

FILED

UNITED STATES COURT OF APPEALS

JAN 28 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LAUREN M. CRUZ, by her next friend
Jean Cruz; VALERIE HERRERA, by her
next friend Carolina Herrera; JENNIFER
N. CERROS; CATHERINE GREMPEL,
by her next friend Tina Grempel,
individually and on behalf of all those
similarly situated,

Plaintiffs - Appellants,

v.

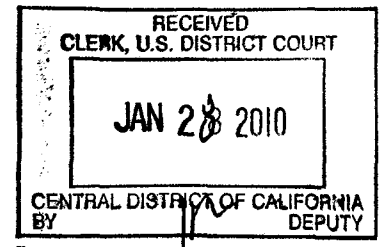
ALHAMBRA SCHOOL DISTRICT;
CITY OF ALHAMBRA; RUSSELL LEE-
SUNG; VICTOR SANDOVAL; LOU
TORRES; WILLIAM A. VALLEJOS;
JOHN H. NUNEZ; ROBERT L. GIN;
RUTH E. CASTRO; BARBARA A.
MESSINA, in their official capacities,

Defendants - Appellees.

No. 06-55811

D.C. No. CV-04-1460- ABC
Central California
(Los Angeles)

ORDER



Before: Peter L. Shaw, Appellate Commissioner

I
Background

Appellants Lauren M. Cruz, Valerie Herrera, Jennifer N. Cerros, and
Catherine Grempel (collectively, "Cruz") brought a Title IX class action against

GML/Appellate Commissioner

No. 06-55811

the Alhambra Unified School District, the City of Alhambra, and other individuals (collectively, “Alhambra”) alleging Alhambra’s failure to provide female students with an equal opportunity to participate in school athletics. The parties entered into a settlement agreement providing that the district court would retain jurisdiction over the determination of attorneys’ fees. Cruz filed a motion for attorneys fees pursuant to 42 U.S.C. § 1988. The district court granted in part the motion for attorneys’ fees. Cruz filed a Federal Rule of Civil Procedure 59(e) motion to amend or alter the judgment, which the district court denied.

Cruz filed a notice of appeal of both district court orders. This court vacated the order granting attorneys’ fees in part, and reversed the order denying the Rule 59(e) motion.

Cruz filed a motion for attorneys’ fees and expenses on appeal, Alhambra filed an opposition, and Cruz filed a reply. The court granted the motion for attorneys’ fees and expenses, and referred the determination of an appropriate amount of fees to the Appellate Commissioner.

No. 06-55811

II Attorneys' Fees

A. Applicable Law

The starting point for determining the amount of a reasonable fee award under 42 U.S.C. § 1988 is the calculation of the lodestar. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate, taking into consideration the relevant factors in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). *See Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000); *see also Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 n.2 (9th Cir. 2000) (explaining the factors relevant to the lodestar calculation).¹ There is a strong presumption that the lodestar figure represents a reasonable fee, and therefore it should be enhanced or

¹ The so-called *Kerr* factors bearing on the determination of a reasonable fee are: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) time limitations imposed by the client or the circumstances; (7) the amount involved and the results obtained; (8) the experience, reputation, and ability of the attorneys; (9) the “undesirability” of the case; (10) the nature and length of the professional relationship with the client; and (11) awards in similar cases. *See Van Gerwen*, 214 F.3d at 1045 n.2 (citing *Dague*, 505 U.S. at 561-67); *see also Kerr*, 526 F.2d at 70.

No. 06-55811

reduced only in rare and exceptional cases. *See Van Gerwen*, 214 F.3d at 1045; *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.8-9 (9th Cir. 1996).

A fee applicant has the burden of documenting the appropriate hours expended in the appeal and must submit evidence in support of the claimed hours and of the claimed hourly rate. *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1993). “The party opposing the fee application has the burden of rebuttal that requires submission of evidence” to the court challenging the accuracy and reasonableness of the hours charged or the facts asserted in the fee applicant’s affidavits. *Id.* at 1397-98.

