

**COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION**

**E-Filing No. 0804527  
Control No. 081519**

**# 6 September 2008**

**No. 2214 ST of 1985**

**Estate of EVELYN FIRSTIN, Deceased**

**Sur account entitled First and Partial Account for The Trust  
Established Under The Will Of Evelyn Firstin, stated by  
PNC Bank, National Association, Surviving Trustee**

**Before O'KEEFE, ADM. J.**

**This account was called for audit**

**September 8, 2008 &  
November 5, 2009**

**Counsel appeared as follows:**

**PAUL L. FELDMAN, ESQ., of FELDMAN AND FELDMAN, LLP  
- for the Accountant**

**KAREN CONN MAVROS, ESQ., of SCHACHTEL, GERSTLEY,  
LEVINE & KOPLIN, P.C. - for Schachtel, Gerstley,  
Levine & Koplín, P.C., Claimant**

**This trust arises under the Will and Codicils of Evelyn Firstin, dated May  
24, 1966, January 19, 1967, March 21, 1980, and, April 13, 1980, whereby the testatrix  
created separate trusts for the benefit of her son, William, and, for the benefit of her  
daughter, Mitzi.**

**William is to receive the net income of the trust for his benefit, for his life, and, on his death, the principal is to be divided into shares representing his lawful natural born children who were living at the death of the testatrix (not including step-children or adopted children). Each such child of William is to receive the net income of his or her share for his or her life, and, at the death of such child, the principal of his or her share shall be paid to his or her issue then living, per stirpes. If there should be no such children or issue of such children of William entitled to receive the principal of this trust, then it shall fall into and become a part of the separate trust created for the benefit of Mitzi.**

**Mitzi is to receive the net income of the trust for her benefit, for her life, and, on her death, the principal is to be divided into shares representing her children who were living at the death of the testatrix (including children of Mitzi who were adopted as of the time of the execution of the Will of the testatrix and any children born to Mitzi prior to the death of the testatrix). Each such child of Mitzi is to receive the net income of his or her share for his or her life, and, at the death of such child, the principal of his or her share shall be paid to his or her issue then living, per stirpes. If there should be no such children or issue of such children of Mitzi entitled to receive the principal of this trust, then it shall fall into and become a part of the separate trust created for the benefit of William.**

**William is given the non-cumulative right to withdraw up to ten thousand dollars (\$10,000.00) from the principal of the trust for his benefit in any one calendar year.**

**Mitzi is given the non-cumulative right to withdraw up to ten thousand dollars (\$10,000.00) from the principal of the trust for her benefit in any one calendar year.**

**William and Provident National Bank are appointed to serve as Trustees of the trust for the benefit of William. William is given the right to remove Provident National Bank, and, upon such removal, William must appoint another financial institution, qualified to serve as a Trustee, to serve with William.**

**Mitzi and Provident National Bank are appointed to serve as Trustees of the trust for the benefit of Mitzi. Mitzi is given the right to remove Provident National Bank, and, upon such removal, Mitzi must appoint another financial institution, qualified to serve as a Trustee, to serve with Mitzi.**

**Evelyn Firstin, the testatrix, died on April 29, 1983.**

**The testatrix was survived by her son, William, and, by two children of William named Franklin and Jennifer.**

**The testatrix was survived by her daughter, Mitzi, and, by two adopted children of Mitzi named Michael and Carol.**

**William, Mitzi and Provident National Bank served as Executors of the Will of Evelyn Firstin.**

**By his Adjudication dated October 1, 1985, Administrative Judge Pawelec confirmed the Account of the Executors, and, awarded the following assets to William and Provident National Bank as Trustees of the trust for the benefit of William, to wit:**

**\$ 148,143.56 in Cash;**

**United States Treasury Notes valued at \$ 65,193.00;**

**1,000 shares of the common stock of International Business Machines (IBM) valued at \$ 116,812.50; and,**

**208 shares of the common stock of Exxon Corp (Exxon) valued at \$ 7,319.00.**

**By my Decree dated May 8, 2006, I removed William from his office of Co-Trustee of the trust for his benefit under the Will and Codicils of Evelyn Firstin. Said Decree was entered on Petition of PNC Bank, National Association (formerly Provident National Bank), and, provided that PNC was permitted to remain as sole Trustee.**

**William Firstin, son of the testatrix, died on September 28, 2007.**

**William's son, Franklin, died in William's lifetime without leaving issue.**

**William's daughter, Jennifer, does not have issue at this time, and, is now William's sole surviving issue.**

**Mitzi Firstin, daughter of the testatrix, is alive at this time.**

**Mitzi has two children, named Michael and Carole, who were adopted by Mitzi as of the time of the execution of the Will of the testatrix.**

