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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LARISA KHAZAN ET AL., Plaintiffs, Respondents, and Cross-Appellants, v. FELIX BRAYNIN ET AL., Defendants, Appellants, and Cross-Respondents.	A128536 (City & County of San Francisco Super. Ct. No. CGC00310997)

This case returns to us after we decided two prior appeals in the same matter. Larisa Khazan (Khazan) and Boris Khazan (collectively plaintiffs) brought this action against Felix Braynin (Braynin), Vera Braynin, Vladislav Chernoguz (Chernoguz), and Biana Chernoguz (collectively defendants). Plaintiffs sought judicial foreclosure of a deed of trust on a property in San Francisco, alleging that defendants had defaulted on a promissory note secured by the deed of trust. They also alleged that defendants had defaulted on a second promissory note, committed fraud, and violated the Racketeer Influenced and Corrupt Organizations Act, 18 United States Code section 1961 et seq. (RICO). Defendants cross-complained for slander of title and cancellation of cloud on title. Plaintiffs prevailed on their causes of action for judicial foreclosure, declaratory relief, and default on the second promissory note and on the cross-complaint, but were unsuccessful in their fraud-based and RICO causes of action. The trial court then awarded plaintiffs contractual attorney fees in the amount of $1,370,604.

In one of the earlier appeals, *Khazan v. Braynin* (March 30, 2009, A113035) [nonpub. opn.] (*Khazan I*), we affirmed the judgment on the merits. On the same date, we reversed the order determining the amount of attorney fees and directed the trial court to reconsider plaintiffs' fee request. (*Khazan v. Braynin* (March 30, 2009, A114369) [nonpub. opn.] (*Khazan II*). The trial court has now done so. Defendants appeal the resulting decision, and plaintiffs have filed a cross-appeal challenging the trial court's ruling on when interest on the award should begin to accrue.

We reject defendants' challenges to the amount of the attorney fee award, and conclude the trial court correctly ruled that interest should run from the date of the fee award on remand.

I. BACKGROUND

For the background of this dispute, we quote from our opinion in *Khazan I*: [1]

A. The Loan and Deed of Trust

Braynin and Chernoguz operated a real estate business known as Crown Real Estate and Investment (Crown), and together defendants owned a property on Hayes Street in San Francisco. Braynin asked plaintiffs for a loan to fund construction on the Hayes Street property. Plaintiffs agreed to loan them $300,000, with the loan secured by a deed of trust. In February 1995, Braynin gave plaintiffs a $300,000 promissory note and deed of trust, payable within one year. The parties dispute how much money plaintiffs gave in return. Plaintiffs took the position that they gave defendants checks totaling $140,000, and the remainder of the promissory note represented unpaid amounts defendants had previously borrowed from plaintiffs. According to defendants, all previous loans had been paid off, and Khazan gave Braynin checks totaling $119,000, promising him the balance of $181,000 within about two weeks.

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[1] Brackets enclosing material denote additions to the opinion in *Khazan I*. Empty brackets [] denote deletions from the opinion.

B. Defendants' Version of Events

The parties gave dramatically different versions of the events that took place next. According to defendants, within a few days of lending the money, Khazan told defendants that plaintiffs no longer wanted to continue with the loan, and instead asked them to transfer the money to another company, A and A Financial Management (A&A).[2] Chernoguz told A&A's owner, Alexander Lushtak, to transfer the $119,000, plus interest, from Crown's account at A&A to the Khazans' account, and Khazan was aware of the transfer. Braynin asked Khazan to return the note and deed of trust. At first she told him she was too busy to look for them. Later she said she had torn them up and thrown them away.

Braynin had a deed of reconveyance prepared, which recited that the indebtedness secured by the deed of trust had been fully paid and satisfied. He explained to plaintiffs that he wanted the deed of reconveyance executed so he could record it in the event the deed of trust and promissory note turned up. Plaintiffs signed the deed of reconveyance.[3] However, although Braynin asked them to come to Crown's office to have it notarized, they did not do so. Braynin eventually forgot about the deed of reconveyance.

Plaintiffs made no demands on the note for at least two years, and defendants

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[2] Defendants had introduced plaintiffs to A&A, which apparently specialized in arbitrage investments.

[3] Defendants presented evidence that the Khazans' signatures on the deed of reconveyance were genuine.

made no payments. In approximately April or May 1997, however, A&A collapsed,[4] and plaintiffs lost money they had invested with A&A. In late May 1997, Khazan recorded the $300,000 deed of trust.

C. Plaintiffs' Version of Events

Plaintiffs' version of the events relevant to this appeal is irreconcilable with defendants'. Khazan testified that she did not have an account with A&A, that she never intended to loan money to A&A,[5] and that the $300,000 note was fully funded by a combination of "new money" she gave defendants and "old money" rolled over from previous loans.[6] Khazan did not immediately record the deed of trust because Braynin asked her not to do so, so that he could borrow more money against the property. She never told Braynin plaintiffs wanted to withdraw from the loan, did not ask him to have her money transferred to A&A, and did not tell him she had torn up the note and deed of trust. Khazan had no memory of signing the deed of reconveyance, although she agreed that the signatures on the document looked like plaintiffs'. She received numerous interest payments on the loan before April 1997, often in the form of cash and checks from Crown or A&A, but it appears that she did not keep records of the payments. When the note came due, she asked Braynin and Chernoguz when it would be paid, and they

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[4] Lushtak was later indicted for wire fraud (18 U.S.C. § 1343) and money laundering (*id.*, § 1956(a)(1)(A)(i)) in connection with his operation of A&A. He pled guilty to money laundering. It appears that some of the clients whom defendants had introduced to A&A—and who held A&A notes cosigned by Lushtak, Braynin, and Chernoguz—held Braynin and Chernoguz responsible for the losses they suffered in A&A's collapse. According to defendants, in order to forestall lawsuits by these clients, Braynin and Chernoguz issued promissory notes to the clients to replace the A&A notes, and they indicated they would pay the note amounts if they earned enough money from their other business operations. Although the balance in Khazan's A&A account was $357,000, she told Braynin to prepare a note for $57,000, and Braynin and Chernoguz did so.

