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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 RICHARD M. GILMAN, et al.,

No. CIV. S-05-830 LKK/CKD

12 Plaintiffs,

13 v.

ORDER

14 EDMUND G. BROWN, JR., et al.,

15 Defendants.

16

17 Plaintiffs move for attorneys' fees in the amount of
18 \$58,471. For the reasons set forth below, the motion will be
19 granted, but in the amount of \$34,201.56.

20

I. ATTORNEYS' FEES

21 Plaintiffs are generally entitled to attorneys' fees where,
22 as here, they are the prevailing parties in a civil rights action
23 brought pursuant to 42 U.S.C. § 1983. See 42 U.S.C. § 1988(b)
24 ("the court, in its discretion, may allow the prevailing party ...
25 a reasonable attorney's fee as part of the costs"); Bauer v.
26 Sampson, 261 F.3d 775, 785 (9th Cir. 2001) ("Plaintiffs in § 1983
27 actions 'should ordinarily recover an attorney's fee unless
28 special circumstances could render such an award unjust'")

1 (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402
2 (1968)). Plaintiffs bear the initial burden "of establishing
3 entitlement to an award and documenting the appropriate hours
4 expended and hourly rates." Hensley v. Eckerhart, 461 U.S. 424,
5 437 (1983).

6 Plaintiffs' fee request is broken down as follows:

7 * Carter White, Esq.: 38.0 hours @ \$211.50 per hour = \$8,037.00.
8 * Carter White, Esq.: 4.0 hours @ \$211.50 per hour = \$846.00.¹
9 * Law students: 234.46 hours @ \$211.50 per hour = \$49,588.29.²
* Case expenses: \$0.00.³

10 Defendants do not challenge plaintiffs' entitlement to fees.
11 They do however, argue that the amount plaintiffs seek should be
12 reduced.

13 **A. Billing Rate.**

14 Plaintiffs are incarcerated prisoners, and therefore the
15 fees they may seek for this litigation are limited by the Prison
16 Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. Martin v.
17 Hadix, 527 U.S. 343, 350 (1999) (the PLRA "places a cap on the
18 size of attorney's fees that may be awarded in prison litigation
19 suits"). That statute provides:

20 ¹ This is for work on plaintiffs' reply memorandum on this
21 attorneys' fees motion.

22 ² Plaintiffs initially sought payment for 245.46 law student
23 hours. ECF No. 542 at 9. Defendants objected that 11 of those
24 hours were billed but not worked. ECF No. 546 at 2. Plaintiffs
conceded error, and reduced the number to 234.46 law student
hours. ECF No. 550 at 1.

25 ³ Plaintiffs initially sought case expenses of \$3,292.30. ECF
26 No. 542 at 9. Defendants objected that the expenses were not
27 supported by any receipts or other documentation. ECF No. 546
at 7-8. Plaintiffs, without comment, dropped their request for
28 case expenses.

1 (1) In any action brought by a prisoner who
2 is confined to any jail, prison, or other
3 correctional facility, in which attorney's
4 fees are authorized under [42 U.S.C. § 1988],
5 such fees shall not be awarded, except to the
6 extent [authorized here] ...

7 (3) No award of attorney's fees in an action
8 described in paragraph (1) shall be based on
9 an hourly rate greater than 150 percent of
10 the hourly rate established under section
11 3006A of Title 18 for payment of court-
12 appointed counsel.

13 42 U.S.C. § 1997e(d). Thus:

14 The [PLRA] caps attorney fees authorized
15 under 42 U.S.C. § 1988 at 150 percent of the
16 "rate established" by the Criminal Justice
17 Act, 18 U.S.C. § 3006A, "for payment of
18 court-appointed counsel." 42 U.S.C.
19 § 1997e(d)(3).

20 Perez v. Cate, 632 F.3d 553, 554 (9th Cir. 2011).

21 In turn, 18 U.S.C. § 3006A provides that the hourly rate
22 shall be determined by the Judicial Conference of the United
23 States in conformity with a formula set forth in the statute. 18
24 U.S.C. § 3006A(d)(1); Perez, 632 F.3d at 555. The Judicial
25 Conference, in its turn, has established the following maximum
26 rates in these cases:

If services were performed between...	The maximum hourly rate is...
03/01/2014 to present	\$126
09/01/2013 through 02/28/2014	\$110
01/01/2010 through 08/31/2013	\$125
03/11/2009 through 12/31/2009	\$110
01/01/2008 through 03/10/2009	\$100

27 7 Guide to Judiciary Policy § 230.16.⁴ Thus, the baseline rate -

28 ⁴ This document is available at
www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter2.aspx#230_16 (last visited by the court on July 25, 2014).