**Michael does not have issue at this time.**

**Carole has one child who is named Carie Ann.**

**The trust for the benefit of William Firstin, under the Will and Codicils of Evelyn Firstin, continues for the benefit of William's daughter, Jennifer, who will receive the net income thereof for her life, and, upon the death of Jennifer, the principal of said trust shall be paid to her issue then living, per stirpes. If Jennifer dies without leaving issue, then the principal of said trust shall fall into and become part of the separate trust for the benefit of Mitzi Firstin under the Will and Codicils of Evelyn Firstin.**

**The Register of Wills of Bucks County has granted Letters Testamentary**

to Jennifer Firstin who is the duly appointed and qualified Executor of the Will of William Firstin.

PNC Bank, National Association (formerly Provident National Bank), has filed an Account of the administration of the trust for the benefit of William Firstin under the Will and Codicils of Evelyn Firstin.

Jennifer Firstin refused to sign the Account which has been filed by PNC, National Association (PNC) and is now before this Court for audit.

Jennifer Firstin, as an individual and as Executor of the Will of her deceased Father, William Firstin, filed several Objections to the Account of PNC.

On November 5, 2009, I held a Hearing to receive evidence on all issues which are raised in the aforementioned Objections. At the said Hearing, Jennifer Firstin offered her own testimony, and, eleven Exhibits which were marked "F-1" through "F-11". At the said Hearing, PNC offered the testimony of one of its employees named Richard Yurasko, and, seven Exhibits which were marked "P-1" through "P-7". At the said Hearing, the law firm of Schachtel, Gerstley, Levine & Koplín offered the testimony of one of its partners named Bernice J. Koplín, Esquire, and, four Exhibits which were marked "K-1" through "K-4".

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty to diversify the investments of the trust assets. At Page 3 of her Brief, Jennifer makes the following statement, to wit,

**"In creating this trust in 1984, my grandmother's will bequeathed 1,000 shares of IBM and 208 shares of Exxon to the trust. At that time, these two stocks represented exactly 35.7% and 4%, respectively, of trust assets. During the succeeding twenty-four years of PNC's fiduciary management of trust assets, the percentage of market**

consumed by these two positions was not only never reduced, but was allowed to grow to 55% and 12%, respectively.”

At Page 9 of her Brief, Jennifer makes the following statement, to wit,

“PNC’s reckless disregard for its fiduciary and contractual duties of prudence and due diligence resulted in a perpetual failure to diversify trust assets – thereby failing to protect trust assets from the dangers of a volatile market, while simultaneously neglecting to act in the best interests of the beneficiaries by making trust assets productive.”

In her Brief, Jennifer does not ask for a surcharge in any specific amount by reason of the alleged breach of fiduciary duty to diversify.

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty of loyalty by engaging in self-dealing. At Page 11 of her Brief, Jennifer makes the following statements, to wit,

“In February 1995, PNC purchased 100% of Blackrock, a family of mutual funds for \$ 240 million. During the next two years, PNC reorganized Blackrock into a corporation, and then merged its entire asset management unit, including all Common Trusts Funds (CTF’s) into Blackrock. (Appendix, p.4).

Again, from 1995-1998, PNC converted all CTF’s and various other trust assets – without cotrustee approval (Exhibit PNC-7, handwritten note) – into Blackrock shares (Exhibit F-1, p.21; p.25) In total, trustee converted 50% of the trust’s portfolio at that time into Blackrock – turning itself into the trust’s single largest creditor. The unit price for Blackrock shares purchased with trust assets was also determined by the trustee, Blackrock’s proprietor.”

At Page 10 of her Brief, Jennifer makes the following statement, to wit,

“...., throughout the life of the trust, PNC invested eighty-nine cents of every trust dollar in proprietary funds. ....”

