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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD M. GILMAN, et al.,

NO. CIV. S-05-830 LKK/GGH

Plaintiffs,

v.

O R D E R

EDMUND J. BROWN, et al.,

Defendants.

_____ /

On July 25, 2011, the court ordered the parties to show cause why a statistical expert witness should not be appointed pursuant to FRE 706, and if appointment is made, whether the court should apportion such expert costs half to plaintiffs and half to defendants. (Doc. No. 359). The court also instructed the parties to submit nominations for statistical expert witnesses.

On August 24, 2011, the parties responded to the order to show cause and submitted nominations for potential expert witnesses. Plaintiffs have agreed that an expert should be appointed and that costs should be apportioned equally. Defendants contend, however, that an expert will not be helpful in the instant case and that

1 plaintiffs should pay the entire cost of any neutral experts
2 appointed by the court.

3 For the reasons discussed in the order to show cause, the
4 court finds that appointment of a neutral expert witness is
5 appropriate in this case. The court has reviewed the background
6 information for the proposed expert witnesses, and will appoint
7 Professor Richard A. Berk of the University of Pennsylvania. The
8 court is confident that Professor Berk can provide unbiased
9 testimony.¹

10 Professor Berk's fees are \$250 per hour for this case. The
11 court finds this rate to be reasonable. Defendants urge the court
12 to apportion his fees entirely to plaintiffs. They do not argue
13 that they lack the resources to pay the expert costs, but rather
14 contend that plaintiffs should bear any costs because the expert
15 will only be evaluating plaintiffs' evidence. The argument is
16 without merit. The court is appointing an expert because it
17 believes it needs his expertise to evaluate the evidence,
18 regardless of who produced it. Accordingly, it concludes that
19 costs and fees should be apportioned equally between plaintiffs and
20 defendants.

21 The scope of Professor Berk's expert testimony shall be to
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23 ¹ Defendants appear to have concerns about the ability of an
24 expert to be impartial. To perhaps assuage the concerns of
25 defendants about his ability to be neutral, Professor Berk has
26 informed the court that he had served as an expert for the
California Department of Corrections and Rehabilitation in the past
and currently serves as an expert for the parole and probation
departments of several mid-Atlantic states.

1 determine the statistical probability that Proposition 9 will have
2 the effect of prolonging incarceration for all or some class
3 members. Professor Berk should separately consider the evidence
4 presented by plaintiffs at the April 6, 2011 hearing and the
5 evidence accumulated by plaintiffs to date. In the order to show
6 cause, the court separated the analysis into two separate
7 questions: first, to consider the likelihood that the modified
8 deferral periods will prolong incarceration and second, to consider
9 the likelihood that the advanced hearing process, as applied, will
10 mitigate any prolonged incarceration.² The court in no way intends
11 to constrain Professor Berk's analysis, and encourages him to go
12 beyond the limitations of these questions to the extent that he
13 determines that additional analysis will shed light on the question
14 before the court: namely whether Proposition 9 creates a
15 significant risk for increased incarceration by class members.

16 The court further notes that the current motion before the
17 court is for a preliminary injunction. Accordingly, the court
18 recognizes that there may not yet be sufficient evidence from which
19 to draw conclusions as to certain subgroups of the class. The focus
20 of the instant inquiry is whether some or all class members are
21 likely to experience prolonged incarceration as a result of

22
23 ² The court notes that in the order to show cause it used the
24 term "significant risk" when describing the questions for expert
25 testimony. Recognizing the ambiguity caused by use of the term
26 significant with respect to statistical expert testimony, the court
now makes clear that the expert is to analyze the likelihood of
increased incarceration and the court is to determine whether the
likelihood demonstrates a significant risk of increased
incarceration.

1 Proposition 9 before final resolution of this case, and not whether
2 they are likely to experience prolonged incarceration ever. For
3 this reason, the court further instructs Professor Berk to opine
4 on the likely time in which the class or a subgroup of the class
5 will experience a likelihood of prolonged incarceration, if any.

6 Professor Berk is appointed as a neutral expert. For this
7 reason, plaintiffs and defendants may no longer communicate
8 directly with him. The court will coordinate with Professor Berk.

9 Plaintiffs shall submit to the court within fourteen (14) days
10 of the issuance of this order all evidence presented in the
11 evidentiary hearing, all data underlying the summaries and other
12 analyses presented at the hearing, and all data obtained to date
13 from the Rutherford class action and concerning implementation of
14 the advanced hearing process. If possible, plaintiffs shall submit
15 this information in electronic format. Plaintiffs shall also serve
16 a copy of this evidence upon defendants. Upon receipt, the court
17 shall send the evidence to Professor Berk for analysis.

18 Further, a status conference is currently set for September
19 6, 2011. In light of this court's expert appointment, the court
20 vacates the status. The court shall set a further status conference
21 after Professor Berk provides the court with an estimate on the
22 time required to prepare his expert report.

23 For the foregoing reasons, the court ORDERS as follows:

- 24 (1) Professor Berk is appointed as a neutral expert witness.
- 25 (2) Professor Berk shall be compensated at the rate of \$250
26 per hour. He shall quarterly submit itemized bills to

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the court. The court will file the bills and provide the parties with fourteen (14) days to object. The court will then direct payment of the bill, in full or in part.

(3) Plaintiffs shall submit to the court within fourteen (14) days of the issuance of this order an electronic version of all data described above. They must also serve a copy of such data upon defendants.

(4) The September 6, 2011 status in this case is VACATED.
IT IS SO ORDERED.

DATED: August 31, 2011.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT