Hogan I*). We are, therefore, very dismayed to learn that the Hogans continue to retain possession the Gardenview property. We are equally concerned that the two appeals before us today<sup>1</sup> are evidence of a pattern of delay, designed to prolong the Hogans' stay in a home that does not belong to them.

The first appeal, by the Engstroms, is from an order denying their motion to strike or tax a memorandum of costs on appeal that the Hogans filed after this case was remanded pursuant to our decision in *Hogan I*. We will reverse that order with instructions to the trial court to enter a new order granting that motion. The second appeal is by the Hogans, who challenge several post-remand orders. Despite their more than 100 pages of briefing, the Hogans' complaints boil down to two. First, they contend they are being denied a full recovery. Second, the Hogans maintain they are entitled to full payment of all of their money damages and litigation costs before they have to vacate the Gardenview property. We reject these arguments, in all of their forms. We also unequivocally affirm prior orders in this case which establish that the payment of any consequential damages to the Hogans is conditioned on the return of the Gardenview property to the Developers.

## II. STATEMENT OF FACTS

### A. *Background*

As noted above, this case began with the Hogans' August 2002 complaint. The Hogans alleged that, after they became interested in purchasing the Gardenview property in April 2000, they entered into separate agreements with each set of defendants. First, they entered into an agreement with the Engstroms pursuant to which the parties agreed that the Engstroms would represent both the Hogans and the Developers with respect to

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<sup>1</sup> On October 3, 2011, we granted the Engstroms' opposed motion to consolidate these two appeals. The Engstroms' motion to augment the record in A128451 is therefore denied as moot.

the sale of the Gardenview property (the dual agency agreement). Second, and shortly thereafter, the Hogans entered into the Gardenview purchase agreement with the Developers, pursuant to which they purchased the property for \$499,000. The Hogans further alleged that they subsequently discovered that both the Developers and the Engstroms failed to disclose material facts and falsely represented other facts about the condition of the Gardenview property.

The Hogans attempted to allege nine causes of action including claims for breach of contract, breach of warranty, mutual mistake and intentional fraud. With regard to the claims based on fraud and mistake, the Hogans alleged grounds to support their unilateral rescission of the Gardenview purchase agreement and also sought relief based on that rescission. On December 2, 2003, the Developers formally acknowledged that the rescission was valid and offered to restore the Hogans' consideration. Accordingly, on May 17, 2004, the superior court filed an order affirming the rescission of the Gardenview purchase agreement (the 2004 rescission order).

Thereafter, the Hogans made numerous attempts to avoid the impact of the 2004 rescission order, including filing a petition for writ of mandate, which this court denied. The Hogans did, however, persuade the trial court that rescission could not be enforced against them until there was a trial on their claims for damages. However, during a hearing on in limine motions, the court expressly advised the parties of its intention to issue a "conditional" judgment effectuating the rescission of the purchase agreement.

Trial commenced in February 2007. At the conclusion of the Hogans' case, the court granted a nonsuit as to all but three causes of action: (1) the second cause of action against the Engstroms for breach of a dual agency agreement; (2) the third cause of action for intentional misrepresentation against all of the defendants; and (3) the twelfth cause of action for breach of fiduciary duty against the Engstroms. At the conclusion of the trial, the jury was given a 33-page special verdict form.

Five pages of the special verdict form required the jury to balance the equities and to calculate consequential damages relating to the rescission. The findings of the jury established, among other things, that the Hogans' consequential damages totaled

\$792,688, the Developers were entitled to total off-sets in the amount of \$458,229 and, therefore, the Hogans were entitled to a total net award of \$334,459 in consequential damages arising from the rescission. In balancing the equities, the jury also made a finding that the Developers were to assume the balance of the mortgage obligations on the Gardenview property.

The jury was also instructed to make separate findings as to each of the Hogans' three remaining claims. With regard to the third cause of action for intentional concealment the jury made the following findings: Mary Engstrom intentionally concealed facts from Victoria Hogan which caused her damage in the amount of \$35,000; DeAngelis-Pope Homes failed to disclose material facts to both Hogans, causing them damage in the amount of \$115,000; DeAngelis Construction failed to disclose facts to both Hogans which caused them damage in the amount of \$400; and Gary Pope failed to disclose facts to both Hogans which caused them damage in the amount of \$400. The jury also found that the Engstroms breached their contract with the Hogans causing damages totaling \$30,000. Finally, the jury found that the Engstroms breached their fiduciary duties, but concluded that the Hogans did not suffer any economic damages as a result of the breach of those duties.

A June 6, 2007, amended judgment contained the following provisions: "1. Plaintiffs [the Hogans] shall recover judgment against [the Developers] jointly and severally in the amount of \$394,246.41; [¶] 2. [The Developers] jointly and severally shall pay the existing mortgage debt in the amount of \$417,000.00. [¶] 3. Plaintiff [Ron Hogan] shall recover judgment against [Clayton Engstrom] in the amount of \$10,000. [¶] 4. Plaintiff [Victoria Hogan] shall recover judgment against [Clayton Engstrom] in the amount of \$10,000. [¶] 5. Plaintiff [Victoria Hogan] shall recover judgment against [the Engstroms] . . . in the amount of \$45,000. [¶] 6. Plaintiffs [the Hogans] to return the home at 2014 Gardenview Place, Santa Rosa, California to [the Developers]."

**B. *Hogan I***

The Hogans appealed the amended judgment and both sets of defendants filed cross-appeals. The Hogans also filed a separate appeal from a post-judgment order

striking their memorandum of costs, and the Developers filed a separate appeal from a post-judgment order denying their motion to correct the amended judgment to conform to the special verdicts of the jury. This court considered and resolved these three appeals and two cross-appeals in our decision in *Hogan I*.

First, we denied the Developers' appeal from the post-judgment order denying their motion to correct the amended judgment. We found that the amended judgment did conform to the jury verdicts. We also rejected the Developers' claim that the amended judgment needed to be corrected to clarify that the Hogans must return the Gardenview property to the Developers as a condition of obtaining consequential damages. As we explained, "[a]lthough we appreciate why the Developers are concerned about this issue, the amended judgment clearly *does* require the Hogans to return the Gardenview property."

Second, we denied the Hogans' appeal from the amended judgment, but granted both sets of defendants some relief pursuant to the cross-appeals. Although many confusing and sometimes contradictory issues were raised,<sup>2</sup> the Hogans' primary contention was that the Gardenview purchase agreement was not rescinded. We expressly rejected this core premise of virtually every argument that the Hogans presented to us. As we explained, "[d]espite the overwhelming and convoluted record generated by these parties, a straightforward application of the rescission statutes compels the conclusion that the Gardenview property purchase agreement was unilaterally rescinded by the Hogans."