At Page 13 of her Brief, Jennifer makes the following request for a surcharge by reason

of the alleged breach of fiduciary duty of loyalty by engaging in self-dealing, to wit,

**“I respectfully request that the court compel PNC to pay a surcharge to the trust in the symbolic amount of \$ 277,669, representing the total number of trust dollars (without interest) PNC misused and self-dealt for its own profit and to the detriment of the trust and its beneficiaries.”**

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC breached its fiduciary duty of loyalty by engaging in double-dipping. At Page 14 of her Brief, Jennifer makes the following statements, to wit,

**“In addition to self-dealing with trust assets for the sake of its shareholder values, PNC also used Blackrock as a means of generating additional levels of income by charging additional fees for rendering investment advisory services to the proprietary mutual funds in which it had invested trust assets – thereby unnecessarily increasing administrative costs beyond the standard management fees already in place at the account level.”**

\* \* \* \* \*

**“Converting all CTS’s and other trust securities into Blackrock provided PNC with additional brokerage fees (churning), wrap-fees, front – and rear-end loads, promotional fees as well as an additional advisory fee as fund manager. ....”**

At Page 16 of her Brief, Jennifer makes the following request for a surcharge by reason of the alleged breach of fiduciary duty by engaging in double-dipping, to wit,

**“As a remedy for the damages to beneficiary income resulting from PNC’s double-dipping, as well as its breaches of its fiduciary duties of loyalty and care; ....- I respectfully request that the court compel PNC to pay a surcharge to the trust in the amount of \$ 90,375, representing the sum of the standard fees (without interest) charged by PNC as corporate fiduciary to the trust.”**

In her post-hearing brief, Jennifer Firstin alleges and argues that PNC

breached its fiduciary duty to make the assets of the trust productive. At Page 17 of her Brief, Jennifer makes the following statement, to wit,

**“All of the aforementioned breaches of PNC’s fiduciary duties to the beneficiaries contributed to and resulted in the negligible investment results of this trust – thereby depriving both my father and myself of the security and comfort which a productive, diversified and loyally-managed trust could have provided over the last twenty-five years, ....”**

At Page 19 of her Brief, Jennifer makes the following request for a surcharge by reason of the alleged breach of fiduciary duty to make the assets of the trust productive, to wit,

**“I therefore respectfully request that the court compel PNC to pay surcharges equal to the gap between the 6.99% total investment return to the trust cited by PNC (N.T. p.72) and the 10% competitive standard presented by PNC to the court as a benchmark of its investment performance. (Exhibit PNC-5, “Arithmetic Average Return, Composite indices”)**

**• \* \* \***

**“Based upon the principal balance of \$ 608,999 on hand at the time PNC submitted its accounting for the trust to this court (Exhibit F-1, p.20), I respectfully request a 42% total principle surcharge on principal balance payable to the trust in the amount of \$255,779.**

**Based upon the total income to the trust of \$ 327,518 accrued at the time PNC submitted its accounting for the trust to this court (Exhibit F-1, p.60), I respectfully request a 42% total income surcharge on total income to the trust payable to myself (as current income beneficiary as well as sole heir to the previous income beneficiary) in the amount of \$137,557.”**

At Page 20 of her post-hearing brief, Jennifer Firstin objects to the payment of the following legal fees, to wit,

**\$ 1,040.60 paid to Harkins and Harkins on May 15, 2006, which payment appears as a disbursement of principal for “Legal Services Rendered” at Page 13 of the Account;**



**\$ 2,500.00 paid to Schachtel, Gerstley, Koplin on July 3, 2008, which payment appears as a disbursement of principal for “Professional Services Rendered” at Page 13 of the Account;**

**\$ 1,002.60 allegedly paid to Schachtel, Gerstley, Koplin on August 12, 2008, which payment appears at Page 13 of the Account as a disbursement of principal made on July 3, 2008 to the Clerk of Orphans’ Court for “Fee For Filing First And Partial Account”;**

**\$ 2,668.63 allegedly paid to Feldman & Feldman, LLP, on November 2, 2009, which payment does not appear in the Account because the Account closes on July 10, 2008; and,**

**\$ 4,446.70 allegedly paid to Feldman & Feldman, LLP, on March 2, 2010, which payment does not appear in the Account because the Account closes on July 10, 2008.**

**At Page 20 of her Brief, Jennifer makes the following request for a surcharge by reason of the aforementioned payments of legal fees, to wit,**

**“As PNC has....removed a total of \$11,679.53 in trust assets in order to pay for legal fees accrued in defending its own multiple breaches of fiduciary duties owed to the beneficiaries, I respectfully request that the court compel PNC to reimburse to the trust the total amount of \$11,679.53.”**

**At page 21 of her post-hearing brief, Jennifer Firstin asks the court to remove PNC from its office of Trustee of the continuing trust for her benefit under the Will and Codicils of Evelyn Firstin. She also asks the court to appoint Wachovia (Wells Fargo) to serve in place of PNC.**

**The Account filed by PNC is stated for the period February 8, 1984 to July 10, 2008. In its summary and index, the Account includes the following entries, to wit:**