[5] She believed A&A was defendants' company and that checks to A&A went to defendants.

[6] The funding included the $119,000 paid to defendants, and an additional $21,000 check made out to A&A, at Braynin's request.

told her they would pay very soon. She decided to record the note after Braynin told her, in around April 1997, that he had lost his money. After the note was recorded, Khazan again asked defendants when they would repay the amounts due on the $300,000 note. They said they would repay the loan, and Braynin indicated the payment would be made within a year.

D. The Litigation

Plaintiffs brought this action, seeking judicial foreclosure of the deed of trust and alleging fraud and other causes of action, and defendants cross-complained for slander of title and cancellation of cloud on title.[[7]] A jury first heard the evidence and rendered its verdict. Responding to the special verdict form's questions regarding breach of the $300,000 note, the jury found that defendants had executed and delivered the note, that plaintiffs had fully funded the note with checks and the rolling over of an existing indebtedness, that plaintiffs had not instructed Braynin and Chernoguz to cancel the $300,000 promissory note and deed of trust and to transfer their money to A&A, and that the interest rate on the note was usurious.[8] On the cause of action for breach of the $57,000 note, the jury found that Braynin and Chernoguz had executed and delivered the

[7] The Fifth Amended Complaint, which was the operative complaint, alleged 14 causes of action: (1) judicial foreclosure of deed of trust; (2) fraud; (3) common count for money had and received; (4) common count for money lent; (5) fraud—entering into contract without intention of performing; (6) appointment of receiver; (7) declaratory relief; (8) promissory note; (9) common count for money had and received; (10) common count for money lent; (11) fraud—entering into contract without intention of performing; (12) fraudulent conveyance; (13) fraudulent conveyance; and (14) RICO (18 U.S.C. § 1961 et seq.). Counts 1 through 6 related to the $300,000 promissory note and deed of trust. Count 7 sought declaratory relief in connection with the third-party promissory notes secured by deeds of trust. Counts 8 through 11 related to the $57,000 promissory note. Counts 12 and 13 alleged Chernoguz and Braynin had fraudulently executed interspousal deeds of trust to their wives. Count 14 alleged a criminal enterprise among defendants and Lushtak.

[8] Because the jury found plaintiffs had not instructed Braynin and Chernoguz to cancel the note and deed of trust and to transfer their money to A&A, it did not reach the question of whether the money had in fact been transferred to A&A. Based on these findings, the jury similarly did not reach the cross-complaint's cause of action for slander of title. []

note to Khazan, and that it was supported by $57,000 consideration. The jury found against plaintiffs on the other causes of action submitted to it. [In particular, the jury rejected plaintiffs' allegations that Braynin and Chernoguz committed fraud by telling them that it was unnecessary to record the $300,000 deed of trust because there was sufficient equity in the Hayes Street property and they would not endanger the value of the deed of trust; that Braynin and Chernoguz falsely promised to repay the notes for $300,000 and $57,000 without intending to do so; and that Braynin and Chernoguz committed two "predicate acts" under RICO [¶]].

The trial court later issued a statement of decision ruling in plaintiffs' favor on their first cause of action for judicial foreclosure of the deed of trust—finding that plaintiffs were entitled to the unpaid balance on the note, plus interest and attorney fees, and indicating its intent to issue a judgment of foreclosure directing the sale of the Hayes Street property—and the seventh cause of action for declaratory relief.[9] The court entered judgment in plaintiffs' favor on their causes of action for judicial foreclosure, declaratory relief, and default on the $57,000 note, as well as on the cross-complaint. [We end our quotation from our opinion in *Khazan I*.] In *Khazan I*, we affirmed that judgment.

E. Initial Attorney Fee Order

As we explained in *Khazan II*, "[t]he February 1995 note for $300,000 provided: 'Should suit be commenced to collect this note or any portion thereof, such sum as the Court may deem reasonable shall be added hereto as attorney's fees.' The promissory note for $57,000, dated June 1, 1997, contained nearly identical language.

"In ruling for plaintiffs on their causes of action for judicial foreclosure and declaratory relief, the trial court awarded plaintiffs their attorney fees in an amount to be determined. Plaintiffs brought a motion seeking a lodestar amount of $944,952 for the

[9] The court declared plaintiffs' deed of trust in second position for purposes of disposition of the proceeds of the sale of the property.

legal services of one of their attorneys, Arthur Brunwasser, and an additional $94,506 for the services of another attorney, Robert S. Rivkin, and asked to have the lodestar amount enhanced by a factor of 1.5.

"The trial court found that plaintiffs incurred lodestar attorney fees of $850,732 for Brunwasser's services, and applied a 1.5 multiplier for those services, for an award of $1,276,098. It also awarded $94,506 for Rivkin's services, for a total attorney fee award of $1,370,604. It used a rate of $400 per hour as the prevailing rate in the community for similar services for Brunwasser's work, and $285 per hour for Rivkin's work. The court awarded no fees for the time spent on the failed RICO claim, but declined to apportion the fees incurred for the contract and fraud causes of action, concluding they arose from a common nucleus of facts." (Fn. omitted.)

Thus, although the jury rejected the fraud causes of action, the trial court found that the facts relevant to each claim were closely related and could not be separated from each other. Based on this finding, the trial court did not apportion fees between contract causes of action, for which contractual attorney fees were available, and the fraud causes of action, for which they were unavailable. We considered the propriety of this action in *Khazan II*, and reversed the attorney fee award. In doing so, we concluded that while we did not dispute a finding that some, or even most, of the attorney fees plaintiff sought arose from issues common to the contract and fraud claims, it was clear to us that at least some of the fees were incurred in connection with claims that were not relevant to the contract causes of action. In particular, we pointed to evidence of defendant's dealings with various third parties in connection with the A&A transactions, evidence that arguably had relevance to the fraud-based causes of action, but had no relevance to the contractual causes of action. We also noted the authority for a trial court correcting attorney fee awards to account for a party's limited success. (See, e.g., *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417-418 (*Harman II*); *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250 (*Sokolow*).)