Our affirmance of the May 2004 rescission order required two material modifications of the amended judgment which were made pursuant to the cross-appeals filed by both sets of respondents in the core appeal of the judgment in *Hogan I*. As we

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<sup>2</sup> We noted for the record that the parties had failed their obligations to clearly state their claims and support them with references to the record and relevant authority and that "the hundreds of pages of briefing generated by these parties contain many arguments that either lack sufficient factual or legal support, are not coherent, or are not responsive to the actual judgment before us today."

explained more fully in our prior decision, by rescinding the Gardenview purchase agreement, the Hogans made an election of remedies which precluded them from recovering legal damages for fraud from either set of respondents. Furthermore, we found that the intentional concealment damages award against the Developers was duplicative of the consequential damages already ordered by the jury and thus, had to be stricken from the judgment. Furthermore, although the Engstroms could not be liable for fraud damages, they could be held jointly and severally liable for the Hogans' consequential damages. Thus, we instructed the trial court to "modify the amended judgment to (1) strike the award of damages against the Developers for intentional concealment; (2) provide that the Engstroms are jointly and severally liable for a portion of the Hogans' consequential damages awarded against the Developers, and that the Engstroms' share of that joint and several liability is equivalent to the damages awarded against them for intentional concealment and breach of contract."

Finally, we denied the Hogans' separate appeal from a post-judgment order striking their memorandum of costs. In that order, the trial court granted motions by both the Developers and the Engstroms to strike the Hogans' 2007 post-judgment cost bill "because the court finds that under the circumstances it is unable to determine whether any party has truly obtained a net monetary recovery or that there is a 'prevailing party' under any definition. . . . The court is convinced that there was no prevailing party in either fact or law; *each side is to bear their own fees and costs.*" (Emphasis supplied.) With no hesitation whatsoever, we unequivocally affirmed the trial court's order. We noted, among other things, that the "only relief afforded by the judgment was relief based on rescission," that, although the Hogans obtained some monetary relief, the "defendants obtained relief based on rescission as well," and that the trial court clearly did not abuse its discretion in light of the record before us which would have supported a finding that "the Hogans' primary goal at trial was to obtain legal damages to which they were not entitled."

On September 1, 2009, a standard form of remittitur was issued by this court which included the following statement: "Respondent to recover costs."

**C. *Post-Remand Cost Memoranda and Fee Requests***

After this case was remanded to the trial court, all of the parties took the position that they were “respondents” within the meaning of the remittitur with respect to at least one of the appeals or cross-appeals in *Hogan I* and, therefore, filed motions to recover some of their costs on appeal. The Hogans, who acted in pro per during the post-remand proceedings in the lower court, used the opportunity to seek much more than that.

On October 9, 2009, the Hogans filed a motion for “legal fees and costs” pursuant to Code of Civil Procedure (CCP) section 1021.4 and Civil Code section 3283.<sup>3</sup> They sought unspecified attorney fees and costs based on alleged “criminal activity” committed by both the Developers and the Engstroms, and they represented that the Sonoma County District Attorney’s Office and the “Department of Real Estate” were investigating whether or not criminal charges would and could be brought against both sets of the original defendants.

On October 9, 2009, the Hogans also filed a “Memorandum of Costs on Appeal” claiming a total of \$602,352.46 in costs and fees (the October 2009 cost bill).<sup>4</sup> This cost

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<sup>3</sup> CCP section 1021.4 provides that a court may award attorney fees in a civil action to a “prevailing plaintiff” against a defendant in that action who has been convicted of a “felony offense.” Civil Code section 3283 provides: “Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.” These were the only authorities cited in the Hogans’ moving papers.

<sup>4</sup> This 2009 cost bill is dated “October 9, 2007,” which appears to be a scriveners’ error. The copy in the record bears no court filing stamp. However, other parts of the record reflect that it was filed and served on both the Developers and the Engstroms on October 9, 2009.

In July 2010, before any briefs were filed in either of the appeals addressed herein, the Hogans filed a motion to “correct” the record on appeal by striking this document and several others, alleging they were erroneously included in the Clerk’s Transcript on appeal. The Hogans’ unopposed motion was granted by this court on August 6, 2010. In retrospect, that motion should have been denied. The Hogans’ 2009 cost bill and the other documents that were the subject of their July 2010 motion to strike are obviously extremely relevant to the issues on appeal. Therefore, we will take judicial notice of them all. (Evid. Code, § 452, subd. (d).)

bill included fees and costs allegedly incurred prior to appeal which the trial court had already denied. It also included \$588,966.03 in attorney fees.

On October 22, 2009, the Engstroms filed a motion to strike or tax the Hogans' October 2009 cost bill, together with a supporting memorandum of points and authorities. The Engstroms summarized their objections as follows: "(1) the appellate court's remittitur did not award [the Hogans] costs on appeal of which judicial notice is requested; (2) the trial court's award as to costs and attorney's fees . . . was that all parties were to bear their own costs and attorney's fees in that there was no prevailing party; (3) there is no contract or statute which allows for the award of attorney's fees against the Engstroms; (4) the Hogan plaintiffs have failed to produce any documentation supporting their claims for any part of the \$602,352.46 amount." The Engstroms also filed a separate opposition to the Hogans' motion for fees and costs and a supplemental pleading in support of their motion to strike or tax the Hogans' cost memorandum. Meanwhile, on October 26, 2009, the Developers filed a motion to strike and/or tax the Hogans' 2009 cost bill, which was accompanied by a supporting memorandum, declaration and various exhibits.<sup>5</sup>

The Hogans filed allegedly responsive pleadings that are very difficult to decipher. Reading these documents together, it appears that the Hogans took the position that their motion for fees and costs and their 2009 cost bill were two distinct requests, each or both of which entitled them to recover all of their costs and attorney fees incurred at any time during this litigation. Regarding their motion for fees and costs pursuant to CCP section 1021.4, the Hogans requested that the court stay the matter "until the criminal case can be developed and completed in the future." By contrast, the Hogans defended their 2009 cost bill with a theory which mischaracterized them as the prevailing party in *Hogan I*. They argued that the term "respondent" in a remittitur necessarily includes "cross-respondent" and, therefore, they were the prevailing party in the cross-appeal by the

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<sup>5</sup> This motion is one of the documents of which we take judicial notice. (See footnote 4.)

Engstroms and, as such, could recover from the Engstroms all of their attorney fees and costs incurred at any time during this litigation.