**receipts of principal totaling \$ 337,468.06;**

**net gains on conversions totaling \$ 156,804.65;**

principal disbursements totaling \$ 104,436.12 which includes \$ 62,222.60 in compensation to PNC;

principal distributions to William Firstin totaling \$ 55,000.00;

principal balance on hand having an acquisition value of \$ 334,836.59 and a value on July 10, 2008 of \$ 608,999.44;

receipts of income totaling \$ 327,518.43;

income disbursements totaling \$ 33,084.27 which includes \$ 28,229.24 in compensation to PNC;

income distributions to William Firstin totaling \$ 283,714.54;

income distributions to the Estate of William Firstin, Deceased, totaling \$ 821.36;

income distributions to Jennifer Firstin totaling \$ 9,175.08;

income balance on hand, being invested cash, in the amount of \$ 723.18.

In the Account, PNC charges itself with receipts of principal having a total value of \$ 337,468.06 which sum is comprised of the following assets, to wit,

\$ 148,143.56 in Cash;

United States Treasury Notes valued at \$ 65,193.00;

1,000 shares of the common stock of International Business Machines (IBM) valued at \$ 116,812.50; and,

208 shares of the common stock of Exxon Corp (Exxon) valued at \$ 7,319.00.

The Account includes the following information concerning the 1,000 shares of IBM which were received from the Executors of the Estate of Evelyn Firstin, Deceased, to wit:

100 shares, having an acquisition value of \$ 11,681.25, were sold on November 24, 1993 for \$ 5,339.82, thus producing a

loss of \$ 6,341.41;

900 shares were received as a result of a two for one stock split on May 28, 1997;

200 shares, having an acquisition value of \$ 11,681.25, were sold on July 30, 1997 for \$ 21,220.79, thus producing a gain of \$ 9,539.54;

1,600 shares were received as a result of a two for one stock split on May 27, 1999;

300 shares, having an acquisition value of \$ 8,760.94, were sold on March 16, 2005 for \$ 27,659.08, thus producing a gain of \$ 18,898.14;

300 shares, having an acquisition value of \$ 8,760.94, were sold on May 22, 2006 for \$ 24,590.24, thus producing a gain of \$ 15,829.30;

350 shares, having an acquisition value of \$ 10,221.09, were sold on January 16, 2007 for \$ 34,564.93, thus producing a gain of \$ 24,343.84;

350 shares, having an acquisition value of \$ 10,221.09, were sold on January 8, 2008 for \$ 36,576.19, thus producing a gain of \$ 26,355.10;

during the period of the Account, from February 8, 1984 to July 10, 2008, the trustees collected \$ 61,142.00 in dividends on the shares of IBM in the trust;

on July 10, 2008, the closing date of the Account, 1,900 shares of IBM, remained in the trust; and,

on July 10, 2008, the remaining shares of IBM had an acquisition value of \$ 55,485.94, and, a market value of \$ 234,042.00.

The Account includes the following information concerning the 208 shares

of Exxon which were received from the Executors of the Estate of Evelyn Firstin, Deceased, to wit:

208 shares were received as a result of a two for one stock split on September 22, 1987;

**416 shares were received as a result of a two for one stock split on May 14, 1997;**

**832 shares were received as a result of a two for one stock split on July 19, 2001;**

**264 shares, having an acquisition value of \$ 1,161.19, were sold on March 16, 2005 for \$ 15,923.95, thus producing a gain of \$ 14,762.76;**

**200 shares, having an acquisition value of \$ 879.69, were sold on May 22, 2006 for \$ 12,109.62, thus producing a gain of \$ 11,229.93;**

**100 shares, having an acquisition value of \$ 439.84, were sold on January 16, 2007 for \$ 7,134.78, thus producing a gain of \$ 6,694.94;**

**100 shares, having an acquisition value of \$ 439.84, were sold on January 8, 2008 for \$ 9,361.35, thus producing a gain of \$ 8,921.51;**

**during the period of the Account, from February 8, 1984 to July 10, 2008, the trustees collected \$ 29,262.84 in dividends on the shares of Exxon in the trust;**

**on July 10, 2008, the closing date of the Account, 1,000 shares of Exxon, remained in the trust; and,**

**on July 10, 2008, the remaining shares of Exxon had an acquisition value of \$ 4,398.44, and, a market value of \$ 86,060.00.**

**On July 10, 2008, the closing date of the Account, the principal balance on hand was comprised of the following assets, to wit,**

**\$ 2,309.41 in Cash;**

**1,900 shares of IBM having an acquisition value of \$ 55,485.94, and, a market value of \$ 234,042.00;**

**1,000 shares of Exxon having an acquisition value of \$ 4,398.44, and, a market value of \$ 86,060.00;**

400 shares of JP Morgan Chase & Co having an acquisition value of \$ 14,624.00, and, a market value of \$ 13,804.00;

Investments in two Black Rock funds having a total acquisition value of \$ 131,000.00, and, a total market value of \$ 127,610.87; and,

Investments in six other funds having a total acquisition value of \$ 127,018.80, and, a total market value of \$ 145,173.16.

