

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRISON LEGAL NEWS,  
Plaintiff,  
v.  
ARNOLD SCHWARZENEGGER, et al.,  
Defendants.

No. C 07-02058 CW  
ORDER GRANTING IN  
PART AND DENYING  
IN PART  
PLAINTIFF'S  
MOTION FOR  
RECOVERY OF  
ATTORNEYS' FEES  
AND COSTS

Plaintiff Prison Legal News has filed a motion for recovery of reasonable attorneys' fees. Defendants oppose the motion. The motion was decided on the papers. Having considered all of the papers filed by the parties, including Defendants' sur-reply and Plaintiff's opposition to the sur-reply, the Court grants Plaintiff's motion in part and denies it in part.

BACKGROUND

Plaintiff Prison Legal News (PLN) is an organization that alleged that the California Department of Corrections and Rehabilitation (CDCR) illegally censored its publications. In January, 2006, the parties entered into an agreement to negotiate

1 in order to settle Plaintiff's claims and to avoid litigation. In  
2 December, 2006, the parties entered into a settlement agreement.  
3 The settlement agreement provided for payment to PLN as the  
4 prevailing party through December 11, 2006, the date the settlement  
5 agreement was executed. However, Defendants opposed PLN's request  
6 for attorneys' fees and costs for work performed after the  
7 agreement was executed. On October 9, 2007, PLN moved to recover  
8 fees and costs incurred between December 12, 2006 and August 31,  
9 2007 and to establish a semi-annual fee process.

10 The Court granted the motion in part and concluded that,  
11 because PLN is the prevailing party in this action, it is "entitled  
12 to attorneys' fees for work performed after the settlement  
13 agreement was signed." Docket no. 35 at 5. The Court denied PLN's  
14 request to establish a semi-annual fee process but noted that PLN  
15 could file further motions for attorneys' fees. PLN now moves the  
16 Court to order Defendants to pay \$143,322.96 in attorneys' fees,  
17 costs and expenses for work performed from September 1, 2007  
18 through October 15, 2008.

#### 19 DISCUSSION

##### 20 I. Reasonableness of Fees

21 In the Ninth Circuit, reasonable attorneys' fees are  
22 determined by first calculating the "lodestar." Jordan v.  
23 Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). "The  
24 'lodestar' is calculated by multiplying the number of hours the  
25 prevailing party reasonably expended on the litigation by a  
26 reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d  
27 359, 363 (9th Cir. 1996). There is a strong presumption that the

1 lodestar figure represents a reasonable fee. Jordan, 815 F.2d at  
2 1262. However, the court may adjust the award from the lodestar  
3 figure upon consideration of additional factors that may bear upon  
4 reasonableness. Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70  
5 (9th Cir. 1975). The twelve Kerr factors are (1) the time and  
6 labor required, (2) the novelty and difficulty of the questions  
7 involved, (3) the skill requisite to perform the legal service  
8 properly, (4) the preclusion of other employment by the attorney  
9 due to acceptance of the case, (5) the customary fee, (6) whether  
10 the fee is fixed or contingent, (7) time limitations imposed by the  
11 client or the circumstances, (8) the amount involved and the  
12 results obtained, (9) the experience, reputation, and ability of  
13 the attorneys, (10) the "undesirability" of the case, (11) the  
14 nature and length of the professional relationship with the client,  
15 and (12) awards in similar cases. Id.

16 The Supreme Court has recognized that, while it is appropriate  
17 for the district court to exercise its discretion in determining an  
18 award of attorneys' fees, it remains important for the court to  
19 provide "a concise but clear explanation of its reasons for the fee  
20 award." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hall v.  
21 Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award,  
22 the district court should provide a "detailed account of how it  
23 arrives at appropriate figures for 'the number of hours reasonably  
24 expended' and 'a reasonable hourly rate'" (quoting Blum, 465 U.S.  
25 at 898).

26 A. Work Performed

27 Plaintiff requests a total of \$143,322.96 in fees and costs  
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1 for work on the case between September 1, 2007 and October 15,  
2 2008. This amount represents \$54,382.67 for work to ensure and  
3 enforce compliance with the settlement agreement, and \$88,940.29  
4 for fees work. Defendants argue that 55.25 of the 162.7 hours  
5 billed by Plaintiff's counsel are unreasonable because they are for  
6 work not relevant to the settlement agreement or not benefitting  
7 Plaintiff. Defendants separated these 55.25 hours into three sub-  
8 categories, (1) 4.8 hours of work related to inmate issues, (2)  
9 26.7 hours of work related to corresponding with inmates, and (3)  
10 23.75 hours for work related to general censorship issues.

11 First, Defendants categorize 4.8 hours of Plaintiff's  
12 counsel's work as related to inmate issues not relevant to the  
13 instant case. The Court reviewed these charges and concludes that  
14 they reasonably relate to the settlement agreement. Second,  
15 Defendants charge that any direct communication with inmates by  
16 Plaintiff's counsel in the course of enforcing the settlement  
17 agreement is unreasonable because all communication can come from  
18 PLN. The Court disagrees. Nothing in the settlement agreement  
19 requires Plaintiff's attorneys to communicate on settlement  
20 enforcement issues only with PLN. Moreover, the settlement  
21 revolves around PLN's right to deliver its publication to prisoners  
22 in Defendants' custody. Thus, the prisoners themselves are often  
23 in the best position to observe whether the settlement agreement is  
24 being enforced. Defendants also question the reasonableness of  
25 time spent corresponding with inmates in inform them about the  
26 settlement agreement. Defendants note that because the Court, in a  
27 previous order, allowed Plaintiff's counsel to bill for time spent  
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1 preparing press releases about the settlement, it is duplicative  
2 and unreasonable to discuss the settlement agreement with prisoners  
3 individually. The Court disagrees. To enforce the settlement  
4 agreement, prisoners must understand their rights and privileges  
5 under the agreement. Addressing prisoners' questions and concerns  
6 is integral to this process.

7 Third, Defendants argue that 23.75 hours of work billed  
8 relates to censorship issues outside the scope of the settlement  
9 agreement. Paragraph 1(i) of the settlement agreement states,

10 The parties agree that the CDCR will develop a  
11 centralized list of disapproved magazines or  
12 publications that are prohibited as offensive,  
13 threatening, contain security concerns, or obscene as  
14 described in the DOM, or any other regulation. The CDCR  
15 will provide a copy of that list to PLN's attorneys  
16 within 30 days after it is issued. The parties agree  
17 that the centralized list is not the only method to  
18 prohibit publications, and that nothing prohibits  
19 institutions from disallowing material as described in  
20 the DOM, or any other regulation, provided it meets  
21 constitutional requirements.

22 Defendants argue that Plaintiff's counsel can charge for work  
23 related to the creation of the "centralized list" described above,  
24 but not for issues relating to CDCR's prohibition of other  
25 materials from institutions. Plaintiff's counsel counter that  
26 addressing other censorship issues directly relates to enforcing  
27 the section of the settlement agreement that notes that  
28 institutions may still disallow "material as described in the DOM,  
or any other regulation, provided it meets constitutional  
requirements." (Emphasis added). What Defendants describe as  
"censorship issues," Plaintiff's counsel argue is really work done  
to ensure that all exclusion of material satisfies the requirements

1 of the constitution.

2       Although the settlement agreement revolves around PLN's  
3 allegations that the CDCR censored PLN publications, the agreement  
4 does not provide a mandate for PLN to police the constitutionality  
5 of all prison-censored material. Rather, the agreement noted that  
6 "[t]he parties agree" that all other means of disallowing material  
7 are still available to prisons, "provided [they] meet[]  
8 constitutional requirements." The parties simply agreed that CDCR  
9 would follow prison rules and the constitution. They did not agree  
10 that PLN would serve as the enforcement arm of all censorship  
11 issues for all prisoners indefinitely. Therefore, Plaintiff's  
12 counsel's fees for 23.75 hours of work performed in relation to  
13 prison material that was censored under the DOM or other  
14 regulations will not be reimbursed.

15       B. Hourly Rate

16       Determining a reasonable hourly rate is a critical inquiry.  
17 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895  
18 n.11 (1984)). In establishing the reasonable hourly rate, the  
19 court may take into account: (1) the novelty and complexity of the  
20 issues; (2) the special skill and experience of counsel; (3) the  
21 quality of representation; and (4) the results obtained. See  
22 Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir.  
23 1988). These factors are subsumed in the initial lodestar  
24 calculation, and should not serve as independent bases for  
25 adjusting fee awards. Morales, 96 F.3d at 363-64. The reasonable  
26 rate inquiry should also be informed by reference to the prevailing  
27 market rates in the forum district. Gates v. Deukmejian, 987 F.2d

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1 1392, 1405 (9th Cir. 1992).

2 Plaintiff seeks an hourly rate of \$740 for Sanford Jay Rosen,  
3 a 1962 law school graduate and the lead attorney on its case, \$370  
4 for Amy Whelan, a 2001 law school graduate, \$340 for Kenneth  
5 Walczak, a 2003 law school graduate, and \$170 for Melanie  
6 Wilkinson, a paralegal. These rates represent Plaintiff counsel's  
7 2008 rates. Defendants argue that Plaintiff's counsel should not  
8 receive 2008 rates for work performed in 2007.