On January 21, 2010, the trial court held a hearing on several motions pertaining to the various requests for fees and costs. The hearing started late, and there was significant confusion regarding the relationship among the motions before the court and the parties' inconsistent positions and arguments. However, during discussion on the Hogans' requests for fees and costs, the trial court unequivocally rejected Victoria Hogan's claim that the Hogans were the prevailing party in this case; it noted that it had rejected such a claim in its 2007 post-trial ruling and that this court had specifically affirmed that part of its ruling in *Hogan I*. "I'm staying with that determination," it said.

Discussion of the Engstroms' motion to tax or strike the Hogans' costs was particularly confusing. The court had issued a tentative ruling which denied the Engstroms' motion on the ground that "It sets forth no basis, evidence, authority, or analysis that could constitute a meaningful or coherent challenge to the costs which Plaintiffs claim." At the hearing, the Engstroms' counsel acknowledged that adverse tentative ruling, but also stated that their motion was moot because the court had expressed its intention to deny the Hogans' motion for fees and costs on appeal. Victoria Hogan took the position, however, that the Hogans' motion for fees and costs was separate and distinct from their "alternative" memorandum of costs on appeal. Therefore, she argued, since the court intended to deny the Engstrom's motion to tax or strike the cost memorandum, the Hogans were entitled to the \$602,000 requested therein. The court confessed it was confused by Ms. Hogan's logic. Then, the Developers' counsel argued that the Hogans were not respondents within the meaning of the remittitur and therefore they were not entitled to any costs at all. The trial court then made clear that it was out of time that afternoon, and asked the parties to "work together, if you can, [and] come up with a judgment." But it also took the matters under submission.<sup>6</sup>

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<sup>6</sup> After the hearing, the Engstroms filed a short supplemental brief regarding the motions under submission in order to clarify their position. The Engstroms explained that: "since the trial court and the appellate court found there was no prevailing party in

On March 3, 2010, the trial court filed several orders on the motions that were argued at the January 21 hearing. The court denied the Hogans' motion for legal fees and costs. It also granted in part the Developers' motion to strike the Hogans' 2009 cost bill by striking the attorney fees and some of the Hogans' cost items. However, the court allowed the Hogans to recover some costs on appeal, accepting the theory that the remittitur awarded costs on appeal to respondents and cross-respondents in *Hogan I*.

In a separate order filed on March 3, 2010, the trial court denied the Engstroms' motion to tax or strike the Hogan's 2009 cost bill, stating "[t]his motion, lacking meaningful analysis or authority, is DENIED."

**D. *The Hogans' Efforts to Collect a "Cost" Judgment***

After the trial court issued its March 2010 orders on the various motions for costs on appeal, the Hogans made numerous attempts to enforce a so-called judgment for costs against the Engstroms.

**1. *Proposed Judgment for Costs***

On May 6, 2010, the Hogans sent a request to the clerk of the superior court to file a "Judgment of Costs after Appeal" which the Hogans had drafted. The pleading purported to hold both the Engstroms and the Developers jointly and severally liable for "plaintiff's costs of \$602,352.40 on the judgment." The court placed a stamp on the pleading indicating that it was denied by the court and returned it to the Hogans with a note stating that the document was "inconsistent and directly contradictory of earlier rulings made by this court."

**2. *Abstracts of Judgment***

On August 5, 2010, the Hogans recorded an Abstract of Judgment against the Engstroms for the amount of \$602,352.40. On August 19, 2010, the Hogans filed three

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this action, plaintiffs are to bear their own attorney's fees and costs. As such, [the Engstroms'] motion to strike and/or tax costs in the amount of \$602,352.40 must be granted in order to avoid inconsistent rulings. In the alternative, should the Court uphold the tentative whereby plaintiffs' motion for attorney's fees and costs is denied [our] motion becomes moot."

additional abstracts of judgment against the Engstroms, one for \$45,000, and the other two for \$10,000 each. The Engstroms filed an ex parte application for an order staying or invalidating these four abstracts of judgment. Opposing that application, the Hogans took the position that their \$602,352.40 cost bill became a judgment on March 3, 2010, when the court denied the Engstroms' motion to tax or strike the Hogans' memorandum of costs.

On September 29, 2010, the court filed an order granting the Engstroms ex parte relief.<sup>7</sup> The September 29 order states that the August 5 abstract of judgment against the Engstroms for \$602,352.40 is "deemed of having no force and effect and is invalid." The order also states that the three abstracts recorded against the Engstroms on August 19 are subject to a stay of execution and are "invalid pending further order of the court" because the Engstroms had posted an undertaking and had also deposited funds with the court in connection with the underlying judgment.

### **3. *Motion to Release Funds***

On September 14, 2010, the Hogans filed an ex parte application for an order releasing \$81,972.73 in funds that the Engstroms had deposited with the court in November 2009 in connection with the underlying judgment. The record reflects that the Engstroms deposited these funds in a court account in "trust" for the Hogans because the Hogans had refused to accept their tender of this payment as full satisfaction of the judgment against them.

The Hogans sought release of these funds as "partial" payment for the Engstroms' liability which, according to the Hogans, had now increased to \$722,155.43. On September 17, 2010, the court denied the Hogans' ex parte application to release these funds.

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<sup>7</sup> Although not at issue in this appeal, the trial court also granted the Developers ex parte relief from abstracts of judgment that the Hogans improperly filed against them.

**E. *Modifications to the Amended Judgment***

The post-remand cost orders were not the only source of significant post-remand litigation in this case. The parties also battled about modifications to the amended judgment required by our decision in *Hogan I*.

On April 20, 2010, the trial court filed an order modifying the June 2007 amended judgment in accordance with our remand instructions (the modified judgment). Among other things, the judgment was modified to provide: “The Hogans are entitled to \$278,446.97 from any or all of the Developer Defendants . . . at the time that Plaintiffs return the real property at 2014 Gardenview Place, Santa Rosa, California, to Developer Defendants. The Engstrom defendants are jointly and severally liable for a portion of the Hogans’ consequential damages awarded against the Developers, and . . . the Engstroms’ share of that joint and several liability is equivalent to the damages awarded against them, in the collective amount of \$65,000 (sixty-five thousand), for intentional concealment and breach of contract in the Judgment and Amended Judgment.”

On May 5, 2010, the Hogans filed a motion to correct or vacate this modified judgment. They argued, among other things, that the modified judgment needed to be corrected to (1) strike language requiring the Hogans to return the Gardenview property as a condition of recovering their consequential damages; (2) award the Hogans interest on their money damages accruing from the entry of the jury verdicts, and (3) award the Hogans their costs and attorney fees on appeal.

At a July 2, 2010, hearing on the Hogans’ motion to correct the modified judgment, the trial court struck some language that had been added to the modified judgment which it characterized as an “incomplete and unnecessary” description of this court’s decision in *Hogan I*. However, the court affirmed language in the modified judgment requiring the Hogans to return the Gardenview property to the Developers as a condition of obtaining their money damages.