In deciding whether or not to impose a surcharge upon PNC for its administration of the trust for the benefit of William Firstin under the Will and Codicils of Evelyn Firstin, I will apply the following principles recited by Judge John Kelly, Jr., in his Opinion for a panel of our Superior Court in the matter reported as Estate of Pew, 440 Pa.SuperiorCt. 195 (1994), to wit,

“ A surcharge is the penalty imposed for failure of a trustee to exercise common prudence, skill and caution in the performance of its fiduciary duty, resulting in a want of due care. .... The standard of care imposed upon a trustee is that which a man of ordinary prudence would practice in the care of his own estate. .... If a fiduciary has greater skill than that of a person of ordinary prudence, then the fiduciary’s standard of care must be judged according to the standard of one having this special skill. Further, a trustee who obtains the appointment as trustee by representing that he or she has greater skill than a person of ordinary prudence that trustee will be held to that higher standard. ....” Pew, supra, at 236-237 (citations omitted)

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“ A trustee cannot be surcharged for a breach of duty unless the breach caused a loss to the trust. .... One who seeks to surcharge the trustee for breach of trust must bear the burden of proving the particulars of the trustee’s wrongful conduct. .... The propriety of an investment by a trustee must be judged as it appeared at the time it was made and not as viewed in the light of subsequent events. .... The mere retention of stocks which the trustee received from the settlor is not, in itself, negligence. .... Especially when such stocks have produced a high rate of return for

the trust over an extended number of years. .... Hindsight is not the test of liability for surcharge. .... To make after-sight the sole judge of the trustee’s prudence would be manifestly unfair. ....” Pew, supra, at 240-241 (citations omitted)

Jennifer Firstin did not testify that she had any particular experience in making investments. Ms.Firstin did testify that she used the figures in PNC’s Account to create her Exhibits “F-3” and “F-4”. Exhibit “F-3” is headed “IBM/Exxon & PNC investment activity 1984-2008”. Exhibit “F-4” is headed “Investments, Fees & Distributions 1984-2008”.

When counsel for PNC asked Jennifer Firstin to explain how she was harmed by the retention of IBM and Exxon, she made the following statement, to wit,

“....if you had done your fiduciary duty, you would have spoken up as fiduciary trustees and maybe in 1994, '95 or '96, not in 2005, and said, ‘Look. We have to sell these and invest in different funds’ – for example, Goldman Sachs – and you would have turned \$ 330,000 into a million and a half, like every other bank has done. The only growth has occurred from these two stocks, which my grandfather, who was a good businessman, picked out over 70 years ago.”  
NT 54

Ms.Firstin testified that her Father liked IBM and Exxon from the time of the funding of the trust for his benefit in 1984. She agreed that, after the year 2000, her Father did not want IBM sold regardless of the income it produced. When asked about her Father’s relationship with PNB, she made the following statements, to wit,

“He didn’t like your bank, and he thought you were doing a lousy job investing.” NT 58

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“He was dissatisfied with income the entire time.” NT 59

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**“Everything that was done in this account was done without his approval” NT 103**

**When asked whether PNC conducted regular investment reviews with her Father, Ms.Firstin gave the following response,**

**“ Well, I’m going to tell you the truth, which I sent you in an e-mail. My dad did nothing regularly. Nothing. He was just living his life the way he chose. He was disorganized, and he could not stand PNC, so he was not coming and running to the bank all the time, no.” NT 52**

**PNC offered the testimony of its employee named Richard Yurasko.**

**Mr.Yurasko holds a Bachelor’s Degree in finance from John Carroll University; an MBA from Duquesne University; and, Licenses issued by NASD and the Commonwealth of Pennsylvania. He worked as an Associate Broker at a firm called The Money Group before being hired by PNC. He has worked as a Portfolio Manager and a Trust Adviser for PNC. He has been the Trust Advisor on the trusts for the benefit of William Firstin since 2004. He has reviewed the files kept by his predecessors, and, is familiar with the administration of the trusts by PNC.**