9 "District courts have the discretion to compensate prevailing  
10 parties for any delay in the receipt of fees by awarding fees at  
11 current rather than historic rates in order to adjust for inflation  
12 and loss of the use funds." Gates, 987 F.2d at 1406. In Missouri  
13 v. Jenkins, the Supreme Court allowed current billing rates to  
14 apply to legal work performed several years before the fees were  
15 awarded. 491 U.S. 274, 284 (1989). The Court noted that  
16 "clearly, compensation received several years after the services  
17 were rendered -- as it frequently is in complex civil rights  
18 litigation -- is not equivalent to the same dollar amount received  
19 reasonably promptly as the legal services are performed, as would  
20 normally be the case with private billings." Id. The Court then  
21 held that "an appropriate adjustment for delay in payment --  
22 whether by the application of current rather than historic rates or  
23 otherwise -- is within the contemplation of the statute." Id.

24 In the present case, Plaintiff's counsel is not seeking  
25 compensation for work performed years earlier. Rather, Plaintiff's  
26 counsel seek fees for work going back to September 1, 2007.  
27 Although this delay is not as long as in Jenkins, the Court

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1 recognizes that "a fee award at current rates is intended to  
2 compensate prevailing attorneys for lost income they might have  
3 received through missed investment opportunities as well as lost  
4 interest." Gates, 987 F.2d at 1406. Therefore, Plaintiff's  
5 counsel shall be paid at 2008 rates for the work performed in 2007.

6 Defendants also argue that the 2008 rates are unreasonable and  
7 that the Court should adopt the Laffey Matrix to determine rates.  
8 The United States Department of Justice uses the Laffey Matrix to  
9 determine reasonable hourly rates in the District of Columbia in  
10 fee-shifting cases. The Court declines to adopt the matrix in this  
11 case. As noted above, local prevailing market rates inform the  
12 reasonable rate inquiry, Gates, 987 F.2d at 1405, and Plaintiff's  
13 counsel provide ample evidence that its 2008 rates are reasonable  
14 by citing to eight local law firms that charge similar 2008 rates.  
15 See Rosen Dec. ¶ 56. Therefore, the Court will not reduce the  
16 hourly rates claimed by Plaintiff's counsel.

## 17 II. Settlement Obligations

18 Despite substantial progress made by Defendants in fulfilling  
19 the settlement agreement, the Court declines Defendants' request to  
20 conclude that CDCR has completed all of its obligations under the  
21 settlement agreement and that no more fees applications may be  
22 submitted by Plaintiff. Defendants are mistaken that all of their  
23 obligations are complete simply because they distributed a  
24 centralized list of banned publications to all adult institutions  
25 and distributed an internal memorandum about updated inmate mail  
26 regulations. See Brinkman Dec. ¶ 14, Ex. H. Defendants  
27 obligations do not end with merely completing these two tasks. In  
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1 the settlement agreement, Defendants have agreed to stop many  
2 practices, such as requiring the PLN to use special, approved  
3 vendor labels when distributing publications to CDCR inmates; and  
4 Defendants have also agreed to engage in other practices, such as  
5 notifying inmates and publishers when they disallow a publication.  
6 See Brinkman Dec. Exh. A ¶¶ 1(b) and (h). Defendants shall  
7 continue to follow the terms of the settlement and Plaintiff's  
8 counsel may incur reasonable fees ensuring that they do so.

9 CONCLUSION

10 For the foregoing reasons, Plaintiff's motion for attorneys'  
11 fees is GRANTED in part and DENIED in part (Docket No. 39). The  
12 Court awards Plaintiff \$137,502.46 in fees and expenses,<sup>1</sup> to be  
13 paid forthwith by Defendants.

14 IT IS SO ORDERED.



15  
16 Dated: 12/5/08

17 \_\_\_\_\_  
18 CLAUDIA WILKEN  
19 United States District Judge  
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23 \_\_\_\_\_  
24 <sup>1</sup>\$137,502.46 = Total fees requested (\$143,322.96) minus fees  
25 for work that related to censorship issues outside the scope of the  
26 settlement agreement (\$5,820.50). The \$5,820.50 figure was  
27 calculated as follows: (Sanford Jay Rosen (0.9 hours x \$740 per  
28 hour = \$666)) + (Amy E. Whelan (4.65 hours x \$370 per hour =  
\$1720.50)) + (Kenneth M. Walczak (2 hours x \$340 per hour = \$680))  
+ (Melanie E. Wilkinson (16.2 hours x \$170 per hour = \$2754)) =  
\$5,820.50.