B. Fee Request

Cruz seeks \$186,620.30 in attorneys’ fees on appeal for their attorneys and other timekeepers at hourly rates of \$530 for Patricia Shiu, Esq., \$490 for Vicky L. Barker, Esq., \$340 for Elizabeth Kristen, Esq., \$275 for Sharon Terman, Esq., \$550 for Richard M. Pearl, and \$100 for law clerks. Cruz also seeks \$1,765.93 in expenses, thus requesting a total award of \$188,386.23. The hours were expended by the timekeepers as follows:

No. 06-55811

<u>Task</u>	<u>Shiu</u>	<u>Kristen</u>	<u>Terman</u>	<u>Barker</u>	<u>Pearl</u>	<u>Clerks</u>	<u>Totals</u>
Interviews & Conferences	9.50	24.43	12.81	4.70	3.35	0.00	54.79
Obtaining & Reviewing Records	0.30	0.70	5.04	0.00	2.55	0.00	8.59
Legal Research	0.10	14.40	22.79	0.00	1.35	13.14	51.78
Preparing Briefs	33.96	76.50	73.59	6.80	41.80	6.70	239.35
Prepare for, Attend Oral Argument	19.65	48.50	0.00	0.00	4.80	0.00	72.95
Other:							
Mediation	1.65	1.80	1.30	0.10	1.30	0.00	6.15
Rule 59(e) Motion	3.95	11.40	30.82	1.00	1.35	0.00	48.52
Fee Reply	0.00	20.05	0.00	1.00	5.05	0.00	26.10
Totals	69.11	197.78	146.35	13.60	61.55	19.84	508.23

During the appeal, Cruz filed a notice of appeal and associated documents; a 61-page opening brief and four volumes of excerpts of record; a 30-page reply brief; two letters of additional citations pursuant to Federal Rule of Appellate Procedure 28(j); two letters to the court; a bill of costs; a request for publication; an attorneys' fees motion; a motion for an extension of time to file a reply to appellees' opposition to the motion for attorneys' fees; and a reply to the opposition to the motion for attorneys' fees.

Cruz participated in mediation both before briefing and after submission of the appeal, and attended oral argument.

No. 06-55811

Kristen states in her declaration that, in the exercise of billing judgment, she eliminated unproductive, duplicative, and excessive hours expended by herself and attorneys Shiu, Terman, and law clerks at her law firm, the Legal Aid Society-Employment Law Center (“LAS-ELC”). In a further exercise of billing judgment, she reduced the total hours expended by those attorneys by approximately 26 percent to arrive at the number of hours claimed in the fee motion. Pearl states in his declaration that he carefully reviewed the fee request and that all claimed hours were “reasonably devoted to pursuing [his] clients’ interests and would have been billed to a fee-paying client.”

C. Compensation for Pearl’s Time

Alhambra contends that Cruz is not entitled to compensation for Richard Pearl’s time because he was an expert on appeal, and 42 U.S.C. § 1988 does not authorize compensation for expert fees in a Title IX case. Pearl submitted a declaration with the fee motion stating that he was retained by Cruz and her attorneys to assist in the litigation. His time records show that he expended his time on the Rule 59(e) motion, the appeal and related correspondence, and the fee motion. Although Pearl concedes that he specializes in attorneys’ fees and has been retained as an expert in fee matters, he states that he submitted the declaration

No. 06-55811

with the fee motion as an advocate, not as an expert in this matter. The evidence and documentation shows that he was not an expert in this appeal, and instead was retained as counsel. Alhambra's contention therefore lacks merit.

D. Documentation Deficiencies

Alhambra contends in a footnote and without elaboration that Pearl's time records are block-billed. Alhambra's contention lacks merit.