**Richard Yurasko described a process whereby employees of PNC conducted annual reviews of the assets in the trust for the benefit of William Firstin under the Will and Codicils of Evelyn Firstin, and, sent letters to William making proposals for changes. Exhibit “P-7” is a Letter dated December 2, 1999 from a PNC Investment Officer named John Ward to William Firstin in which the proposal is made to sell 600 of 3,200 shares of IBM and re-invest the proceeds in BlackRock PA Tax-Free Income Portfolio. Exhibit “P-7” includes a response from William which reads as follows, to wit,**

**“Dear Mr.Ward**

I am not happy with PNC's management of my trust account. (I am also unhappy with First Union's trust department for the same reason :)

I am a co-trustee. As such I was to be consulted as to changes in the trust's holdings. Without my approval, your bank turned the trust into an in-house 'Black-Rock' trust with little to show in the way of earnings. Don't touch IBM -- I'll be back with some ideas in the months ahead."

Exhibit "F-5" is another Letter from John Ward to William, dated November 27, 2000, which closes with the following statement, to wit,

"We merely want you to understand that we can still focus on growth using stocks, but reduce the risks by diversifying out of IBM."

Exhibits "P-4" is a Letter from Mr.Yurasko to William, dated January 14, 2005, in which Mr.Yurasko recommends reducing the holdings of IBM and Exxon. William never responded to this recommendation. Exhibit "P-3", dated January 20, 2006, is another Letter from Mr.Yurasko to William recommending a reduction in the holdings of IBM and Exxon. Mr.Yurasko gave the following account of his discussions with William, to wit,

" A. In my initial administration of the account, mainly they were pertaining to the correspondence of trying to communicate to him that, 'Hey, listen. We have this IBM. This is why we need to sell it. We want to pursue diversification in the account.' And during my conversations with him, it was very clearly communicated that he had no intention. He actually communicated his story about not wanting to sell the IBM stock as a result of a meeting that he had had with the IBM executives a number of years ago, and I believe I subsequently sent him a letter stating such." NT 64

Mr.Yurasko gave the following testimony concerning a conference call in which he and William participated in 2006, to wit,



**“ A. Yes, Well, in 2006, I’m not entirely – I believe in 2006 I actually held a conference call, if I’m recalling this correctly, with the trust advisor, and was very – I would say I was very stern in communicating my concern to the co-trustee.**

**Q. And what was the result of that conference call?**

**A. I believe he was very confused, and I believe at which point we had then reached out to the attorneys, drafting a petition to have him removed as trustee.**

**Q. Was he eventually removed as trustee?**

**A. He was.**

**Q. And was he removed by the Philadelphia County Orphans’ Court?**

**A. I believe. I have no knowledge of which actual court did that, but I would assume.**

**Q. Was he removed because his confusion prevented him from exercising his duties as a co-trustee?**

**A. Yes.” NT 67**

**Richard Yurasko testified that he created Exhibit “P-5” which is a three page document headed “Evelyn Firstin History of Asset Growth Analysis”. Mr.Yurasko gave the following testimony concerning Exhibit “P-5”, to wit,**

**“ Q. Can you explain what you are looking at when we are looking at P-5?**

**A. This is a look at account performance by year. It does include a totals column that shows the performance of the trust over the lifetime. It also provides a breakdown of the total return from a principal only and an income only perspective. .... So ....I have different composite comparisons, so that an investor can compare how various areas of the market or allocations were performing.”**

**Q. Just to get to the bottom line, from your review of P-5 and your preparation and your analysis, what was the**

**total return from inception of this account's administration?**

**A. Roughly in and about 6.99 percent, unadjusted for time.**

**Q. Basically, that's reflected in the middle of the page, on the right side, in the box that says "Arithmetic Average Return"?**

**A. That's correct.**

**Q. And then you have below that those composite indices?**

**A. Right." NT 71-72**

**• \* \* \* \* \***

**" Q. So comparing the return of this portfolio to the other indices, is that within the competitive range of what one would expect when investing, give or take a margin of error or a margin of variance?**

**A. You are indicating the trust?**

**Q. Yes.**

**A. By year or overall?**

**Q. Overall.**

**A. Overall, I mean, there was – the performance was okay. It doesn't necessarily – I would say usually within a percent of the index is very, very good. I left two numbers at the bottom, because keep in mind that the Evelyn Firstin Trust did not receive its initial influx of assets until I think, like, 1986, if I'm not mistaken, so we really only had roughly, by this, about 248 months.**

**Q. Two hundred eighty-four months?**

**A. I'm sorry, 284.**

**Q. And was the return that this portfolio generated in the one percent of somebody's indices?**

A. Very, very close. ....” NT 74-75

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“ Q. So is it correct to state that over the entire administration for your calculations, that PNC took less than one percent in commission?