1 the rate before the multiplier (no more than 150%) is applied -
2 depends on the year the services were performed, and ranges from
3 \$100 to \$126. Indeed, plaintiffs correctly argue (as do
4 defendants) that the proper "baseline" rate for fees under the
5 CJA is the one set by the Judicial Conference. See Plaintiffs'
6 Motion for Attorney's Fees ("Motion") (ECF No. 542) at 6.

7 However, plaintiffs do not request the fees established by
8 the Judicial Conference. Indeed, they do not even make reference
9 to the published, publicly available, maximum baseline rates
10 established by the Judicial Conference, the agency charged by law
11 with making that determination. Instead, plaintiffs seek a
12 baseline rate of \$141. Motion at 6.

13 Plaintiffs request this baseline rate based upon an e-mail
14 they say they received from an "Attorney Advisor" of the Defender
15 Services Office of the Administrative Office of the U.S. Courts,
16 to a person apparently associated in some way with Prisoners
17 Legal Services of Boston, MA. ECF No. 542-1 at 9 ("the
18 authorized CJA hourly non-capital rate for fiscal years 2011,
19 2012 and 2013 was \$139," but was increased in January 2014 "from
20 \$139 to \$141").⁵ The Attorney Adviser states, in the e-mail,
21 that "[t]here is no public document that lists these authorized
22

23 ⁵ See Motion at 6 ("The proper baseline rate for fees under the
24 CJA is currently 141 dollars (see Office of Court Administration
25 material attached to Declaration of C. White)"); March 28, 2014
26 Declaration of Carter White ("White Decl. (3-28-2014)") (ECF
27 No. 542-1) ¶ 15 ("The hourly rate authorized by the Judicial
28 Conference on which the PLRA hourly rate is calculated is not
made available in any published or generally-available online
source and must be obtained via correspondence with the
Administrative Office of the Courts").

1 rates," indicating that discovering the baseline rate is a
2 secret, mysterious process available only through private
3 correspondence with the Defender's Office. See ECF No. 542-1
4 at 9. However, the e-mail makes no reference to the public
5 document that is available from the Judicial Conference on its
6 public website, and which expressly sets forth the baseline
7 rates.

8 Moreover, plaintiffs offer no evidence that the Attorney
9 Adviser speaks for the Judicial Conference, the Administrative
10 Office of the U.S. Courts, or even the Defenders Services Office.
11 Nor do they offer any evidence or legal citation indicating that
12 the Attorney Adviser can overrule the official, publicly
13 available Judicial Conference determination on this matter which,
14 to repeat, can be found at (Vol.) 7 Guide to Judiciary Policy
15 § 230.16, and is available on the public Judicial Conference
16 website, cited above. For these reasons alone, the court will
17 give no weight whatever to the e-mail cited by plaintiffs, as the
18 sole initial support of their assertion that the baseline rate is
19 \$141.⁶

20 In their Opposition, defendants correctly pointed out that
21 the rate authorized by the Judicial Conference is set forth at
22 7 Guide to Judiciary Policy § 230.16. Defendants' Opposition to

23 ⁶ The court notes that the Administrative Office of the U.S.
24 Courts is "under the supervision and direction of the Judicial
25 Conference of the United States," 28 U.S.C. § 604, and not the
26 other way around. Thus it is not obvious that informal
27 correspondence from this Attorney Adviser - which itself does not
28 cite any basis for the views expressed there - could override the
official, published determination of the Judicial Conference, the
entity charged by statute with this determination.

1 Plaintiffs' Motion for Attorney's Fees ("Opposition") (ECF
2 No. 546) at 3-4 & 3 n.3. For reasons they do not explain
3 however, defendants did not use the rates published by the
4 Judicial Conference. Rather, they use rates referred to in the
5 March 20, 2013 Congressional testimony of Hon. Julia Gibbons,
6 which she gave in her role as the Chair of the Committee on the
7 Budget of the Judicial Conference of the United States. Id.,
8 at 3 n.3. However, that is the same baseline rate (for some of
9 2014, in any event), that the Judicial Council authorized, namely
10 \$126 per hour.