Accordingly, we directed the trial court to consider whether it was possible to apportion fees for time spent on issues not attributable to the contract-based causes of action, and if not, to exercise its discretion to reduce the award to reflect plaintiffs' limited success.

F. The Second Attorney Fee Order

On remand, after making reductions not at issue here but before reducing the award to account for the fraud claims, the trial court found that Brunwasser had spent 2073.13 hours on the case. The court established a lodestar of $400 per hour for Brunwasser's services, basing this amount on his experience, market rates in the San Francisco Bay Area, the skill he demonstrated, the high quality of his legal services, and the successful outcome. The court found that "[v]irtually all of the litigation objectives were attained by prevailing in the contract and declaratory relief causes of action. Plaintiffs successfully defended and prevailed on defendants' cross-complaint for slander of title and to remove a cloud on title. Brunwasser's legal services resulted in a highly successful outcome for Plaintiffs." The court concluded that 30 percent of plaintiffs' case was devoted to the unsuccessful fraud causes of action, and subtracted that proportion from the gross hours. The court calculated the lodestar amount of attorney fees as $580,476.40 for Brunwasser's services.

The court went on to consider whether to increase or decrease the lodestar for Brunwasser's services by the application of a multiplier or other adjustment. The court listed the factors it considered: "First, the difficulty and complexity of the case, or lack thereof, of the various issues in this case and the kind of work performed by counsel. Second, the results achieved and those not achieved. Third, the contingent nature of the fee award. Fourth, the time value with regard to the delay in receipt of fees. Fifth, the extent to which the magnitude of the case and time expended precluded counsel from earning income from other sources during the pendency and trial of this case. Sixth, the fact that the successful outcome for Plaintiff conferred a private rather than a public benefit. Seventh, the difficulty of the case and the degree of risk involved." The court concluded that the lodestar amount did not adequately compensate Brunwasser for his work: "The attorney performed these legal services on a contingent fee basis for Plaintiffs of modest means who were otherwise unable to assert their legal rights to preserve their assets. Therefore the outcome of the litigation had significant social utility even though a private benefit was conferred rather than a public benefit. The litigation has spanned a period of almost ten years during which no compensation has been paid to the attorney. The attorney's involvement in this case has unquestionably precluded him from performing remunerative work during an extended period of time. The time value of money in relation to the delay in receiving compensation is a significant [f]actor in the Court's consideration of enhancement fees. . . . Most significant was the successful outcome of the litigation for Plaintiffs. The Court finds these factors highly persuasive in allowing a multiplier." The court applied a multiplier of 1.5 to Brunwasser's fees for total compensation of $870,714.60.

As to Rivkin, the court reduced the initial award by 30 percent, for an award of $66,154, and applied no multiplier. The court also awarded fees on appeal of $174,210 to Brunwasser and $14,235 to Rivkin, fees for the preparation of the fee application on appeal of $17,360 to Brunwasser, and fees for the preparation of the fee application after remand of $52,920 to Brunwasser. Thus, the total award to Brunwasser was $1,115,204, and to Rivkin was $80,389. In its May 7, 2010 order, the trial court ordered interest on the award to begin running on the date of the judgment reflecting that fee order.

II. DISCUSSION

A. Legal Standards

Our Supreme Court has explained the rules governing awards of contractual attorney fees: "Civil Code section 1717 provides that '[r]easonable attorney's fees shall be fixed by the court.' As discussed, this requirement reflects the legislative purpose 'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions.' [Citation.] Consistent with that purpose, the trial court has broad authority to determine the amount of a reasonable fee. [Citations.] As we have explained: 'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong'—meaning that it abused its discretion. [Citations.] [¶] . . . [T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095 (*PLCM*).) The determination of a reasonable fee is committed to the discretion of the trial court, which " 'makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances of the case.' [Citation.]" (*Id*. at p. 1096; see also *Flannery v. Prentice* (2001) 26 Cal.4th 572, 584 [in setting award, consideration may be given to attorney's experience, difficulty of issues, risk incurred, quality of work, and result achieved].)

B. Reduction in Lodestar

Defendants contend the trial court applied the wrong standards in reducing the award by only 30 percent to account for time spent on the fraud-based claims. They rely upon *Harman II*, in which Division One of the First Appellate District, relying on factors articulated in *Hensley v. Eckerhart* (1983) 461 U.S. 424, applied a two-step analysis in considering the propriety of an award of attorney fees under title 42 United State Code section 1988 where the party claiming fees achieved only partial success. (*Harman II*, *supra*, 158 Cal.App.4th at pp. 415-418.) As we explained in *Khazan II*, the lodestar figure is first calculated by multiplying the number of hours expended times a reasonable hourly rate, with adjustments as necessary to fix a fair market value for the services.

(*Harman II*, *supra*, 158 Cal.App.4th at p. 416.) Hours spent on claims unrelated to those on which the party was successful are excluded from the lodestar calculation, but " ' "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed" . . . [or] when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units.' [Citation.]" (*Id.* at p. 417, fn. omitted.) In the second step, if successful and unsuccessful claims are found to be related, the court then evaluates "the 'significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' [Citation.] If the plaintiff obtained 'excellent results,' full compensation may be appropriate. *Ibid*. If there was only 'partial or limited success,' full compensation 'may be . . . excessive.' [Citation.]" (*Ibid*.) In that case, " '[t]he court may appropriately reduce the lodestar calculation "if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." [Citation.] . . . "[T]he most critical factor is the degree of success obtained." [Citation.]' [Citation.]" (*Id*. at p. 418.)

Defendants contend the trial court failed to carry out the second step of this analysis. That is, according to defendants, although the court apportioned the fees to account for time spent solely on the unsuccessful fraud causes of action, it did not then further reduce the fees that were attributable to *both* the contract and fraud claims to reflect plaintiffs' partial success.