A. I am calculating things in that manner. Yes, it does appear that way.

Q. And to your understanding of –

A. And the reason that would happen is because we prorated the fees, so it’s not always – you’re not banking the account for fees when it’s high. Sometimes you’re hitting it when it’s low, so it spreads out the fee.

Q. And one would expect if the portfolio has increased in value that the commission would be slightly higher, correct?

A. That is correct. It’s a performance-based fee.

Q. And in looking at this percentage of fees of point nine percent, which is less than one percent, would that be in conformity with your understanding of what the scheduled rates would be?

A. Yes. I mean, over the lifetime of the trust, it’s probably pretty close. I want to say our formal standard fee schedule right now is 1.1 percent.

Q. And is that competitive among other banks, to your knowledge?

A. To my knowledge, yes?” NT 86-87

In response to questions posed by Jennifer Firstin, on cross-examination,

Richard Yurasko gave the following responses, to wit,

“ Q. But since this trust was opened, the things my grandmother donated into it since 1984, there was 38 percent of IBM since 1984. That’s over ten percent?

**A. Yes. But you have to keep in mind, if there is a co-trustee that does not want to reduce, what can you do?**

**Q. In 2005, you – March of 2006, the papers came from the Orphans' Court, removing him.**

**A. But back in 2004, he was of sound mind. He would have had sound, I would suspect, objections to being removed by force from his responsibility as the fiduciary.”**  
**NT 95**

**• \* \* \* \* \***

**“ Q. My question is that if the results of your labors generated for the beneficiary of this trust, my father, whose fiduciary duty it was for you to take care of with this money, if this person whom you were caring for received \$280,000 in 25 years, as though that’s an adequate amount of money to generate from this, and that your \$90,000 from \$280,000 is 30 to 35 percent – for every three dollars my dad got, you got one dollar. Let me finish, because there are two questions. Do you feel that that was your fiduciary duty, when my grandmother put this in your hands, what she expected you to do for the benefit of my dad, and do you feel as though you earned your fees?**

**A. Yes. The thing that I think you need to keep in mind, your father was the co-fiduciary on the account. We weren’t – our job wasn’t to take care of Mr.Firstin. Our job was to take care of the trust somehow along those lines. The benefit he receives is derived from the assets. If the assets are declining in dividends, as in the case of the IBM holding, and the yield structure in the market – keep in mind, in the early days of the Evelyn Firstin Trust, there was nearly a ten percent coupon bond issued by the U.S. Treasury in the trust. Yield structures were not the same when that matured. If you look from 1984 forward, and look at interest rates, they have just been coming down and down and down. So, I mean, yes.” NT 99-100**

**On the questions of self-dealing and double-dipping, Richard Yurasko gave the following testimony, to wit,**

**“ Q. Is there any prohibition that you know of under Pennsylvania law that prevents a corporate fiduciary from**

investing in their own common funds?

A. No.

Q. Is there any regulation under Pennsylvania law that you know of that prevents a corporate fiduciary from investing in affiliating funds?

A. No.” NT 82-83

On the record made by the parties in this matter, I hold that PNC should not be surcharged for failing to diversify the investments of this trust; for failing to make the assets of the trust productive; for self-dealing; or, for double-dipping. In so holding, I have found the testimony of Richard Yurasko and his Exhibit “P-5” to be more convincing than the testimony of Jennifer Firstin and her Exhibits “F-3” and “F-4”. This is because Mr.Yurasko is more experienced than Ms.Firstin in making investments; in assessing returns on investments; and, in assessing compensation of trustees.

Evelyn Firstin made her son, William, a co-trustee of the trust which she created for the benefit of William under her Will and Codicils. She also gave William the power to remove and replace PNC as the corporate co-trustee of said trust. Said power to remove and replace made William more than a mere co-trustee. It put him in a dominant position in relation to PNC.