The trial court also denied the Hogans’ request to include their claimed costs and fees as part of the judgment, stating: “The court has already ruled on these in its prior

orders regarding the parties' motions seeking to recover, tax, or strike costs and fees on appeal and the order at issue does not change these."

Finally, the court denied the Hogans' request for an award of interest that had allegedly accrued on the underlying money judgment. The court acknowledged that the judgment was "in part a money judgment on which interest could potentially accrue." However, the court held that "no interest starts accruing until the money payment becomes due and, at least with respect to the [Developers], the payment is not due until Plaintiffs tender return of the house. Moreover, no interest could begin accruing until the judgment became final, in accord with the appellate decision and after the parties' final challenge to the judgment."

At the conclusion of the July 2, 2010, hearing, the court ordered the Developers to prepare an order consistent with its rulings. For reasons not explained by the appellate record, that order was not signed by the court or filed until October 20, 2010. In any event, the formal order incorporates the language and reasoning of the trial court which we have quoted above.

#### **F. *Disputes Regarding Undertakings and Stay Orders***

After this case was remanded, the parties also filed several motions directed at enforcing their respective rights under the modified judgment. These motion were all heard and decided at a hearing on October 22, 2010 (the October 22 hearing).

##### **1. *Background***

On June 27, 2007, the Hogans obtained an order staying enforcement of the amended judgment against them pending their appeals in *Hogan I*. Ordinarily, the perfecting of an appeal does not stay a judgment directing the sale, conveyance or delivery of possession of real property unless an undertaking is posted. (CCP, § 917.4.) However, in this case, the trial court granted the Hogans' unopposed motion to stay enforcement of the amended judgment against them during the appeals in *Hogan I* on the theory that the "requirements of Code of Civil Procedure section 917.4 are satisfied by the judgment of \$390,471.09 in favor of plaintiffs and against DEVELOPER DEFENDANTS."

Unlike the Hogans, both sets of defendants posted appellate bonds in connection with the appeals in *Hogan I*. In August 2007, the Developers posted a bond in the amount of \$591,370.00. In June 2008, the Engstroms posted a bond in the amount of \$97,500.

In late October 2009, after *Hogan I* was decided, the Engstroms attempted to tender a payment of \$81,972.73 in full satisfaction of the judgment against them. This payment covered the \$65,000 judgment and post-judgment interest through October 22, 2009. When the Hogans refused to accept this tender, the Engstroms deposited the funds in a court account in trust for the Hogans.

## **2. *Motion to Enforce/Increase Undertakings Posted by Developers***

On August 20, 2010, the Hogans filed a motion to enforce liability against the Developers' bond and for an order requiring the Developers to increase the amount of their undertaking in order to stay future enforcement of the judgment against them. The Hogans argued that the Developers were required to increase their undertaking by \$1,865,829.06 because their liability to the Hogans had significantly increased since the original verdicts were entered.

The calculations that the Hogans made to support this claim were not sufficiently coherent for us to repeat here. However, it appears that their analysis was based on the following assumptions: (1) the Developers are jointly and severally liable for a \$602,000 cost judgment allegedly entered against the Engstroms; (2) the Developers' liability increased to include accrued interest on the unpaid money judgment; (3) the Developers are liable for additional "out of pocket damages" that the Hogans allegedly incurred since entry of the original judgment.

The trial court denied this motion at the October 22 hearing. At the hearing, the court rejected Victoria Hogan's theory that the Hogans had secured a \$602,000 cost judgment against the Engstroms and that the Developers were jointly and severally liable for that judgment. As the court explained, "Well, again, I don't see it. But to my knowledge there has never been an award to you of attorneys' fees in this case, period, for any theory, that I'm—so right now, my belief from looking at the file is you have

never been given an award of attorneys' fees." At the hearing, the court also rejected Victoria Hogan's request for an order that any money paid by the Engstroms would not reduce the amount owed by the Developers.

### ***3. Motion to Enforce/Increase Undertakings Posted by the Engstroms***

On August 31, 2010, the Hogans filed a motion to enforce liability against the Engstroms' existing appeal bond and for an order requiring the Engstroms to increase their undertaking. Though unclear, it appears that the theory behind this motion was that the March 3 cost order constituted a judgment which could be immediately enforced against the existing bond unless the Engstroms increased their posted undertaking to secure this second judgment.

At the October 22 hearing, the court asked whether the Hogans had any basis for their request to increase the Engstroms' undertaking, aside from the erroneous argument that they had been "awarded the 602-plus-thousand dollars in attorneys' fees." Ms. Hogan argued that, even if the court would not award the Hogans' costs, they were entitled to an order requiring the Engstroms to pay their share of the judgment without any condition that the Hogans have to return the property to the Developers.

The court responded by denying this motion, and then inquired whether the Hogans would dismiss the Engstroms with prejudice from this lawsuit if the Engstroms paid them \$65,000 plus interest. Victoria Hogan responded that she believed that the appellate court would affirm the \$602,000 cost award and "[s]o we cannot agree to give up \$602,000." To this, the court responded as follows: "Again, I'll tell you, this Court has never awarded you that amount of money. Never."<sup>8</sup>

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<sup>8</sup> A formal order denying this motion was signed and filed several months later on March 16, 2011. On April 13, 2011, this court granted the Hogans' request to take judicial notice of this March 16, 2011 order. The written order reflects that the court redacted language in a proposed version of the order which would have expressly held that the Hogans do not have a \$602,000 cost judgment against the Engstroms. On appeal, the Hogans argue that this redaction proves they do have such a judgment. We disagree; we have no reason to believe that redaction indicated any change of position by the trial court.

#### **4. *Motion to Reduce the Developers' Undertaking***

At the October 22 hearing, the trial court also granted a motion by the Developers to reduce the amount of their posted undertaking. We are unable to locate that written motion in the poorly organized Appellants' Appendix.