"Block billing" is the failure to itemize each task individually in the billing records. The time requested should be reduced if block billing makes it impossible to evaluate the reasonableness of the time. *See Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004)); *see also Mendez v. County of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008).

Some of the time Pearl recorded in his billing records consists of more than one task listed together in one time entry. Pearl's general practice was to record all of the tasks accomplished in one day in one billing entry, with no itemization of the time required for the discrete tasks. In general, however, Pearl performed only one or two different tasks in a day. Pearl also recorded his time in intervals of 1/20th of an hour, or 3 minutes. Furthermore, Pearl provided information about

No. 06-55811

the division of his time in a document substantially similar to Form 9 of the Ninth Circuit Rules.

Given the limited number of tasks performed in each entry, the precision of the time recorded, and the categorization of his time provided in the document equivalent to Form 9, Pearl's documentation is adequate to evaluate the reasonableness of his time. *See United Steelworkers of Am. v. Ret. Income Plan, ASARCO*, 512 F.3d 555, 565 (9th Cir. 2008); *Fischer*, 214 F.3d at 1121. Pearl satisfied his burden of submitting evidence supporting the hours claimed by listing the hours and "identify[ing] the general subject matter of [the] time expenditures." *Hensley*, 461 U.S. at 437 n.12.

Alhambra contends that the fee motion is deficient because a declaration was not submitted from each timekeeper, citing *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The Supreme Court in *Blum* stated that a fee applicant should produce evidence *in addition* to the affidavit of the fee applicant's attorney to justify the requested hourly rate. *See id.* The Court did not mandate a requirement that each attorney representing a party must file an affidavit. Here, Cruz submitted declarations from Kristen and Pearl, in addition to declarations from other attorneys, that provided sufficient information regarding the hours claimed and the

No. 06-55811

hourly rates, thus satisfying *Blum*. Kristen's and Pearl's declarations satisfy Ninth Circuit Rule 39-1.6(b) that the fee motion be supported by a declaration attesting to the accuracy of the information regarding hourly rates and time expenditures.

Alhambra's contention lacks merit.

E. Reasonable Hours

1. Pearl

Alhambra contends that Pearl's work was unnecessary and duplicated work performed by other attorneys. This contention lacks merit.

Alhambra does not point to any specific time entries as being excessive or present independent evidence showing that Pearl's time was excessive. Pearl and Kristen states in their declarations that Pearl's expertise in attorney's fees and appellate litigation was important to the appeal because Cruz's other attorneys had very little experience with fee motions or fee appeals. Pearl also consulted about the Rule 59(e) motion, provided appellate strategy, provided research on selected topics within his expertise, provided sample briefs, edited drafts of briefs, and helped Kristen prepare for oral argument.

Given Alhambra's lack of specificity regarding what it considers Pearl's unnecessary or excessive tasks and Cruz's explanation of Pearl's role, Alhambra's

No. 06-55811

contention lacks merit. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1113 (9th Cir. 2008) (“Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much.”)

2. Barker

Alhambra contends that Cruz should not be compensated for Barker’s 13.6 hours because the work was unnecessary and duplicated other attorneys’ time. This contention has merit.

According to the fee documentation and the record on appeal, Shiu was lead counsel and had overall responsibility for the appeal, and reviewed the other attorneys’ work and advised them. Kristen drafted most of the substantive briefing and conducted oral argument. Terman and the law clerks provided legal research and brief writing assistance. Terman also drafted the Rule 59(e) motion. Pearl’s role is described above.

Although the fee motion and accompanying documentation explain the roles the other timekeepers played in the appeal, Barker’s contribution is unclear. Cruz’s fee motion and reply state that Barker “provided necessary assistance and review regarding briefing” and acted in supervisory capacity. Kristen’s

No. 06-55811

declarations state that Barker, along with Pearl, provided “assistance” and she reviewed “work prepared by less experienced counsel with a lower hourly rate.” Baker’s time records show numerous short conferences with other counsel and some review of briefs and fee pleadings. Her role and work duplicates that of Pearl and Shiu. The fee materials fail to demonstrate the necessity of her contributions to the success of the appeal. Given the contributions of the other attorneys involved and their experience, and the absence of any particularized justification in the fee motion for the employment of Barker, her work appears to be duplicative. *See Welch*, 480 F.3d at 949. Cruz will not be compensated for Barker’s time.