William liked IBM and Exxon from the time they were received into the trust in 1984, and, he never agreed to sell any of said holdings. PNC employees conducted annual reviews of the assets in the trust. They kept trying to convince William to reduce the holdings of IBM and Exxon, and, to use the proceeds of sale to

**diversify the investments of the trust, but, William rejected all such recommendations. In 2006, when it became apparent that William was confused and unable to serve as a co-trustee, PNC filed a Petition with this Court to have him removed.**

**Jennifer Firstin has failed to prove that the trust has suffered any loss by reason of the retention of IBM and Exxon in its portfolio.**

**Jennifer Firstin has failed to prove that PNC breached its fiduciary duty by producing a total return of 6.99%.**

**The 0.90% commission charged by PNC is a performance based fee, and, is a competitive fee. It is thus presumed to be reasonable in the absence of compelling evidence to the contrary. See Section 7768 (d) of the Probate, Estates and Fiduciaries Code.**

**As a corporate fiduciary, PNC did not engage in self-dealing when it invested the assets of the trust in its own common trust funds, or, in the Black Rock family of mutual funds. See Section 7209; Section 7772 (c) (4); and, Section 7772 (c) (5) of the PEF Code.**

**As a corporate fiduciary, PNC did not engage in double-dipping when it paid reasonable compensation to itself and its affiliate, the Black Rock family of mutual funds. See Section 7772 (h) (2) of the PEF Code.**

**In keeping with the foregoing discussion, I hold that PNC should not be surcharged for failing to diversify the investments of this trust; for failing to make the assets of the trust productive; for self-dealing; or, for double-dipping.**

**In keeping with the foregoing discussion, I reject Jennifer Firstin's request**

to remove PNC and replace it with Wachovia as trustee.

Having considered the testimony of Bernice J. Koplin, Esquire, and the Exhibits which she identified, as well as the principles set forth in LaRocca Estate, 431 Pa. 542 (1968) and Wormley Estate, 359 Pa. 295 (1948), I hold that the law firm of Schachtel, Gerstley, Levine & Koplin is entitled to receive the sum of \$ 4,028.75 for its services in preparing and filing the Account of PNC, and, for its services in successfully defending PNC against surcharge. I dismiss the objection of Jennifer Firstin to the payment of \$ 2,500.00 to Schachtel, Gerstley, Levine & Koplin, on July 3, 2008, which appears as a disbursement of principal for "Professional Services Rendered" at Page 13 of the Account. I will allow an additional fee of \$ 1,528.75 to said law firm as requested in its appearance slip.

Having observed the efforts of Paul L. Feldman, Esquire, in successfully defending PNC against surcharge, I hold that the law firm of Feldman and Feldman, LLP, is entitled to receive the sums of \$ 2,668.63 and \$4,446.70 for its services in successfully defending PNC against surcharge. I dismiss the objections of Jennifer Firstin to the payment of said sums. I will allow a fee of \$ 7,115.33 to law firm of Feldman and Feldman, LLP.

I dismiss the objection of Jennifer Firstin to payment of the sum of \$ 1,040.60 to the law firm of Harkins and Harkins for its services in preparing and filing the Petition to remove William Firstin from his office of co-trustee.

All Objections having been addressed and dismissed, the Account of PNC shows a balance of Principal, after distributions, of \$ 334,836.59

which is awarded as follows, to wit: \$1,528.75 in additional counsel fees to the law firm of Schachtel, Gerstley, Levine & Koplin; \$ 7,115.33 in counsel fees to the law firm of Feldman and Feldman, LLP; and, the balance then remaining, or residue, to PNC Bank, N.A., as surviving trustee of the trust for the benefit of William Firstin, under the Will and Codicils of Evelyn Firstin, which trust continues for the benefit of William's daughter, Jennifer.

The account shows a balance of income, after distributions,  
of \$ 723.18  
which is awarded to Jennifer Firstin.

The above award of counsel fees of \$ 7,115.33 to the law firm of Feldman and Feldman, LLP, is made subject to the payment of \$ 2,668.63 which was made to said law firm on November 2, 2009.

The above award of counsel fees of \$ 7,115.33 to the law firm of Feldman and Feldman, LLP, is further made subject to the payment of \$ 4,446.70 which was made to said law firm on March 2, 2010.

All of the above awards are made subject to all payments and transfers heretofore properly made on account of distribution.

Leave is hereby granted to the accountant to make all transfers and assignments necessary to effect distribution in accordance with this adjudication.

AND NOW, \_\_\_\_\_, the Account is confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An Appeal from this Adjudication may be taken, to the appropriate Appellate Court, within thirty (30) days from the date of



**issuance of the Adjudication. See Phila. O.C. Div. Rule 7.1.A and Pa. O.C. Rule 7.1, as amended, and, Pa.R.A.P. 902 and 903.**

**ADM. J.**