In any event, the Developers argued at the hearing that they were entitled to an order reducing their undertaking by \$115,000, the amount of the separate damages award for intentional concealment which had been stricken from the judgment pursuant to *Hogan I*. The Developers also sought an order clarifying that, to the extent the Hogans collected money from the Engstroms, that payment was to be credited against the total consequential damages award to reflect the finding in *Hogan I* that the Engstroms shared a portion of the joint and several liability for the Hogans consequential damages. Victoria Hogan argued that there was no legal basis for the bond reduction and that, in any event, the current undertaking did not afford the Hogans adequate protection. The trial court rejected these arguments and granted the Developers' motion.<sup>9</sup>

#### **5. *Motion to Vacate Stay of Order to Return of Gardenview Property***

In September 2010, the Developers filed a motion to vacate the June 2007 order which stayed enforcement of the amended judgment against the Hogans pending their appeals in *Hogan I*. They argued that the Hogans were continuing to use the stay order as a justification and excuse for refusing to tender the house notwithstanding that the

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<sup>9</sup> On October 22, 2010, the court signed and filed an order granting the Developers' motion to reduce the amount of the undertaking they had posted in connection with the underlying money judgment against them. Pursuant to this order, the undertaking required by law was reduced to \$417,670.45, to reflect the fact that the separate award of fraud damages against the Developers had been stricken from the modified judgment. Furthermore, the court ordered that "any monies collected from the Realtors on the principal amount of \$65,000 by the Hogans must be deducted from the amounts owed by [the Developers] or alternatively if the Hogans recover the full underlying amount to perform rescission from [the Developers], the monies on deposit from the [Engstroms] must be payable directly to [the Developers] to satisfy the [Engstroms] contribution obligations."

appeals in *Hogan I* had been decided and the rescission of the Gardenview purchase agreement had been expressly affirmed on appeal.

At the October 22 hearing, the Developers advised the court that they had attempted to work with the Hogans to resolve the matter and had repeatedly offered to let the Hogans keep the house instead of collecting their consequential damages. Although Ms. Hogan argued there was “no need” to remove the stay, she did not articulate any substantive objections to the Developers’ motion, which the trial court granted.

At the conclusion of the October 22 hearing, after the four motions summarized above were decided, the trial court attempted to engage the parties in a plan to settle this entire case. Victoria Hogan resisted that effort. She suggested that she had a separate interest in the property that was not being protected, she complained that the Hogans were not being made whole, and she stated that the Hogans intended to file another appeal.

**G. *Demands For Satisfaction of Judgment***

In November 2010, the Developers and the Engstroms each filed a demand for full satisfaction of judgment from the Hogans. The Developers’ demand was accompanied by a tender of payment of the Hogans’ costs on appeal.<sup>10</sup> The Engstroms’ demand was accompanied by a tender of payment of \$65,000, the amount of their joint and several liability for the Hogans’ consequential damages. Both demands also stated that the Hogans refused to tender the Gardenview property to the Developers as required by the modified judgment.

On November 15, 2010, the Hogans filed a notice of appeal from several of the orders summarized above. Thereafter, the Hogans filed objections to the demands for satisfaction of judgment in which they argued, among other things, that their pending appeal automatically stayed enforcement of the modified judgment against them.

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<sup>10</sup> Although the Developers disputed that the Hogans were entitled to costs on appeal, they did not appeal the March 2010 order denying in part their motion to strike those costs from the 2009 cost bill.

### III. THE ENGSTROMS' APPEAL

The Engstroms appeal the March 3, 2010, order denying their motion to strike or tax the Hogans' 2009 cost bill (the March 3 cost order) on the ground that they lodged several valid objections to that cost bill. We agree.

First, the Engstroms objected that the Hogans' 2009 cost bill is inconsistent with the remittitur that issued after our decision in *Hogan I*. Indeed, that remittitur does not hold the Engstroms liable for any of the Hogans' costs on appeal. When we decided *Hogan I*, this court did not expressly address the subject of costs on appeal in our written decision. In hindsight, this omission was unfortunate. In any event, the remittitur that subsequently issued provided for an award of costs on appeal to *the respondents*. The Hogans were the respondents with respect to only one of the three appeals at issue in *Hogan I*, the Developers' appeal from the post-judgment order to correct the amended judgment. Thus, if the Hogans are entitled to any costs on appeal, those very limited costs are recoverable only against the Developers, not against the Engstroms.

The Hogans contend that language in the remittitur awarding costs on appeal to the "respondents" includes them as the "cross-respondents" in the two cross-appeals in *Hogan I*. The only authority the Hogans supply for this proposition is an Advisory Committee Comment to rule 8.216 of the California Rules of Court (rule 8.216).<sup>11</sup> Rule 8.216 pertains to the briefing sequence and time to file appellate briefs. The referenced Advisory Committee Comment states: "As used in this rule, 'appellant' includes cross-appellant and 'respondent' includes cross-respondent. (Compare rule 8.100(e))." On their face, rule 8.216 and the Advisory Comment that applies only to that rule, have nothing to do with awards of costs on appeal and are patently irrelevant to the issue presented here.

The relevant rule is rule 8.278 which provides, among other things, that absent a contrary directive by the appellate court, costs on appeal are awarded to the "prevailing" party. Under no version of reality can the Hogans be viewed as the prevailing party with

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<sup>11</sup> All references to rules are to the California Rules of Court.

respect to either of the cross-appeals in *Hogan I*. Indeed, each of these cross-appeals significantly *reduced* the Hogans' monetary award. Pursuant to the Developers' cross-appeal, we struck the separate award of fraud damages against the Developers. Pursuant to the Engstroms' cross-appeal, we held that the Engstroms were not liable to the Hogans for a separate award of legal damages but instead shared a portion of the Developers' joint and several liability for the Hogans' consequential damages. Thus as a matter of simple fact, the Hogans lost both cross-appeals.

A second valid objection raised by the Engstroms is that the Hogans' 2009 cost bill includes attorney fees and costs that were incurred *prior to the appeals* in *Hogan I*. As reflected in our factual summary above, in 2007 the trial court denied the Hogans' motion for trial court fees and costs. Furthermore, this court expressly affirmed that order in *Hogan I*. Nevertheless, the 2009 cost bill includes costs and fees allegedly incurred prior to *Hogan I*. Apparently, the Hogans' theory below was that an award of costs on appeal entitled them to an award of all of their costs and fees throughout this litigation. This theory is absolutely inconsistent with rule 8.278 and, in any event, is not repeated on appeal.

The Hogans do argue, however, that they were entitled to seek and recover all of their attorney fees from the trial court after this case was remanded pursuant to our instructions in *Hogan I*. To support this contention, the Hogans mistakenly rely on *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918 (*Butler-Rupp*).

