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COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION  
No. 557 IV of 2002  
Control No 072426  
Stuart David Fiel, Testamentary Trust

O P I N I O N

**Introduction**

Alvin Elfand, as Executor of the Stuart David Fiel Estate and Trustee of the Stuart D. Fiel Testamentary Trust, (hereinafter "Trustee"), has filed a petition for an award of attorneys' fees and expenses incurred in his successful defense of a surcharge action brought against him through objections to his account. For the reasons set forth below, those attorney fees are approved as are the costs with slight modification, but the request for \$42,862.50 to compensate Mr. Elfand for the time he spent working with his attorneys on the surcharge defense is denied for lack of legal support. A brief history of the surcharge litigation will help place the fee petition within its factual context.

**Background**

**A. Adjudication of the Surcharge Claim Against Alvin Elfand**

Stuart David Fiel died on July 28, 2000. He had been the sole shareholder of the personal injury law firm Stuart D. Fiel Associates (hereinafter "SDFa"). Mr. Fiel had named his longtime accountant, Alvin Elfand, to serve as Trustee and Executor of his estate. Two years after Fiel's death, his parents, Adele and Leonard Fiel, his sister, Carol Eyler, and his brother Scott Fiel filed a petition in April 2002 to compel an accounting by Mr. Elfand. On March 2, 2005, Mr. Elfand, as both Trustee and Executor, filed an Interim Account for the Stuart David Fiel Trust, which included his First and Final

Account of the Estate of Stuart David Fiel.<sup>1</sup> Objections were filed to the Account on April 4, 2005 by Adele and Leonard Fiel, Carol Eyer, and Scott Fiel, (hereinafter “Objectors”) who sought to surcharge Mr. Elfand, inter alia, for his alleged negligent administration of the decedent’s personal injury law firm SDFA after his death. In addition, the Objectors challenged Mr. Elfand’s claimed fee of \$275,000 and the total claimed attorney fees (\$625,000) of the Executor’s attorney, Schachtel, Gerstley, Levine and Koplin (“SGLK”) as excessive.

Hearings were scheduled on the objections beginning in July 2005. The parties agreed that in resolving the objections to the SGLK attorney fees, consideration of the attorney fees and costs incurred in the defense of the surcharge claim should be deferred until the end of the litigation.<sup>2</sup> Consequently, the amount of SGLK fees in dispute at the hearing totaled \$490,350 with the defense costs of \$135,000 to be resolved at a later date after resolution of the surcharge claim.

By adjudication dated June 4, 2007, this court concluded that Alvin Elfand, as Executor/Trustee, should not be surcharged for the alleged negligent administration of decedent’s law firm after Fiel’s death. In deciding not to shut down the Fiel firm precipitously, Elfand and his counsel, the SGLK law firm, were guided by the terms of Mr. Fiel’s will and by their ethical concerns for the welfare and confidentiality of the firm’s clients. During the hearing, the Trustee presented expert testimony by Lawrence Fox to support the crucial decisions he made such as the appointment of a supervising

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<sup>1</sup> The Estate Account covered the period July 28, 2000 through January 31, 2002, while the Trust Account covered the period June 20, 2000 through December 31, 2004. 12/21/2007 Trustee’s fee petition, ¶1.

<sup>2</sup> 12/21/2007 Trustee’s Fee Petition at 1, n.2 (citing 7/19/2005 N.T. at 3-4).

attorney due to the ethical prohibitions against a nonlawyer such as Mr. Elfand supervising a law firm.<sup>3</sup> Based on the record as a whole, this court concluded:

The objectors have thus failed to meet their burden for imposing a surcharge against Mr. Elfand. In their attacks on his administration of the law firm, they neglect to acknowledge the impressive financial benefits he bestowed on the beneficiaries, which are relevant not only to this surcharge issue but also to the reasonableness of his executor's commission.<sup>4</sup>

This court also concluded that Mr. Elfand was entitled to the entire \$275,000 commission requested based, inter alia, on the reasonableness factors set forth in LaRocca Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968). Expert testimony by Martin Heckscher was also presented as to the reasonableness of Mr. Elfand's commission.<sup>5</sup>

The attorney fees in the amount of \$490,350 sought for the SGLK law firm raised complex issues due to the varied nature of the services counsel had performed for the estate/trust. Once again, Martin Heckscher provided expert testimony as to the claimed attorney fees based on the LaRocca factors, while the Objectors' expert witness, Ms. Amacher, adhered instead to a rigid analysis of the fees under the schedule set forth in the Johnson Estate. Based on the record and accountant's exhibit R-16, this court approved attorney fees in the amount of \$240,550 for estate and trust services.<sup>6</sup> The SGLK attorney fees charged in relation to the continued operation of the Fiel firm, negotiations with firm attorneys and valuation of files, however, were reduced, in part because they

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<sup>3</sup> See Fiel Trust Adjudication, No. 557 IV of 2002 (June 4, 2007, Herron, J.) (hereinafter "Fiel Trust Adjudication") at 19-20. See also Ex. 4 (Lawrence Fox Expert Opinion) attached to 2/1/2008 Objectors' Memorandum.

<sup>4</sup> Fiel Trust Adjudication at 28.

<sup>5</sup> Fiel Trust Adjudication at 31.

<sup>6</sup> Fiel Trust Adjudication at 39-46.

were duplicative of efforts by Patrick Kittredge and supervising attorney Bennett Block.<sup>7</sup> None of the fees considered in the adjudication related to actions taken by the SGLK law firm in defending Mr. Elfand from the surcharge claim.<sup>8</sup> Those defense attorney fees will now be considered.