After concluding that by prevailing in the contract and declaratory relief cause of action, plaintiffs had attained "[v]irtually all of the litigation objectives," the trial court explained its reasons for reducing the gross hours by 30 percent as follows: "The Court's review of the case to award reasonable attorney's fees [] which do not include work attributable to the unsuccessful fraud claims has considered pre-trial litigation, pre[-]trial interviewing of witnesses, trial preparation and post-trial work. After detailed review of the litigation and having taken a broad overall view of the case, the Court finds that determination of a percentage allocation is the most reasonable method to determine the fraud component. Accordingly, the Court's overall conclusion is that 30 [percent] of the Plaintiff[s'] case was devoted to the unsuccessful fraud causes of action. Therefore, the Court subtracts 30 [percent] from Brunwasser's claimed gross hours . . ." The court then considered whether the circumstances of the case—including "the results achieved and those not achieved" warranted an increase *or decrease* in the lodestar by a multiplier or other adjustment.

The trial court made no finding that the contract and fraud claims were so interrelated that the time devoted to each could not be separated. (See *Harman II*, *supra*, 158 Cal.App.4th at p. 425.) In fact, the 30 percent deduction exceeded the amount plaintiffs estimated their counsel had spent on the fraud claims: Based on his review of the case history, Brunwasser testified that he believed there was a direct relationship between the amount of pretrial time he spent on various issues and his examination of witnesses on those issues, and estimated that only 20 percent of his direct examination of witnesses had been devoted to non-contract evidence, and that the attorneys for all parties had devoted only 15 percent of their trial time to non-contract evidence. Accordingly, it is by no means clear that the 30 percent deduction reflected only time that the trial court concluded had been spent exclusively on the fraud claims or that it included no time that may have been spent on issues common to the fraud and contract claims.

In any case, we are satisfied that the trial court was aware of its discretion to decrease the award further to account for a partially successful outcome, and that it exercised its discretion not to do so. In *Khazan II*, after discussing at length the rule of *Harman II*, we directed the trial court to consider whether it was possible to further apportion fees for time not attributable to the contract-based causes of action, and, if such apportionment was not possible, to exercise its discretion to reduce the award to reflect plaintiffs' limited success. (*Khazan II*, slip op. at pp. 16-18.) Plaintiffs argue the trial court adhered to the terms of this directive. We agree. Moreover, consistent with our reasoning and with the rule of *Harman II*, the trial court, after reducing the award by 30 percent to reflect time spent on the fraud claims, then considered whether to *reduce* the resulting lodestar based on a variety of factors, including "the results achieved and those not achieved." The question before us, then, is not whether the trial court in fact exercised its discretion to decide whether to reduce the award to reflect plaintiffs' limited success, but whether its exercise of that discretion in declining to reduce the award was reasonable and consistent with the governing legal standards.

In considering this issue, we first note that a reduction in a fee award to account for partial success is not mandatory. In *Khazan II*, we explained that "in certain cases, courts have not required apportionment between successful and unsuccessful causes of action. As stated in *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 431, '[w]here a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised.' [Citation.] 'To reduce the attorneys' fees of a successful party because he does not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the costs of enforcing' the plaintiff's rights. [Citations.]" However, 'when a plaintiff has achieved limited success, or has failed with respect to distinct and unrelated claims, . . . a reduction from the lodestar is appropriate.' . . . (*Hogar Dulce Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1369.)" (*Khazan II*, slip op. at p. 13.) We also noted, however, that in certain cases in which courts had not required apportionment of fees for issues common to both successful and unsuccessful causes of action, it appeared that the trial court had already corrected the fee request to account for the prevailing party's limited success. (*Id*. at pp. 9, 14, citing *Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1642 (*Nazemi*), *Korech v. Hornwood* (1997) 58 Cal.App.4th 1412, 1422, *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134, and *Greene* *v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 423.) Indeed, in *Harman II*, the Court of Appeal found the trial court had not abused its discretion when it deleted from a fee request hours not intertwined with a successful damages claim, but declined to make further adjustments for a number of reasons, including that "additional reductions for lack of success 'would amount to doubly reducing the fees.' " (*Harman II*, *supra*, 158 Cal.App.4th at pp. 424-426.)

Defendants argue, however, that the trial court's findings on the degree of plaintiffs' success fly in the face of our decision in *Khazan II*, and that these findings impermissibly infected the choice of a lodestar figure. In *Khazan II*, we concluded that some of the evidence presented at trial—such as evidence of third-party transactions—was not relevant to the contract-based causes of action, and that defendants should not bear the cost of the time spent on plaintiffs' unsuccessful attempt to prove they acted fraudulently. (*Khazan II*, slip op. at pp. 11-12.) We concluded, "[w]ith respect to their broader goals, plaintiffs achieved only limited success. They failed in all their fraud-related causes of action, in which they had sought not only compensatory but also punitive damages. They cannot be said to have achieved all or substantially all of their objectives in the litigation." (*Khazan II*, slip op. at p. 17, fn. omitted.) We did not, however, require the trial court to apply any specific formula, but only directed it to exercise its discretion to address this issue. (*Khazan II*, slip op. at p. 18.)

In setting the rate of $400 per hour for Brunwasser's services, the trial court referred to "the highly successful outcome for Plaintiffs," and also "considered all facts and circumstances of the case," including that "[v]irtually all of the litigation objectives were attained by prevailing in the contract and declaratory relief causes of action. Plaintiffs [also] successfully defended and prevailed on defendants' cross-complaint for slander of title and to remove a cloud on title. [Therefore,] Brunwasser's legal services resulted in a highly successful outcome for Plaintiffs." In declining to decrease the lodestar—and at the same time in deciding to apply a multiplier of 1.5—the court relied on a variety of factors, including the factor it stated was "[m]ost significant[,] . . . the successful outcome of the litigation for Plaintiffs." This was not error.

According to defendants, however, this reliance on the "successful outcome" was inconsistent with our statements in *Khazan II* and violated the doctrine of law of the case.[10] In our earlier decision, we concluded that plaintiffs had not achieved all or substantially all of their goals in the litigation, based on their failure to prevail in their fraud-based causes of action, but we made no finding on the *degree* of plaintiffs' overall success. On remand, the trial court was clearly of the view that, on the whole, plaintiffs were successful in this litigation, but reduced the fees originally claimed for the fraud-based and contract-based claims by nearly one-third to account for plaintiffs' lack of success on the fraud claims. As the court pointed out, plaintiffs succeeded not only on their own contract-based causes of action, but on the claims defendants raised in their cross-complaint for slander of title and cancellation of cloud on title. We see no violation of the law of the case in the trial court's analysis.

