

The Court need not recite the background of this case, as the parties are fully aware of the facts after years of litigation. Instead, the Court briefly recites the relevant facts surrounding Lopez McHugh's objections to the Special Master's Third Report and Recommendation ("R&R") regarding the allocation and distribution of common benefit fund expenses for the Pennsylvania/New Jersey state court fund.

Due to the nature of this large litigation, the Court entered CMO 14 (doc. 1042) establishing a common benefit fee and expense fund to provide "for the fair and equitable sharing among plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the **common benefit** of all plaintiffs in this complex litigation." *Id.* at 1 (emphasis added). One aim of CMO 14 is to encourage sharing of work product valuable to the litigation as a whole and avoid duplicative work. To be entitled to the benefits and perks of the common benefit fund, firms must sign a Participation Agreement and be subject to an assessment fee based upon timing of participation. *See id.*, Exhibit A. "Common Benefit Work Product" would then be available to all participating law firms.

Special Master Stack issued his third R&R in response to a request from Pennsylvania and New Jersey state court counsel, asking for reimbursement from the MDL common benefit fund for expenses incurred in their companion state court litigations (e.g. for deposition and court transcript expenses, state court document depository costs, etc.). Counsel advised that the expenses incurred in

the state court litigation helped to advance the litigation as a whole, hence entitling them to reimbursement from the common benefit fund. State court counsel also advised that the extra expenses sustained by the state court fund is largely due to Lopez McHugh declining to execute the Participation Agreement, resulting in additional fees expended to provide Lopez McHugh with the materials needed to litigate, that would otherwise have been available to the firm had the Participation Agreement been signed.

In issuing his R&R, Special Master Stack determined that the state court fund should be reimbursed despite finding no common benefit by the companion litigations' work, because the firms who timely signed the Participation Agreement "should not pay the price for the actions of one firm." Doc. 4059, at 3. Objecting to the Special Master's recommendation, Lopez McHugh seeks a "correction of the record" to demonstrate why and how the additional expenses were incurred.

III. Standard of Review

The Court's review of the R&R is governed by 28 U.S.C. § 636(b)(1)(C), which provides in part:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b) also directs that the Court make a *de novo* determination of those portions of the report and recommendation to which specific written

objections have been made. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); 28 U.S.C. § 636(b)(1)(B), (C); FED. R. CIV. P. 72(b). In making this determination, the Court must look at all the evidence contained in the record and give fresh consideration to those issues for which specific objection has been made. *Id.* However, the Court need not conduct a *de novo* review of the findings of the R&R for which no objections have been made. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985).

IV. Analysis

Special Master Stack's R&R, which was well-reasoned and thorough, recommended that the balance of the expenses submitted by the state court lawyers litigating in Pennsylvania and New Jersey should be reimbursed to their state court fund, even though the expenses were not valuable to the whole as stated in CMO 14. This is because the expenses were created due to duplicative efforts for deposition transcripts and depository to benefit the firm of Lopez McHugh, who denied signing the Participation Agreement entitling it to common work product. As such, Special Master Stack also recommended that Lopez McHugh not be reimbursed its \$25,000 contribution to the state court fund (Doc. 4059, at 3).

In objecting to Special Master Stacks' R&R, Lopez McHugh does not suggest or argue for reimbursement of its \$25,000 contribution to the state court fund (Doc. 4065 at 4, n. 1). Instead, Lopez McHugh simply seeks "a correction of the record," *id.*, to explain why Special Master Stack's explanation of the facts is

“incorrect.” *Id.* at 1. The Court however, sees little reason to more fully develop the record on a point to which no real objection is raised to the ultimate action. Lopez McHugh does not take fault with the reimbursement of the state court fund, or denial of reimbursement of its \$25,000 contribution – instead Lopez McHugh is simply unhappy with how the Special Master reasoned his way to those conclusions and his characterization of the firm’s action as “gaming” the system. It is a reasonable conclusion however, that Lopez McHugh’s delay in signing the Participation Agreement led to accrual of the fees the Pennsylvania/New Jersey state court fund now seeks reimbursement for, and that the sole reason in delaying execution of the Participation Agreement was for the firm to avoid the associated MDL common benefit assessment.

Succinctly, Lopez McHugh offers four reasons why it believes it is improper to categorize the firm’s actions as “gaming” the system. First, that Lopez McHugh did not “understand that the document depository was for the sole benefit of Lopez McHugh.” *Id.* at 2. Second, that Lopez McHugh attorneys were not aware or do not recall any transcripts being made available in a transcript database. *Id.* at 2-3. Third, that Lopez McHugh’s sole benefits only lasted for a period of six months. *Id.* at 3. And fourth, that Lopez McHugh was not “trying to game the system,” in part because no settlement discussions were held with any defendant prior to the firm’s signing of the Participation Agreement. *Id.* at 3-4. None of these arguments offer any reason to believe that Lopez McHugh waited to sign the

Participation Agreement in good faith or that the expenses submitted for reimbursement were for the benefit of more than one law firm.

The overarching principle to remember when reviewing the reimbursement requests submitted by the state court litigation, is whether the expenses were incurred for the common benefit of the litigation as a whole. Here, it is clear to see that is not the case, and Lopez McHugh does not raise any points to convince the Court otherwise that the submitted expenses were not brought about due to its actions. Points one and two brought by Lopez McHugh are subjective and the firm does not show how the collective memory or thinking of its employees changes that expenses were incurred that did not provide a common benefit for the entire litigation. Point three, by admission of Lopez McHugh, demonstrates that for at least six months, fees were collected solely on behalf of the firm. And finally, Lopez McHugh does not offer any explanation in its objections as to why it delayed executing the Participation Agreement. As Special Master Stack stated, there is no basis then to change the rationale in the R&R concluding that the delay was motivated to attempt to avoid the common benefit assessment. This action created expenses that did not benefit the litigation as a whole. Lopez McHugh's implied argument that this should even out because it participated as a state court litigant and did not request compensation for common work product it produced, holds no weight. Because Lopez McHugh did not sign the Participation Agreement, it *could not* request any form of reimbursement. Accordingly, the Court agrees with the conclusions of the R&R that the expenses submitted by the

Pennsylvania/New Jersey state court litigants were not incurred for the common benefit, but should nonetheless be compensated from the MDL common benefit fund.

V. Conclusion

For the reasons stated above, the Court finds that Special Master Stack's Report and Recommendation regarding the allocation and distribution of common benefit expenses for the Pennsylvania/New Jersey state court fund is well-reasoned, thorough, and correct. The Court **ADOPTS** Special Master Stack's Report and Recommendation, in full, and over Lopez McHugh's objections.

IT IS SO ORDERED.

Signed this 8th day of April, 2017.

David Herndon



Judge Herndon

2017.04.08

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United States District Judge