11 **1. Judge Gibbons.**

12 In their Reply, plaintiffs turn to the March 18, 2010
13 Congressional testimony of Judge Gibbons. See Reply at 2
14 & 2 n.2.⁷ Plaintiffs argue that the baseline rate is the \$141
15 rate because "[i]n March 2010, the Judicial Conference requested
16 that Congress increase the non-capital CJA rate to 'the
17 statutorily authorized rate of \$141 per hour, effective January
18 1, 2011.'" Reply at 2 (quoting the testimony of Judge Gibbons).

19 In other words, after initially asserting that the baseline
20 rate was determined through private correspondence with the
21 Defender's Office, they now assert that the rate is determined by
22 poring through Congressional testimony. However, plaintiffs do
23 not explain how Congressional testimony, even from Judge Gibbons,
24 could override the official, published determination of the

25 _____
26 ⁷ The testimony is available at
27 [http://www.uscourts.gov/News/Viewer.aspx?doc=/uscourts/News/2010/
28 docs/Judge_Gibbons_Judicial_Conference.pdf](http://www.uscourts.gov/News/Viewer.aspx?doc=/uscourts/News/2010/docs/Judge_Gibbons_Judicial_Conference.pdf) (last visited by the
court on July 25, 2014).

1 Judicial Conference itself. Even if poring through this
2 testimony is the proper way to determine the baseline rate,
3 plaintiffs do not explain why we should not use Judge Gibbons's
4 more recent testimony:

5 Panel attorney rates as of March 1, 2014, are
6 \$126 per hour for non-capital work and \$180
per hour for capital work.

7 March 26, 2014 Congressional Testimony of Hon. Julia Gibbons.⁸

8 Moreover, even assuming that \$141 is the "statutorily
9 authorized rate," plaintiffs' argument is predicated upon a false
10 choice. According to plaintiffs, the baseline is not determined
11 by the rate Congress appropriates funds for, but rather by the
12 amount authorized by statute. Reply at 4. Although plaintiffs
13 are correct on one level, they omit the critical second step
14 here, which is that the amount "authorized by statute" is left to
15 the Judicial Conference to determine. See 18 U.S.C. § 3006A(d)
16 ("the Judicial Conference is authorized to raise the maximum
17 hourly rates specified in this paragraph"). Thus, the amount
18 authorized by statute, for purposes of determining the baseline
19 amount, is the amount actually determined by the Judicial
20 Conference, not the theoretical amount the Judicial Conference
21 could raise it to,⁹ or the amount that the Judicial Conference

22 ⁸ Available at
23 [http://news.uscourts.gov/sites/default/files/Judge-Gibbons_2015-](http://news.uscourts.gov/sites/default/files/Judge-Gibbons_2015-Budget.pdf)
24 [Budget.pdf](http://news.uscourts.gov/sites/default/files/Judge-Gibbons_2015-Budget.pdf) (last visited by the court on July 25, 2014).

25 ⁹ Judge Gibbons also testified:

26 The CJA authorized the Judicial Conference to
27 implement annual cost-of-living adjustments
(COLAs) to panel attorney rates, subject to
28 congressional funding. If the statutory COLAs
provided to federal employees (the base
employment cost index component only) had

1 asked the Congress to fund.¹⁰ Equally important, it is a rate
2 that is determined by reference to official, public documents
3 that are easily accessible by the parties and this court, not by
4 going through secret channels, by means of private e-mail
5 communications, by interpreting random pieces of paper (see
6 below), and by poring over Congressional testimony.¹¹

7 **2. 2014 Budget Justification.**

8 Plaintiffs next turn to two pieces of paper which they
9 assert is "an excerpt from the Fiscal Year 2014 Judiciary

10 been provided to panel attorneys on a
11 recurring, annual basis since 1986, the
12 authorized noncapital hourly rate for fiscal
year 2011 would be \$141.

13 Gibbons Testimony (3-18-2010) at 14 (emphasis added).

14 ¹⁰ Judge Gibbons further testified:

15 This \$15 per hour increase represents a
16 significant step in closing the gap between
17 the previous \$110 rate and the statutorily
authorized rate of \$141 per hour rate that we
are seeking for 2011.

18 March 18, 2014 Testimony of Judge Gibbons at 13 (emphasis added).

19 ¹¹ The Ninth Circuit, in Perez, confirmed the Judicial Conference
20 rate by referencing the "Report of the Proceedings of the
21 Judicial Conference of the United States (Sept. 19, 2000)," which
is available on the Judicial Conference's publicly available
22 website. Perez, 623 F.3d at 555 n.1 ("the Defender Services
23 Committee of the Judicial Conference recommended a rate of \$113,
and the full Conference ratified this recommendation"). The
24 Ninth Circuit was able to find this rate apparently without
receiving any private e-mails from the Defender Services Office,
25 or poring through congressional budget testimony. The Report of
the Proceedings of the Judicial Conference for September 2000 is
26 a public document, available from the Judicial Conference's
website. See also, Madrid v. Gomez, 190 F.3d 990, 994 (9th
27 Cir. 1999) (finding the baseline rate is the one set by the
28 Judicial Conference).