Defendants also contend that even on the contract claims, plaintiffs were only partially successful because defendants prevailed on their affirmative defense that the 17.6 percent interest rate on the $300,000 note was usurious. The trial court found that interest rate usurious and ordered interest to accrue from June 1997, the due date of the principal amount, at the legal rate of seven percent. Defendants argue that as a result, plaintiffs received only one quarter of the amount they had sought on the contract causes

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[10] The doctrine of law of the case states that "where an appellate court states in its opinion a principle of law necessary to the decision, that principle becomes law of the case and must be adhered to in all subsequent proceedings, including appeals. . . . 'Application of the rule is now subject to the qualifications that "the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision." [Citations.]' [Citations.] " (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1064.)

of action, and contend the trial court should have reduced the attorney fee award to reflect this partial success.[11] Plaintiffs dispute the figures defendants provide, arguing they were awarded half the amount they sought, and point out in addition that they were successful in defeating defendants' cross-claims for slander of title, for which defendants requested $415,800 in damages, and that they were successful in their foreclosure and declaratory relief claims.

Harman II cautions against requiring direct proportionality between an attorney fee award and the amount of compensatory damages awarded. (*Harman II*, *supra*, 158 Cal.App.4th at pp. 420-421.) Defendants have made no showing the usury defense consumed a significant amount of attorney time in relation to the time spent on the contract claims as a whole. Nor have they made an adequate showing of the amount the parties sought on the various causes of action. In the circumstances, they have not met their burden to show abuse of discretion in the trial court failing to reduce the fee award to account for the usury defense.

C. Reasonableness of Multiplier

Defendants also challenge the trial court's application of a multiplier of 1.5 to increase the fee award for Brunwasser's services. They argue at length that an enhancement is not appropriate in this case vindicating private, rather than public rights, and suggest that enhancements are not available on an award of contractual attorney fees under section 1717.

Our Supreme Court has explained, " '[T]he Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in limited situations.' [Citation.] When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated. Thus, in 1993, it amended Code of Civil Procedure section 1021.5 to provide that attorney fees awarded to a public entity under

[11] We are unable to verify these amounts from the record citations plaintiffs provide.

the section 'shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in [*Serrano v. Priest* (1977)] 20 Cal.3d 25, 49 [(*Serrano III*)].' (Stats. 1993, ch. 645, § 2, p. 3747.) Its express restriction on the use of fee enhancements therein 'can be read as an implicit endorsement of their use in other contexts.' [Citations.]" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135 (*Ketchum*); see also *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 643, 646.) The high court noted in *Ketchum* that one of the contexts in which the lodestar adjustment method had been applied was in the award of contractual attorney fees pursuant to Civil Code section 1717 (section 1717). (*Ketchum, supra*, 24 Cal.4th at pp. 1134-1135, citing *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 75-76 (*Sternwest*).)

In describing the rules governing fee awards under section 1717, our high court stated that the lodestar amount "may then be adjusted, based on consideration of factors specific to the case," in order to determine the fair market value of the services. (*PLCM*, *supra*, 22 Cal.4th at p. 1095.) For this proposition, it cited *Serrano III*, which listed a number of factors that could be used to *augment* or reduce an award, including the novelty and difficulty of the issues, the skill displayed, the extent to which the litigation precluded other employment, and the contingent nature of the fee award. (*Ibid*.; *Serrano III*, *supra*, 20 Cal.3d at p. 49.) Moreover, the court in *Sternwest* held unambiguously that enhancements are within the trial court's discretion under section 1717. The court did not except from its holding cases in which the rights vindicated were private, rather than public (*Sternwest*, *supra*, 183 Cal.App.3d at p. 76), and our Supreme Court has cited this holding with approval. (*Ketchum*, *supra*, 24 Cal.4th at pp. 1134-1135.) In the circumstances, the trial court could properly consider, in its discretion, whether to award an enhancement.[12]

[12] Defendants point out that the court in *San Dieguito Partnership v. San Dieguito River Valley Regional etc. Authority* (1998) 61 Cal.App.4th 910, 918-919 (*San Dieguito*) questions the reasoning of *Sternwest*. The court in *San Dieguito* concluded section 1717

Defendants argue we should follow a recent case of the United States Supreme Court, *Perdue v. Kenny A.* (2010) ___ U.S. ___, [130 S. Ct. 1662] (*Perdue*). There, the court addressed the question of whether, under federal fee-shifting statutes, the lodestar may be increased due to superior performance and results. (*Id*. at p. 1669.) The court concluded that although there was a strong presumption that the lodestar was adequate to compensate counsel, such an enhancement may be available in " ' "rare" ' and ' "exceptional" ' circumstances" "in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee"; those circumstances could occur where the method used to determine the hourly rate does not adequately measure the attorney's true market value, where the attorney faced an extraordinary outlay of expenses and exceptionally protracted litigation, or where there is exceptional delay in the payment of fees. (*Id*. at pp. 1673-1675.) In reaching this decision, the court discussed six rules established in its earlier cases concerning federal fee-shifting statutes: a reasonable fee is one sufficient to induce a capable attorney to undertake a meritorious civil rights case; there is a strong presumption that the lodestar fee is sufficient to achieve this objective; enhancements for performance may be awarded in rare and exceptional circumstances; the lodestar figure includes most, if not all, factors relevant to determining a reasonable attorney fee; the fee applicant has the burden to

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does not authorize an award of more fees than the prevailing party actually incurred, and therefore the trial court there had not erred in refusing to apply a multiplier. (*Id*. at pp. 916-919.) Our Supreme Court has disapproved *San Dieguito* to the extent it suggests "that fees can be recovered only when, and to the extent that, a litigant incurs fees on a fee-for-service basis." (*PLCM*, *supra*, 22 Cal.4th at p. 1097, fn. 5.) The parties also disagree on the effect of *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, which stated that because an award of fees is an element of costs under section 1717, it is "limited to those costs reasonably and necessarily incurred by the prevailing party" (*id*. at p. 519), but also noted that in awarding contractual fees, the trial court should consider the *Serrano III* factors (*id*. at p. 521). The court in *San Dieguito* cited *Vella* in questioning *Sternwest*'s holding. (*San Dieguito*, *supra*, 61 Cal.App.4th at pp. 918-919.) In light of our Supreme Court's statements in *PLCM* and *Ketchum*, however, we conclude the rule of *Sternwest* on this point is good law.

prove an enhancement is necessary; and the fee applicant must produce " 'specific evidence' " to support the award. (*Id*. at pp. 1672-1673.)