3. Conferences

Alhambra objects that the 50.09 hours claimed for conferences (disregarding the hours claimed for conferences by Barker) are excessive and unjustified. It also contends that a number of entries designated as “preparing briefs and fee application” in the time records were actually conferences that were also excessive. Alhambra’s objection lacks merit.

Given the complexity of the appeal and the discrete roles played by the several attorneys representing Cruz, a significant amount of time was warranted for conferences among the attorneys to coordinate tasks, strategize, and communicate

No. 06-55811

revisions to briefs and motions. Over the course of more than two years in this appeal, Cruz claims approximately 10 percent of the total time in the category of conferences between counsel and others. The amount of time is comparable to that claimed in appeals of similar complexity and will be awarded.

Alhambra's generalized complaint that additional conference time was mislabeled as preparing the briefs or fee motion fails because Alhambra does not identify the entries that it believes are inaccurate, nor has it submitted evidence demonstrating that the time claimed is unreasonable. *See Deukmejian*, 987 F.2d at 1397-98 (party opposing fee application has burden of submitting evidence challenging accuracy or reasonableness of the hours charged). Moreover, Cruz submitted a declaration in reply to Alhambra's contention stating that Kristen carefully reviewed the entries and the Form 9 information to ensure that the time claimed for conferences was accurate. Alhambra's contention lacks merit.

4. Unnecessary Duplication or Overstaffing

Alhambra contends that Cruz's attorneys all claim time for reviewing and preparing the Rule 59 motion, the appellant's brief, the reply brief, and the fee motion. Alhambra therefore contends that the hours claimed for obtaining records, legal research, preparing briefs, preparing the fee application, and preparing the

No. 06-55811

motion to amend judgment should be reduced by 25 percent to account for duplication of effort.

For the most part, Alhambra again fails to identify any particular entries or tasks that it contends resulted in overstaffing or unnecessary duplication of effort. *See Moreno*, 534 F.3d at 1113 (duplication of effort, unless it involves unnecessary duplication, is not a legitimate reason to deny compensation). Cruz presented evidence showing that the different attorneys performed different tasks and were responsible for different parts of the appeal. Alhambra's assertion that the court should reduce particular categories of hours by 25 percent is without merit.

Alhambra contends that it was unreasonable for three attorneys to prepare outlines for the opening brief. Cruz responded to the contention with a declaration from Kristen, in which she states that the time identified totaled 4.99 hours and that the outlines were beneficial in planning and preparing the opening brief. Cruz's evidence demonstrates that the time claimed was reasonably expended and not duplicative. *See id.* Furthermore, contrary to Alhambra's contention, Cruz's attorneys' time entries are not too vague to permit review. *See Fischer*, 214 F.3d at 1121. Alhambra's contention lacks merit.

No. 06-55811

5. Oral Argument

Alhambra contends that the 72.95 hours claimed for oral argument is excessive. Alhambra's contention has merit.

Alhambra argues first that the time claimed for three attorneys to participate in moot court was unnecessary and excessive. Pearl and Shiu participated in moot court with Kristen to prepare her for oral argument. Careful preparation is necessary for a Ninth Circuit appeal of this complexity, and moot court is a reasonable expenditure of time to prepare for oral argument. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004).