*Butler-Rupp* was a commercial landlord-tenant dispute involving contract and tort claims. (154 Cal.App.4th at p. 922.) Initially, plaintiffs recovered both tort and contract damages, but the trial court denied their request for attorney fees incurred in connection with the trial pursuant to an attorney fee clause in the commercial lease. On appeal, the court reversed the tort damages award, affirmed the contract-based award and reversed the order denying plaintiffs/respondents their attorney fees. The Court of Appeal also ordered that the parties were to bear their own costs on appeal. (*Ibid.*) After the case was remanded, the trial court awarded plaintiffs trial court attorney fees *and* attorney fees for

the prior appeal. Pursuant to a second appeal, the defendants challenged only the award of attorney fees for the prior appeal. (*Ibid.*)

In their second appeal, the *Butler-Rupp* appellants argued that the trial court did not have jurisdiction to award respondents appellate attorney fees because the appellate court did not award costs to respondents in the prior appeal. (154 Cal.App.4th at p. 922.) The *Butler-Rupp* court disagreed. It reasoned that a former rule of court which governed the appellate court's determination of costs on appeal *did not* also govern the determination of a prevailing party for purposes of awarding statutory or contractual attorney fees. As the court explained: "The critical point for our purposes is that former rule 27(c)(2) does not govern the determination of the prevailing party for purposes of awarding fees, and a decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney fees on appeal. [Citations.] Instead, to collect appellate attorney fees, a party must demonstrate the right to do so under either a statute or a contract, independent of a costs statute. [Citations.] When that right is founded in contract and controlled by Civil Code section 1717, this statute's definition of 'prevailing party' determines the entitlement to appellate fees. [Citation.] [¶] Furthermore, former rule 27(c)(2) did not state that attorney fees may be awarded only if the Court of Appeal decides to award costs. It simply stated that where costs are awarded, such an award does not include attorney fees and does not prevent a party from seeking them in the trial court unless the Court of Appeal specifically orders otherwise. " (*Id.* at pp. 926-927.)

In this case, the Hogans maintain that *Butler-Rupp* holds that an order denying a party attorney fees "in a prior opinion in the same case" does not "foreclose" a subsequent trial court award of attorney fees on appeal. We simply cannot conceive how the Hogans draw this conclusion. In *Butler-Rupp*, the original order denying the plaintiffs contractual attorney fees was *reversed* on appeal and, after the case was remanded, the trial court awarded both trial court and appellate attorney fees. (*Butler-Rupp, supra*, 154 Cal.App.4th at p. 922.) Here, by contrast, the 2007 order denying the Hogans costs and attorney fees was *affirmed* on appeal. Nothing the *Butler-Rupp* court

said could be reasonably construed as authority for the Hogans' contention that they are not bound by that final order.

*Butler-Rupp* does support the very different proposition that a party's right to recover attorney fees incurred *during* an appeal (i.e. appellate attorney fees) after the case is remanded to the trial court is not dictated by the appellate court's determination regarding costs on appeal. (*Butler-Rupp, supra*, 154 Cal.App.4th 926-927.) In this regard, rule 8.278(d)(2) states: "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." This court did not address the subject of appellate attorney fees in our decision in *Hogan I*, and the 2007 order denying the Hogans' fees and costs pertained only to trial court attorney fees. However, as the Engstroms' argued in their motion to strike the Hogans' 2009 cost bill, the Hogans failed to establish *any* statutory or contractual basis for an award of appellate attorney fees.

A claim for attorney fees on appeal must be made pursuant to a noticed motion, filed within the time limit set forth in rule 3.1702, subdivision (c). Here, the Hogans filed a motion for appellate attorney fees and costs on appeal in which they relied solely on CCP section 1021.4 and Civil Code section 3283. The trial court expressly denied that motion. Consistent with that ruling, the trial court granted the Developers' request to strike the attorney fee portion of the Hogans' 2009 cost bill. We can conceive of no sound reason why the court denied the Engstroms' identical request.

The Hogans contend that the order denying their motion for attorney fees on appeal is irrelevant because their 2009 cost bill was an "alternative" request for fees which the trial court granted in the March 3 cost order. The Hogans' reasoning is convoluted, unconvincing and unsupported by any relevant authority. As we have already explained, and the Hogans appear to concede elsewhere, appellate attorney fees must be requested by noticed motion. Here, the Hogans filed that motion and it was properly denied.

The only reason that the trial court gave for its March 3 cost order was that the Engstroms' motion lacked meaningful analysis or authority. Compared to what, we

cannot help but wonder. The Engstroms' motion may not have been as clear as the Developers' motion on this very same subject, but it was adequate when measured against numerous incoherent documents filed by the Hogans. Furthermore, the unexplained inconsistency between the March 3 cost order, which is the subject of this appeal, and the related orders that the court filed that same day created an opportunity for unfair and extremely costly gamesmanship. On this last point, we summarily reject the Hogans' remarkable contention that the Engstroms have not been prejudiced by the March 3 order.

Finally, we reject an assumption that appears to have driven much of the Hogans' conduct since the March 3 cost order was filed, i.e., that the March 3 cost order afforded them affirmative relief. That order was not an award; it was a denial of a motion on a purely procedural ground. Furthermore, in separate orders entered the same day, the trial court denied the Hogans' motion for fees and costs on appeal and granted the Developers' motion to strike the attorney fees portion of the Hogans' 2009 cost bill. Thus, the trial court has never awarded the Hogans any attorney fees in any order that has been brought to our attention.

In conclusion, the Engstroms raised several valid objections to the Hogans' 2009 cost bill, not the least of which is that the Engstroms are not liable to the Hogans for *any* litigation costs or attorney fees whatsoever. Therefore, we will reverse the March 3 order with directions that the trial court file a new order granting the motion.

#### **IV. THE HOGANS' APPEAL**

##### **A. *Preliminary Considerations***

The Hogans have appealed the following orders: (1) the September 17, 2010, order denying the Hogans' motion to release \$81,972.73 in funds deposited by the Engstroms; (2) the September 29, 2010, order holding that the Hogans' August 5, 2010, Abstract of Judgment is of no force and effect; (3) the October 20, 2010, order granting in part and denying in part the Hogans' motion to correct the modified judgment; (4) the October 22, 2010, order denying the Hogans' motion to enforce the Developers' bond; (5) the October 22, 2010, order denying enforcement of the Engstroms' bond; (6) the

October 22, 2010, order reducing the Developers' bond; (7) the October 22, 2010, order vacating the order staying enforcement of the judgment against the Hogans.

The first 13 pages of the Hogans' appellants' opening brief contains an argumentative "Introduction," which is unaccompanied by any reference to the extremely poorly-organized multi-volume Appellants' Appendix. The factual summary that follows is incomplete, misleading and sometimes simply inaccurate. Then, the Hogans proceed to a lengthy "Discussion" of a variety of issues, some of which are not tied to any specific order that has been appealed and, in the process, neglect to expressly identify any alleged error in some of the orders they have appealed.

Despite these obvious shortcomings, we have attempted to decipher and address the Hogans' substantive claim of error. However, both the quality of the briefing relating to this appeal and the history of this litigation require us to make some preliminary global rulings.

First, the rulings we have made in connection with the Engstroms' appeal apply here and dictate the outcome of many issues raised by the Hogans on appeal. Second, many of the arguments advanced on appeal were not made in the lower court, at least not in any coherent fashion. Those arguments are all waived, although we may address them simply to facilitate a resolution of this litigation. Third, to avoid any future confusion about our intentions herein, we reject *all* of the Hogans' substantive claims of error, we deny their appeal in its entirety, and we expressly find that the Hogans are not entitled to any costs or attorney fees in connection with this appeal.