We reject defendants' invitation to apply the standards of *Perdue* to this case. By its terms, *Perdue* considers the standards for *federal* fee-shifting statutes. The case before us is governed by California law, and our state's Supreme Court has made clear that "the lodestar adjustment method, including discretion to award fee enhancements, is well established under California law." (*Ketchum, supra*, 24 Cal.4th at p. 1137.)[13] As noted in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 568-569 (*Graham*), "United States Supreme Court interpretation of federal statutes does not bind us to similarly interpret similar state statutes. Indeed, in the realm of attorney fees for private attorneys general, this court has markedly diverged from United States Supreme Court precedent." (See also *Flannery v. California Highway Patrol, supra*, 61 Cal.App.4th at p. 646 [no showing that California Legislature intends federal standards to apply to limit trial court's discretion to calculate reasonable attorney fees].) Consistent with this authority, we interpret the trial court's authority to award attorney fees according to California precedent.

We also note that the contractual fee provisions at issue were broad, authorizing the trial court to award " 'such sum as the Court may deem reasonable.' " Nothing in this language suggests the parties intended to fetter the trial court's discretion to enhance the fee award as authorized by California law to reflect the value of counsel's services.

Defendants contend, additionally, that the factors the trial court relied on were improper. In particular, they challenge the court's reliance on the contingent nature of plaintiffs' fee agreement with their counsel, the fact that counsel could not work for

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[13] In *Ketchum*, the court rejected an invitation to adopt the policy arguments in the United States Supreme Court decision of *Burlington v. Dague* (1992) 505 U.S. 557, which barred the use of fee enhancements in federal courts in certain types of cases. (*Ketchum, supra*, 24 Cal.4th at pp. 1136-1137.)

paying clients while performing work for plaintiffs, the time value of money, and the social utility of the litigation.

The trial court may consider a variety of factors in deciding whether to adjust the lodestar. "[T]he unadorned lodestar reflects the general local hourly rate for a *fee-bearing case*; it does *not* include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider under *Serrano III*. The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ketchum*, *supra*, 24 Cal.4th at p. 1138; see also *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, 292 (*Pellegrino*) [where legal work done on contingency basis, enhanced fee award proper to compensate attorney for taking risk of nonpayment and reflects market value of services]; *Flannery v. California Highway Patrol, supra*, 61 Cal.App.4th at p. 646 [contingent nature of case may warrant enhancing lodestar]; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1216 [in adjusting lodestar upward, court may consider novelty and difficulty of issues, skill in presenting them, extent to which nature of litigation precluded other employment, and contingent nature of fee award].) However, in determining an appropriate enhancement, the trial court must not consider factors that were already encompassed in the lodestar. To do so would "result in unfair double counting and be unreasonable." (*Ketchum*, *supra*, 24 Cal.4th at pp. 1138-1139; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 822; *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 879 (*Northwest*).)

In determining the enhancement, the trial court relied on several factors to decide the lodestar amount was not adequate compensation: the services were performed on a contingent basis for plaintiffs of modest means who would otherwise have been unable to assert their rights, and the litigation therefore had "significant social utility"; because of the complexity of the issues and the skill of opposing counsel, there was a high degree of risk of not being paid; the attorney had not been paid during the ten years of the litigation, and had been precluded from performing work for paying clients during that time; and "[m]ost significant," the outcome of the litigation was successful for plaintiffs.

Based on the authorities we have discussed, we find no fault with the court's reliance on the contingent nature of the fee agreement, its attendant risk and delay in payment, or the extent to which counsel was precluded from working for other clients.[14] Nor are we persuaded by defendants' challenge to the court's reliance on the social utility of the litigation; this point was made in connection with the contingent nature of the fee agreement, a factor that is well established as proper for the court to consider. (*Ketchum*, *supra*, 24 Cal.4th at p. 1138; *Pellegrino, supra*, 182 Cal.App.4th at p. 292.) Finally, the trial court could properly consider the successful results and the complexity of the case in enhancing the lodestar. (See *PLCM*, *supra*, 22 Cal.4th at p. 1096; *Serrano III*, *supra*, 20 Cal.3d at p. 49; *Flannery v. Prentice*, *supra*, 26 Cal.4th at p. 584.)[15]

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[14] Our Supreme Court has cautioned, however, that an enhancement for delay in payment, "which is tantamount to an interest rate, is by itself quite small and may be reduced or eliminated if the lodestar rate is based on the present hourly rate rather than the lesser rate applicable when the services were rendered. [Citations.]" (*Graham*, *supra*, 34 Cal.4th at p. 584.)

[15] We recognize that in finding a $400 hourly rate appropriate for Brunwasser's services, the trial court in the second fee order alluded not only to his experience and the market rate in the Bay Area, but also to his skill, the quality of the services, and the highly successful outcome for plaintiffs. In their discussion of the *Perdue* case, defendants suggest that the successful outcome (as well as the complexity of the case and the quality of the legal services) was already subsumed in the lodestar, and it was therefore inappropriate for the court to consider it when setting an enhancement. We are not persuaded. In the initial fee order (the order at issue in *Khazan II*), the court set an hourly rate of $400, "based on rates prevailing in the community for similar work," and noted that the rate was "in the lower end of the range for market rates." It thus appears that, independent of the factors the trial court mentioned in its second fee order, the court

D. Cross-Appeal

1. Background and Contentions

In the second attorney fee order, entered on May 7, 2010, the trial court ordered interest to run from the date of the judgment reflecting that fee order. In their cross-appeal, plaintiffs contend interest should instead have run from November 21, 2005, the date of the original judgment on the merits in the case (the 2005 judgment), which provided: "There is now due and owing to plaintiffs Larisa Khazan and Boris Khazan from defendants Felix Braynin, Vera Braynin, Vladislav Chernoguz and Biana Chernoguz . . . $________ as attorney's fees that may be determined upon motion by plaintiffs."