1 Congressional Budget Justification." Exhibit 3 (ECF No. 550-1 at
2 36-37) of the April 28, 2014 Declaration of Ernest Galvan
3 ("Galvan Decl. (4-28-2014)") (ECF No. 550-1) ¶ 6. The only
4 information plaintiffs offer about these pages is that they were
5 received "by email from the Defenders Service." Gavan Decl. (4-
6 28-2014) ¶ 6. The court is not informed who the author of the
7 pages is, whether the pages are authentic, whether they are part
8 of a draft or final version of something, whether they were ever
9 submitted to Congress or anyone else, whether the language was
10 approved by the Judicial Conference or possibly the
11 Administrative Office, where the full document can be found, or
12 anything else about these pages. These two random pieces of
13 paper are simply not anything that this court can use in making a
14 judicial determination. Moreover, even if plaintiffs have
15 properly interpreted these pages to mean that the maximum
16 baseline rate is \$141 (and this is not at all clear), they have
17 provided no basis for this court to find that these pages
18 override the official, published determination of the Judicial
19 Conference, that the maximum baseline rate for 2014 is \$110 or
20 \$126, depending upon when the work was performed.

21 **3. Webb v. Ada County.**

22 Plaintiffs argue that "what matters is not the amount that
23 Congress approves, but the amount that the statute actually
24 authorizes" (Reply at 4), citing Webb v. Ada County, 285 F.3d 289
25 (9th Cir.), cert. denied, 537 U.S. 948 (2002). Defendants take
26 no issue with this. However, it does not in any way support
27 plaintiffs' \$141 figure.

28 The amount the statute "actually authorizes" is the amount

1 determined by the Judicial Conference:

2 The Judicial Conference shall develop
3 guidelines for determining the maximum hourly
4 rates Not less than 3 years after the
5 effective date of the Criminal Justice Act
6 Revision of 1986, the Judicial Conference is
7 authorized to raise the maximum hourly rates
8 specified in this paragraph up to the
9 aggregate of the overall average percentages
10 of the adjustments in the rates of pay under
11 the General Schedule made pursuant to section
12 5305 of title 5 on or after such effective
13 date. After the rates are raised under the
14 preceding sentence, such maximum hourly rates
15 may be raised at intervals of not less than 1
16 year each, up to the aggregate of the overall
17 average percentages of such adjustments made
18 since the last raise was made under this
19 paragraph.

12 18 U.S.C. § 3006A(d) (emphases added). Nothing in the statute
13 indicates that the amount authorized is the amount of funding the
14 Judicial Conference requests, nor the amount that the Judicial
15 Conference would like to pay attorneys if it had sufficient
16 funding. Rather, it is the amount the Judicial Conference
17 actually determines, using its guidelines. Those guidelines
18 establish rates of \$100 to \$126 from 2008 to 2014. 7 Guide to
19 Judiciary Policy § 230.16.

20 Plaintiffs seem to interpret Webb to say that the rate level
21 the Judicial Conference could have sought over the years in its
22 budget testimony before Congress is the rate that governs here.
23 Reply at 2. But that is not what Webb teaches. Rather, that
24 case holds that the rate the Judicial Conference determines is
25 what governs, even if funds are not available to actually pay
26 that amount:

27 The PLRA expressly provides for payment at
28 the rate "established" under 18 U.S.C.
§ 3006A. 42 U.S.C. § 1997e(d)(3). The

1 Judicial Conference determined that a rate of
2 \$75 per hour for the District of Idaho was
3 justified. Section 1997e(d)(3) makes no
4 distinction between the amount authorized by
5 the Judicial Conference and the amount
6 actually appropriated by Congress to
7 compensate court-appointed counsel in
8 criminal proceedings.

9 Webb, 285 at 839 (emphasis added).

10 **B. Entitlement to Fees.**

11 Although plaintiffs are plainly entitled to attorneys' fees
12 - a proposition not disputed by defendants - they have utterly
13 failed to establish at what rate they should be paid. Not only
14 do they make no reference to the rates established by the
15 Judicial Conference, they actually direct the court's attention
16 away from that determination in favor of an e-mail from the
17 Defenders Office, Congressional testimony, and seemingly random
18 pieces of paper sent to them by e-mail from an unknown person at
19 the "Defender Services." Accordingly, the court would be
20 justified in denying fees entirely based upon plaintiffs' motion.