**B. *The September 2010 Orders***

As noted above, the Hogans' notice of appeal purports to appeal from the September 17, 2010, order denying their ex parte application to release funds deposited by the Engstroms and the September 29, 2010, order invalidating the Abstracts of Judgment the Hogans filed against the Engstroms. In their appellate brief, the Hogans discuss these two orders and identify them as "part of this appeal." However, the Hogans fail to articulate any substantive ground for reversing either order.

Both the motion to release funds and the abstracts of judgment that the Hogans filed against the Engstroms were premised on the notion that the Hogans obtained a cost judgment against the Engstroms. That notion was and is patently false. Therefore, the trial court did not err by denying the request to release funds or invalidating the abstract of judgments.

**C. *The October 20, 2010, Order Regarding the Modified Judgment***

The Hogans seek reversal of the October 20, 2010, order denying their motion to correct the modified judgment on several grounds.

**1. *Conditioning Payment on Return of the House***

The Hogans object to language that was added to the modified judgment which clarifies that the payment of consequential damages to the Hogans is conditional on the Hogans' return of the Gardenview property to the Developers. According to the Hogans, in *Hogan I*, this court rejected the Developers' argument that their obligation to pay money damages to the Hogans was conditional on the Hogans' return of the property. Therefore, the Hogans posit, the trial court violated the law of the case by adding language to the modified judgment which imposes such a condition.

The Hogans misconstrue our decision in *Hogan I*. In that prior appeal, we denied the Developers' request to "clarify that the Hogans must return the Gardenview property as a condition of obtaining relief based on rescission" because we found that the amended judgment already imposed that requirement. Indeed, the record in that prior appeal unequivocally established that the trial court issued a conditional judgment, as it said it would before the trial even commenced.

Even as we denied the Developers' appeal in *Hogan I*, we acknowledged that their concern was legitimate because the Hogans had consistently resisted the consequences of the rescission that they chose to initiate. Now, years later, that resistance persists and the trial court's decision to add language to the modified judgment to clarify that this is a conditional judgment was not only sound, but a proper application of the doctrine of law of the case. (See *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213.)

The Hogans separately contend that Victoria Hogan's status as a third party beneficiary of the Gardenview purchase agreement precludes the court from conditioning payment of the Hogans' money damages on return of the property. Their theory is confusing, to say the least. The Hogans appear to expressly concede that any rights a party might claim as a third party beneficiary to a contract no longer exist once the contract has been rescinded. (See Civ. Code, § 1559 ["A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."].) However, the Hogans then argue that the contracting parties may not rescind a contract when the " 'promisor continues to retain the consideration from the original promise.'" (Quoting *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1025 (*Spinks*).

Remarkably, it appears that the Hogans are using this brand new third party beneficiary theory to attempt to resurrect their claim that the Gardenview purchase agreement was never actually rescinded. At this point in this protracted litigation, the rescission of the Gardenview purchase agreement is an established and undeniable fact. Thus, as the Hogans' authority confirms, a third party beneficiary no longer has any enforceable rights in that agreement. (*Spinks, supra*, 171 Cal.App.4th at p. 1025.)

## **2. Interest**

The Hogans contend that the trial court committed legal error by refusing to include an award of post-judgment interest in the modified judgment. The Hogans' theory is that (1) they were awarded a money judgment, (2) post-judgment interest begins to run from the date of entry of judgment (CCP, § 685.020, subd. (a)), and (3) interest accrues at a rate of 10 percent per annum on the principal amount that remains unsatisfied (CCP, §§ 685.010(a)).

The modified judgment is not properly characterized as a money judgment within the meaning of CCP sections 685.010 and 685.020, at least not until the Hogans return the Gardenview property. In this case, the Hogans made an election to waive legal damages and seek equitable relief relating to their rescission of the Gardenview purchase agreement. Exercising its equitable power and express discretion under the rescission

statutes, the trial court entered a conditional judgment. Thus, although the modified judgment allows the Hogans to recover consequential damages relating to the rescission, those monies are not due unless and until the Hogans return the Gardenview property to the Developers.

The Hogans contend that “[p]ost-judgment interest on consequential damages in a rescission matter is awarded like any other money judgment.” But, the only case the Hogans’ cite for this proposition, *Lund v. Cooper* (1958) 159 Cal.App.2d 349, 352, did not involve a conditional judgment. Indeed, in that case, which involved the rescission of an agreement to purchase real property, the rescinding purchasers never took title to the property, and the other party to the contract did not suffer any damages as a result of the rescission.

If the Hogans are suggesting that the trial court did not have the power to condition the payment of consequential damages on the return of the Gardenview property, they are very wrong. The rescinding party’s obligation to restore consideration it has received under the contract it seeks to undo is manifest in the very concept of rescission, as illustrated by the many early rescission cases cited by the Developers on appeal. (See *Conlin v. Studebaker Brothers Company* (1917) 175 Cal. 395, 398 [In action to rescind contract for purchase of automobile, the “judgment should have made the return of the consideration conditional upon the placing of the automobile in the possession of the defendants”]; see also *Alder v. Drudis* (1947) 30 Cal.2d 372, 384-385; *Sutton-Watts v. Sarnow* (1926) 80 Cal.App. 91.)

More to the point, when the rescinding party turns to the court to provide relief based on a rescission, as the Hogans did in this case, the court is expressly authorized to enter a conditional judgment by Civil Code section 1693 which states: “A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment.”

### 3. *The \$417,000 Mortgage*

The Hogans object to the following language in the modified judgment: “The Developer Defendants must also remove as an obligation of the Hogans the remaining debt of \$417,000 on the real property at the same time as payment of the consequential damages in exchange for the return of the real property . . . .”

The Hogans contend that this new language must be stricken because it impermissibly altered the amended judgment which required the Developers to pay the mortgage balance on the Gardenview property directly to the Hogans as part of their money damages. Again, the Hogans seriously misconstrue a prior court order.

Prior to the modification quoted above, the amended judgment stated: “DEVELOPER DEFENDANTS, jointly and severally, shall pay the existing mortgage debt in the amount of \$417,00.00.” As reflected in our decision in *Hogan I*, this provision of the amended judgment gave effect to the jury’s finding when “balancing” the equities in this case, that the Developers are required to assume the balance of the mortgage obligation on the Gardenview Property. Neither this former provision nor any part of the amended judgment expressly or implicitly required the Developers to make mortgage payments to the Hogans or characterized this mortgage obligation as a “damages award.” Indeed, the Developers’ liability to the Hogans has always been addressed in an entirely separate provision of every version of the judgment in this case.