The trial court explained its reasons for ordering interest to run from the date of the judgment reflecting the second attorney fee order as follows: "The Court of Appeal reversed the fee award and remanded the case to the trial court to reduce the amount attributable to the fraud claims. The Court of Appeal did not modify the fee order. Accordingly, the Court is awarding new fees in this order, therefore interest runs from the date of the new judgment reflecting this order."

The trial court appears to have been relying on *Stockton Theatres, Inc. v. Palermo* (1961) 55 Cal.2d 439 (*Stockton Theatres*). There, our Supreme Court considered when interest began to accrue on the cost of a bond on appeal. (*Id*. at pp. 440-441.) The court explained that in 1954, the trial court had disallowed the cost item, and on appeal, the order was reversed with instructions for the trial court to determine the necessity of the bond. After a hearing, the trial court in 1957 found the expenditure unnecessary and again disallowed the challenge item. On a subsequent appeal, the Supreme Court held

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had concluded a rate of $400 was reasonable some six years ago. In the circumstances, we see no impermissible double counting of factors both to set the lodestar and to enhance it. (See *Northwest, supra*, 159 Cal.App.4th at p. 879.)

the expenditure necessary as a matter of law and reversed, with directions to a trial court to allow the premiums on the bond as a cost on appeal. In 1959, the trial court entered such an order. (*Id*. at pp. 440-444.)

The parties then litigated the question of when interest should begin to accrue on the cost award. The high court applied the following principles: "A judgment bears interest from the date of its entry in the trial court, even though it is still subject to direct attack"; when a judgment is *modified* on appeal, the new sum draws interest from the date of the original order, not from the date of the new judgment; when, however, a judgment is *reversed* on appeal, the new award bears interest only from the date of the new judgment. (*Stockton Theatres*, *supra*, 55 Cal.2d at pp. 442-443.) The court rejected the argument that interest should run from the date of the 1954 order, pointing out that the court of appeal *reversed*, rather than *modified*, that order, and that until the trial court held the required hearing on the necessity of the bond, there could have been no award of costs for that item. (*Ibid*.) But the court also rejected the contention that interest ran from the date of the 1959 trial court order allowing the cost in response to the Supreme Court's directive. Rather, the high court ruled, interest began to run from the date of the 1957 order *denying* the bond premium as a cost, because the Supreme Court's decision reversing the 1957 order was effectively a modification, holding that the plaintiff was entitled to the cost of the bond as a matter of law. (*Id*. at pp. 443-444.) The court stated, "Although the order in that case was couched in terms of a reversal with directions, it had the legal and practical effect of modifying the original award." (*Id*. at p. 444.)

Following *Stockton Theatres*, our Supreme Court in *Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 817-820 (*Snapp*), held that where a trial court's judgment finding an insurer liable for only a portion of the policy limits was reversed on appeal with directions to enter judgment in the amount of the policy limits, interest on the amount of the resulting award should run from the date of the first award. As the court stated, "The legal effect of that reversal was to determine that as of the date of the original judgment plaintiffs were entitled to $25,000. Thus the original judgment was increased from $8,168.25 to $25,000, based solely on the record then before the appellate court. No issues remained to be determined. No further evidence was necessary. Thus the so-called 'reversal' with directions, was, in fact and in law, a 'modification.' " (*Id*. at p. 820.)

Under *Stockton Theatres* and *Snapp*, the question of when interest begins depends on substance, not formalism, and a reversal that effectively acts as a modification will be treated as such. So, for example, in *Munoz v. City of Union City* (2009) 173 Cal.App.4th 199, 207 (*Munoz*), the court concluded that a modification, rather than a reversal, had taken place where the original judgment had allocated fault among a victim, a police officer, and a city; the appellate court had concluded that a portion of the fault allocated to the city was not legally sustainable; and, in a second appeal, the court reversed the judgment and directed the trial court to enter a new judgment allocating fault between the remaining parties based on the jury's original allocation. (*Id*. at pp. 202-203, 207.) The court noted, "here there was no factual determination to be made, no prerequisite to be satisfied before liability could be allocated properly." (*Munoz, supra*, 173 Cal.App.4th at p. 206; see also *Ehret v. Congoleum Corp.* (2001) 87 Cal.App.4th 202, 204, 210 (*Ehret*) [appellate decision reinstating original jury verdict after judgment notwithstanding verdict and calculating offsets based on original jury verdict treated as modification rather than reversal].)

Defendants argue the trial court properly applied the rule of *Stockton Theatres* and *Snapp* to award interest only from the date of the judgment reflecting the May 7, 2010 (second) attorney fee order. They point out that after we reversed the original attorney fee order, on remand the parties provided additional briefing, evidence, and argument, and the trial court made further determinations of fact and law before entering the new award. Thus, defendants contend, this question is governed by the rule that where a judgment is reversed, rather than modified, and the matter returns to the trial court for further factual determinations, interest begins to run on the award at the time of the order after remand.

Plaintiffs assert *Stockton Theatres* does not govern this question. They contend, first, that the statutes governing interest on fees as costs require that interest begin to accrue from the date of entry of the judgment establishing the right to attorney's fees, and not from the date of any later order setting the amount of attorney's fees. Upon this premise they argue that because *Khazan I* affirmed the judgment establishing the *right* to attorney fees and *Khazan II* was a reversal of only the postjudgment order setting the *amount* of fees, then the question of whether *Khazan II* was a "reversal" or a "modification" is irrelevant. To put it another way, plaintiffs assert that because interest begins to accrue on the attorney's fee award from the date of entry of the judgment establishing the *right* to fees, any subsequent reversal and readjudication of an order setting the *amount* of attorney's fees does not interrupt the accrual of interest. We conclude that, even assuming interest on an attorney's fee award runs from the date of the judgment allowing fees, the cases do not support the proposition that interest would continue to accrue on that fee award even after it has been excised from the judgment by an appellate order vacating the award, remanded to the trial court for further evidentiary and adjudicatory proceedings, and made the subject of a new decision and order. [16]