21 However, since defendants do not dispute that plaintiffs are
22 entitled to fees, the court will award fees in accordance with
23 the calculations offered by defendants, which at least have a
24 demonstrable relationship to the applicable law.¹² Defendants
25 request that the clinic law students be paid at the baseline rate
26 for each year, and that Carter White be paid at 150% of the

27 ¹² As noted, defendants also, and for unexplained reasons, rely on
28 Judge Gibbons's congressional testimony, although they at least
acknowledge the existence of the Judicial Conference's published
maximum baseline rates. However, to the degree the numbers
defendants use are not the official numbers, they are slightly
higher, and thus inure to plaintiffs' benefit. Since defendants
are willing to use these numbers, the court will acquiesce.

1 baseline. Both requests are supported by the applicable law.
2 See 7 Guide to Judiciary Policy § 230.16 (establishing the
3 maximum baseline rates); 42 U.S.C. § 1997e(d)(e) (establishing
4 that the maximum fees are 150% of the baseline rates). These
5 figures are as follows:

	Carter White	Clinic Law Students
6		
7		
8	2008: \$169.50 (150% of \$113)	\$113
9	2009: \$177.00 (150% of \$118)	\$118
10	2010: \$213.00 (150% of \$142)	\$142
11	2013: \$189.00 (150% of \$126)	\$126
12	2014: \$189.00 (150% of \$126)	\$126

13 Based on these rates, and the hours documented by plaintiffs,
14 defendants' counsel represents that total fees to plaintiffs are
15 \$34,201.56. Opposition at 7. The court accepts defendants'
16 representation, which is not disputed by plaintiffs, and will
17 award that amount in attorneys' fees to plaintiffs.¹³

18 **C. Stay Pending Appeal.**

19 Defendants request a stay of payment of any attorneys' fees
20 until the proceedings on appeal are resolved. Opposition at 8.

21 ¹³ Plaintiffs assert that baseline fees of \$141 and \$142 were paid
22 by defendants in Coleman v. Brown, 90-cv-520 LKK (E.D. Cal.),
23 pursuant to "settlement agreements approved by the Attorney
24 General and the Coleman Court." April 28, 2014 Declaration of
25 Ernest Galvan (ECF No. 550-1 at 1-4) ¶¶ 4 & 5. Plaintiffs do
26 not, however, direct the court to any specific court filings in
27 the case that would support their assertion, even though there
28 are over 5,000 court filings in that case. The court's own
search has turned up no orders confirming the \$141 or \$142 rate.
(The four filings turned up in the court's own search were about
compensation for non-lawyers. See Coleman v. Brown, ECF
Nos. 3906, 3997, 4029 and 4093.) Even if such documents and
orders could be found, stipulations by the parties to pay
attorneys' fees at a given rate are not relevant to the disputed
rate determination of this case.

1 However, defendants have not advised the court of their
2 compliance with Fed. R. Civ. P. 62(d) ("appellant may obtain a
3 stay [on appeal] by supersedeas bond"). See ACLU of Nevada v.
4 Masto, 670 F.3d 1046, 1066 (9th Cir. 2012) ("[h]ad the State
5 complied with the express requirements of Rule 62(d) by appealing
6 the underlying fees order and posting a supersedeas bond with the
7 district court, it would have been entitled to a stay as a matter
8 of right"). Accordingly, the request will be denied without
9 prejudice to its renewal.

10 **II. CONCLUSION**


11 For the reasons set forth above, the court orders as
12 follows:

13 1. Plaintiffs' motion for attorneys' fees is **GRANTED**, and
14 such fees shall be paid to plaintiffs' counsel by defendants, in
15 the total amount of **\$34,201.56**;

16 2. Defendants' request for a stay of payment is **DENIED**
17 without prejudice to its renewal under Fed. R. Civ. P. 62(d), or
18 (if they believe this rule is inapplicable or not mandatory),
19 pursuant to a motion otherwise explaining their entitlement to a
20 stay.

21 **IT IS SO ORDERED.**

22 Dated: July 25, 2014.

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24
25 
26 LAWRENCE K. KARLTON
27 SENIOR JUDGE
28 UNITED STATES DISTRICT COURT