Alhambra also contends that Cruz should not be compensated for travel time for two attorneys to and from oral argument, and instead Barker, who is in Los Angeles, should have attended oral argument in Pasadena. Alhambra cites no authority in support of this contention and, as noted earlier, Barker's time has been disallowed. This court has held that attorney travel time for which local attorneys customarily bill their clients is compensable. *See Davis v. City & County of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992), *amended*, 984 F.2d 345 (9th Cir. 1993); *see also E.H. Clarke Lumber Co. v. Kurth*, 152 F.2d 914, 915 (9th Cir.

No. 06-55811

1946) (awarding attorneys' fees for attorney's travel to and from oral argument).

Travel time to and from oral argument will be awarded.

Alhambra is nonetheless correct that the total amount of time requested for oral argument is excessive. Given the experience of appellate counsel, the significant amount of time billed for brief and excerpt preparation, and the Appellate Commissioner's review of fee applications in appeals of similar complexity, the attorneys should have prepared for oral argument in 44 hours or less. For oral argument, Cruz is awarded 16 hours at Shiu's hourly rate, 4 hours at Pearl's hourly rate, and 24 hours at Kristen's hourly rate.

F. Hourly Rates

Alhambra next contends that Cruz submitted no evidence that any of the attorneys or other timekeepers actually received the hourly rate requested. This contention lacks merit.

Although evidence of an attorney's customary hourly rate may be considered by a court in setting a reasonable hourly rate, a reasonable or prevailing hourly rate is determined by the market rate. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986); *see Carson v. Billings Police Dept.*, 470 F.3d 889, 892 (9th Cir. 2006) (attorney's usual hourly rate is relevant, but not determinative,

No. 06-55811

evidence of the prevailing market rate). Thus, the proper reference for determining a prevailing rate in a community is the rate charged by attorneys with similar skill, experience, and reputation as the prevailing party's attorneys. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980-81 (9th Cir. 2008). Alhambra's argument lacks merit.

In support of her requested hourly rates, Cruz submitted declarations from Kristen and Pearl, and from Richard W. Odgers, Esq.

Kristen relates in her declaration the education and experience of attorneys Shiu, Terman, and herself, and the two law clerks who worked on the appeal. Kristen also stated that the requested hourly rates were derived from surveys conducted periodically by LAS-ELC, taking into account billing rates charged by for-profit San Francisco law firms for attorneys of comparable experience doing comparable work, as well as rates charged by comparable nonprofit public interest organizations. Kristen based the rates also on information provided by private attorneys relating to rates charged by other San Francisco law firms for comparable litigation. Kristen's declaration states hourly rates awarded to Shiu, Kristen, and law clerks by courts in other cases.

No. 06-55811

In Pearl's declaration, he states his legal education and experience, and discusses numerous cases in which the courts awarded attorney's fees at his requested hourly rate. His current hourly rate is \$550. Pearl specializes in attorneys' fees matters and has been retained as an expert on attorneys' fees issues. He presented substantial evidence that the requested hourly rates in this appeal are reasonable.

Odgers states in his declaration that he has been an attorney and practiced in California since 1961. He presently practices at a large San Francisco law firm, and he is the past Chair of the board of LAW-ELC. He states that he is thoroughly acquainted with the work of the attorneys in the Cruz case and has reviewed the resumes of Shiu, Kristen, and Terman. Odgers is also familiar with Pearl's experience and reputation. He opines that the hourly rates requested by the attorneys in this appeal are consistent with the prevailing market rates for attorneys practicing in San Francisco with comparable experience. His opinion is informed by his knowledge of the method by which LAS-ELC sets its hourly rates and his knowledge of rates charged by other San Francisco law firms for their attorneys.

Cruz has provided evidence of the rates charged by her attorneys and the rates charged by attorneys with similar skill, experience, and reputation as her

No. 06-55811

attorneys to support the requested hourly rates. *See Carson*, 470 F.3d at 892; *Camacho*, 523 F.3d at 980-81. In addition, she has provided evidence of other court-ordered attorney's fee awards, including those involving the attorneys in this appeal. *See Welch*, 480 F.3d at 947 (evidence of rate determinations by other courts is relevant to determining the prevailing market rate); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 406 (9th Cir. 1990) ("rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate").

Moreover, on remand in this case, the district court awarded the hourly rates requested in this application of \$530 for Shiu, \$340 for Kristen, \$275 for Terman, and \$100 for law clerks for work not directly associated with this appeal that was performed during the pendency of the appeal and remand. *Cruz v. Alhambra School Dist.*, No. CV 04-1460 ABC (Mcx) (C.D. Cal. March 3, 2009) (order).

Alhambra contends that the requested hourly rates are excessive, and relies on the declaration of Gerald G. Knapton, Esq. Knapton was admitted to practice in California in 1977, and is employed by a multi-service law firm. Knapton has reviewed more than 200 applications for attorney's fees in many types of cases, and testified as an expert witness in fee dispute matters. Knapton reviewed the fee

No. 06-55811

application in this case and opines that the prevailing market rate for Shiu and Pearl is \$466, for Terman is \$228, for Kristen is \$334, and for the law clerks is \$100. Knapton bases his opinion on the *Laffey* matrix, which is a table of hourly rates corresponding to the number of years attorneys have practiced in the Washington D.C. area. The matrix is prepared and updated each year by the United States Attorney's Office for the District of Columbia, based on and named for the case that first generated the index. *See Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.C. Cir. 1983).

Knapton's opinion is undermined by the fact that this circuit does not follow the legal standard set forth in *Laffey*. *See Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir. 1987). Knapton does not purport to give an opinion under this circuit's law whether the requested hourly rate is "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895; *see also Carson*, 470 F.3d at 892. Cruz, on the other hand, has presented adequate evidence of the prevailing rates in the San Francisco area for similar services by attorneys of comparable credentials. Cruz is awarded attorneys' fees at the requested hourly rates.

No. 06-55811

III Expenses

Alhambra contends that the expenses for traveling to and from oral argument should not be awarded, because such expenses are normally not charged to clients. This court has held that such out-of-pocket expenses may be reimbursed. *See Davis*, 976 F.2d at 1556. Furthermore, Pearl states in his declaration that such expenses are ordinarily charged to fee-paying clients. Reasonable travel expenses will be awarded to Cruz.

Alhambra contends that the travel expenses are excessive because Cruz's attorneys charged for four airline tickets instead of two and spent too much on food. Cruz concedes in her reply that these expenses were inappropriate and submitted an adjusted expense request. The revised request for an award of expenses in the amount of \$1,765.93 is reasonable and is awarded.

IV Conclusion

Cruz is awarded attorneys' fees based on the following hours at the claimed hourly rates:

No. 06-55811

<u>Task</u>	<u>Shiu</u>	<u>Kristen</u>	<u>Terman</u>	<u>Barker</u>	<u>Pearl</u>	<u>Clerks</u>	<u>Totals</u>
Interviews & Conferences	9.50	24.43	12.81	0.00	3.35	0.00	50.09
Obtaining & Reviewing Records	0.30	0.70	5.04	0.00	2.55	0.00	8.59
Legal Research	0.10	14.40	22.79	0.00	1.35	13.14	51.78
Preparing Briefs	33.96	76.50	73.59	0.00	41.80	6.70	232.55
Prepare for, Attend Oral Argument	16.00	24.00	0.00	0.00	4.00	0.00	44.00
Other:							
Mediation	1.65	1.80	1.30	0.00	1.30	0.00	6.05
Rule 59(e) Motion	3.95	11.40	30.82	0.00	1.35	0.00	47.52
Fee Reply	0.00	20.05	0.00	0.00	5.05	0.00	25.10
Totals	65.46	173.28	146.35	0.00	60.75	19.84	465.68

Attorneys' fees of \$169,251.75 and expenses of \$1,765.93, for a total of \$171,017.68, are awarded in favor of Cruz and against Alhambra. This order sent to the district court shall amend this court's mandate.