2. Analysis

Plaintiffs' foundational contention—that interest on contractual attorney fees runs from entry of judgment regardless of when the order setting the amount of fees is entered—is a debatable proposition. We need not resolve that question, however,

[16] Plaintiffs also contend, without any discussion or analysis, that the trial court's post-remand fee order was not a "new" fee award, but merely a "determin[ation] [of] what part of the originally-awarded fees—the portion attributable to litigation over the contract claims—plaintiffs' attorneys would ultimately be awarded." ~(RB 62)~ This is merely another way of saying that a redetermination of the fee award does not affect the running of interest from the date of the judgment.

because the issue is not when interest begins to run in the first instance, but whether interest continues to run irrespective of subsequent events. As we have noted, plaintiffs say *Stockton Theatres* does not apply because there, the court reversed a post-appeal order allowing costs for postjudgment litigation, *viz*., the bond premium as a cost on appeal, which is a separate judgment, i.e., “it is an award for a liability that arose entirely after the original judgment was entered.” ~(RB 69)~ Here, plaintiffs argue, “there was no ‘reversed judgment’ and no ‘new judgment.’ Instead, the original judgment (which by statute included the later-determined attorneys’ fees) was affirmed, not reversed, and therefore the interest on the judgment (including the attorneys’ fees) continues to run from the date of its entry.” ~(RB 67)~ The appeal and reversal, plaintiffs maintain, were from the “fee order” and not from the judgment, so “the judgment, which set the interest running on the attorneys’ fees, was never changed or disturbed . . . [but was] affirmed in full.” [17] ~(RB 67)~

We disagree with plaintiffs’ analysis primarily because it fails to explain why—or under what authority—interest would continue to run on a fee award even after the award

[17] Plaintiffs were perhaps encouraged in this argument by some of the language used in *Snapp*. As we have described, the trial court in *Snapp* determined that an insurance company was liable to pay its insured only a portion of the policy proceeds, and the appellate court reversed, concluding as a matter of law that the insured was entitled to the policy limits. (*Snapp, supra,* 60 Cal.2d at pp. 817-818.) In determining that this was a “modification,” and therefore interest accrued from the date of the original judgment, the court stated: “The appellate court decided, as a matter of law, that $25,000 was owed. There never was a ‘reversal’ of the determination that at least $8,168.25 was owed, but simply a determination that the amount due was, at all times involved, in fact $25,000. The original judgment was not vacated or declared void. It was declared insufficient as a matter of law. There never was a vacation of the original judgment. The original judgment was simply insufficient.” (*Snapp, supra,* 60 Cal.2d at p. 821.) While this language, in isolation, might be seized upon to support the argument that a change in the amount of an award is not a reversal of the judgment (and therefore does not affect the running of interest), this was not the rationale of *Snapp*. As we explain, the determination in *Snapp* was not based upon whether the underlying judgment of liability had been affirmed or reversed, but upon the nature of the proceedings in the trial court after reversal.

is reversed on appeal and remanded for redetermination. Plaintiffs do not identify anything about this case that would distinguish it from *Stockton Theatres* and its progeny, which establish the principle that the date of accrual of interest is controlled, not by the affirmance of the underlying judgment, but by the nature of the proceedings after the reversal of an award on appeal. This is made clear in *Snapp*. There, the court concluded its reversal of the judgment was actually a "modification" not because the underlying judgment was affirmed, but because after the reversal and remand, nothing was left for the trial court to do except to enter the new amount in the judgment, as directed by the court of appeal. "[O]n the first appeal [the court] decided that the plaintiffs were not only entitled to recover $8,168.25, on October 31, 1960, but on that date were entitled to recover more—that is, as a matter of law, the trial court should have allowed $25,000. *This required no further determination of law or of fact. It required no taking of evidence. It required no legal showing or argument. The appellate court decided, as a matter of law, that $25,000 was owed*." (*Snapp, supra*, 60 Cal.2d at 821 [emphasis added]; see, also, *Munoz, supra*, 173 Cal.App.4th at p. 207 [appellate court's reversal reallocated damages based upon jury verdict's "unambiguous[]" determination of comparative fault; "there was no factual determination to be made, no prerequisite to be satisfied before liability could be allocated properly."]; *Stockton Theatres, supra*, 55 Cal.2d at pp. 443-444 [appellate court held as a matter of law that cost item should have been allowed by trial court; therefore reversal was, in effect, a "modification" because it merely "ma[de] the [trial court's] order of April 12, 1957, state what it should have stated on that date."].)

Applying these principles here, we reach the ineluctable conclusion that the reversal in *Khazan II* was not a modification. In *Khazan II* we did not determine, as a matter of law, the correct amount of the fee award; rather, we remanded the matter for "further proceedings consistent with th[e] opinion." Upon remand, the trial court could not simply enter a new award, but instead was required to review the evidence and exercise its discretion anew to set the fee award. To this end, a hearing was held and the parties submitted hundreds of pages of evidence, including detailed time records, analysis of the time spent at trial on contract and non-contract issues, extensive excerpts from the reporter's transcript of the trial proceedings, and pleadings from the litigation. In their briefing in support of and in opposition to the motion, the parties argued about whether apportionment was possible and how the trial court might adjust the fee award to account for plaintiffs' partial success. In its order setting the fees after remand, the trial court indicated that it had conducted a "detailed review of the litigation," including "pre-trial litigation, pre[-]trial interviewing of witnesses, trial preparation and post-trial work," before deciding to use a percentage allocation for the fraud component of the action. The trial court could not have responded to our directions in *Khazan II* without such a review and exercise of discretion, and we agree with the trial court that we reversed, rather than modified, the initial order setting fees.

In the circumstances, we conclude our decision in *Khazan II* was in effect, as well as in name, a reversal, and that the trial court correctly ordered interest to run from the time of the fee award it made on remand.

III. DISPOSITION

The order appealed from is affirmed. The parties shall bear their own costs on appeal.

RIVERA, J.

We concur:

RUVOLO, P. J.

REARDON, J.