The modified judgment clarified but did not substantively alter the provision requiring the Developers to assume the mortgage obligation on the Gardenview property. Under other circumstances, such a modification may have been unnecessary. Here, however, the Hogans have repeatedly mischaracterized the \$417,000 mortgage balance as an award of damages to them and continue to do so notwithstanding express court orders to the contrary.<sup>12</sup> Therefore, the clarification in the modified judgment was proper and appropriate.

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<sup>12</sup> In this regard, we grant the Developers’ November 7, 2011, motion for judicial notice of an October 1, 2007, order and several pleadings relating to that order. Pursuant to this October 1, 2007, order, the trial court denied a prior motion by the

#### 4. *Additional Alleged Damages*

The Hogans contend that the modified judgment must be corrected to include additional damages incurred by them since entry of the original judgment. According to the Hogans, these additional damages, which now total \$144,634.07, include mortgage payments, property taxes, insurance and homeowner association dues that the Hogans paid after entry of the original judgment.

As best we can tell, the Hogans did not seek to have these additional damages included in the modified judgment pursuant to their motion to correct. Therefore, they cannot challenge the October 20 order on this ground.

Furthermore, the Hogans fail to support their claim that these additional amounts can be included in the modified judgment. The Hogans rely on Civil Code section 3283 which states “Damages *may be* awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.” (Emphasis added.) This statute is irrelevant absent evidence that such an award was actually made in this case. It certainly does not support the Hogans’ novel attempt to unilaterally increase their own damages award. The Hogans also mistakenly rely on *Beeler v. American Trust Co.* (1946) 28 Cal.2d 435. In that case, which is factually distinguishable in several aspects, the original judgment provided that the damages awarded to the defendant/respondent included “ ‘advances made by defendant for taxes, if any, subsequent to trial.’ ” (*Id.* at p. 440.) There is no comparable provision in the judgment in this case.

The Hogans contend they incurred these additional expenses in order to protect their interest in the Gardenvue property and that the judgment must be adjusted to include these payments in order to “forestall unjust enrichment of the nonrescinding party through whose fault the grounds of rescission have arisen.” (Quoting *Runyan v. Pacific*

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Hogans for an order requiring the Developers to increase the amount of their undertaking to include the mortgage debt.

On August 29, 2011, the Hogans filed a motion for judicial notice of documents showing that they filed a writ petition for extraordinary review of the October 1, 2007, order which this court denied. The Hogans’ motion for judicial notice is denied on the ground that these documents are irrelevant.

*Air Industries, Inc.* (1970) 2 Cal.3d 304, 317.) First, since the Hogans no longer have a legal interest in the Gardenview property, they have nothing to “protect.” Second, overwhelming evidence supports the conclusion that the Hogans are delaying this litigation in order to increase their monetary recovery. Thus, it is their unjust enrichment which must be forestalled.

**D. *The October 22 Orders***

The Hogans appeal from all four orders that the trial court made at the October 22 hearing. However, once again, they fail to identify a single reversible error.

**1. *The Developers’ Undertaking***

The Hogans reiterate their theory that the Developers’ liability has increased such that their current bonds are insufficient. However, we have already rejected the theories by which the Hogans seek to improperly increase the amount of their damages award. As the trial court found, that liability is fixed by the modified judgment and until the Hogans return the Gardenview property, no payment is due. Therefore, for reasons we have already explained, we reject again the contentions that the Developers’ liability to the Hogans includes (1) post-judgment interest, (2) the Developers’ mortgage obligation, or (3) post-judgment expenditures allegedly made by the Hogans.

**2. *The Realtors’ Undertakings***

The Hogans contend that, if this court rejects the Engstroms’ appeal from the March 3 cost order, then we must also find that the court erred by rejecting their claim that the Engstroms’ undertaking is inadequate to cover the Hogans’ cost judgment.

First, the March 3 cost order was not a cost judgment. Second, the trial court denied the Engstroms’ motion to strike or tax the Hogans’ 2009 cost bill solely for procedural reasons. Third, and in any event, we have reversed the March 3 cost order because the Engstroms are not liable to the Hogans for any costs in connection with the appeals we resolved in *Hogan I*.

**3. *Orders Denying Enforcement of Existing Bonds***

The Hogans contend the trial court erred by denying their requests to enforce the existing bonds against the Developers and the Engstroms. However, their theory rests on

the false premise that they are entitled to recover their consequential damages without having to return the Gardenview property to the Developers. Therefore, their requests to enforce the existing bonds were properly denied.

The Hogans also contend that, even if return of the house is a condition of the judgment, it applies only to the Developers but not to the Engstroms because they were not parties to the rescission. As we explained in *Hogan I*, the Engstroms are not liable to the Hogans for legal damages because the Hogans elected rescission as their sole remedy. Since the Engstroms share joint and several liability for the consequential damages relating to the rescission, they are not required to pay consequential damages unless and until the Hogans' return the Gardenview property to the Developers.

#### **4. *Order Vacating Stay***

The Hogans seek reversal of the October 22 order vacating a stay of enforcement of the judgment against the Hogans. The Hogans contend that the June 2007 stay order should remain in place unless and until the Developers pay all of the Hogans' money damages. We reject this theory for two independent reasons.

First, the June 2007 order served a specific function which clearly no longer applies. As discussed in our factual summary, the trial court stayed the part of the judgment directing the delivery of possession of the Gardenview property to the Developers pending the appeals in *Hogan I* without requiring the Hogans to post an undertaking. However, after the Hogans lost their appeals in *Hogan I* and their obligation to return the house to the Developers was affirmed, they continued to use the stay order as justification for refusing to return the house to the Developers. Under those circumstances, the trial court did not err by granting the Developers' motion to vacate the stay order.

Second, and in any event, the Hogans' claim that they are entitled to a stay of enforcement of the judgment against them until the Developers pay consequential damages is directly contrary to the conditional judgment in this case. The Hogans must return the property as a condition of the judgment awarding them consequential damages resulting from their unilateral rescission of the Gardenview property.

Finally, the Hogans also contend that the order lifting the stay of execution of the judgment against them interferes with Victoria Hogan’s “third party beneficiary rights in the property.” We have already rejected this untimely and unsound theory.

**V. DISPOSITION**

In appeal No. A128451, the trial court’s order of March 3, 2010, is reversed and the matter remanded to that court to enter a new order consistent with the foregoing opinion and the record in this litigation. Costs are awarded to the appellant Engstroms in this appeal.

In appeal No. A130351, the trial court’s orders of September 17, September 29, October 20, and October 22, 2010, are all affirmed. Costs are awarded to the respondents Engstroms and Developers in this appeal.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.