**B. The Fee Petition Seeks to Recover Attorney Fees and Expenses Incurred in Defending Alvin Elfand from Surcharge**

In light of his successful defense of the surcharge claims, Alvin Elfand now seeks to recover \$303,435.50 in attorneys' fees and \$82,089.19 in expenses incurred by the two law firms that defended him over the course of two discrete periods: (1) the SGLK law firm for the pre-hearing period May 27, 2002 through April 2005 and (2) the Conrad, O'Brien, Gellman & Rohn, P.C (hereinafter "COGR") firm for the period after April 2005. In addition, he seeks the amount of \$42,862.50 for the time Mr. Elfand spent in working with his attorneys on the surcharge action.<sup>9</sup> For clarity, each claim will be analyzed separately.

**1. The Fee Claim in the Amount of \$113,325.00 for the Defense Activities of the SGLK Law Firm Is Reasonable**

Under Pennsylvania law, "[i]t is well established that whenever there is an unsuccessful attempt by a beneficiary to surcharge a fiduciary, the latter is entitled to an allowance out of the estate to pay for counsel fees and necessary expenditures in defending himself against the attack." Browarsky Estate, 437 Pa. 282, 284, 263 A.2d 365, 366 (1970)(citations omitted). The estate or trust, in other words, is "obligated to pay the reasonable costs of defending against the attempted surcharge of the executors" by the

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<sup>7</sup> Fiel Trust Adjudication at 47-52. The requested fees of \$490,350 were reduced to \$369,481.25. *Id.* at 52.

<sup>8</sup> Fiel Trust Adjudication at 52.

<sup>9</sup> 12/21/2007 Trustee's Fee Petition at 1 & Proposed Order.

beneficiaries. Id. See also McGillick Foundation, 537 Pa. 194, 204, 642 A.2d 467, 472 (1994).

The executor or trustee has the burden of establishing the reasonableness of the fees requested based on the factual record. Estate of Preston, 385 Pa. Super. 48, 56, 560 A.2d 160, 164 (1989). See also Estate of Rees, 425 Pa. Super. 490, 497, 625 A.2d 1203, 1206 (1993). In the instant case, the parties agree that the factors set forth in LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968) should be used to analyze the reasonableness of the fees claimed. Under LaRocca, the following factors are considered in determining the reasonableness of fees claimed:

[T]he amount of work to be performed; the character of the services rendered; the difficulty of the of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was “created” by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.

LaRocca Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968).

The Objectors have questioned the nature and quality of the services performed by the SGLK law firm in the surcharge defense of Alvin Elfand. In fact, they challenge the reasonableness of the defense fees claimed by SGLK with myriad overlapping arguments that essentially focus on three broad themes: (a) the SGLK fees sought in the Trustees’ fee petition relate to overseeing discovery that was a “modest contribution” to the Trustee’s defense and such fees were incurred in resisting court-ordered discovery; (b) the Trustee’s fee petition seeks payment of fees that SGLK incurred in its own defense, and (c) the Petition seeks SGLK fees that were duplicative in various ways.

Before addressing each specific criteria of the LaRocca test, the Objectors' general arguments must be addressed.

***a. SGLK's Service In Responding to the Objectors' Massive Discovery Requests Was a Crucial Factor in the Successful Defense of the Executor/ Trustee from Surcharge***

From the earliest days of the administration of the Fiel Trust and Estate, the Objectors challenged Alvin Elfand's role as Trustee and Executor. Less than two months after Stuart Fiel's death, his brother Scott Fiel asked Elfand to resign as Trustee and Executor so that he and his sister Carol Eyler could take his place administering the Trust. Scott Fiel also demanded that the estate attorneys communicate directly with him and his sister as to all legal documents, checkbooks, ledgers and court communications. They were particularly concerned about the fate of their deceased brother's law firm, which they viewed as "fresh fruit" to be disposed of as quickly as possible.<sup>10</sup> A particular source of discord was Elfand's decision to ask Carol Eyler not to return to work at the SDFA law firm.<sup>11</sup>

Elfand, however, refused to step down. The Objectors then hired their own attorney Alan Mittelman.<sup>12</sup> The main target of the Objector's curiosity was the SDFA law firm which was a highly problematic "asset" of the Trust that could potentially become a liability if not properly handled. There was, for instance, a dearth of clear records concerning the firm's cases due to the critical role Fiel had played in managing the firm. Not only had Fiel been the sole shareholder of the firm but also its charismatic

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<sup>10</sup> Fiel Trust Adjudication at 9-10.

<sup>11</sup> Fiel Trust Adjudication at 6.

<sup>12</sup> Fiel Trust Adjudication at 10.

leader who kept much of the information about cases in his head in part out of concern that his associates might try to steal them.<sup>13</sup>

For years prior to filing his account, Alvin Elfand had been subjected to extensive discovery requests by the Objectors seeking information about the operation of the Fiel law firm. The defense fees that Mr. Elfand seeks for the SGLK firm are limited to the pre-hearing period beginning May 27, 2002 until April 2005 when the Objectors filed their objections to the Account. Two SGLK attorneys—Bernice J. Koplin and Ronald Levine—provided services at an hourly rate of \$250.00.<sup>14</sup> In addition to communicating with the objectors’ attorney during this period, the SGLK lawyers were involved in all pre-trial discovery which they detail in paragraphs 11 to 27 of the fee petition and buttress with time records attached as Exhibit A. As Mr. Elfand notes, for “three years the Objectors conducted persistent and extensive discovery primarily for information regarding the law firm. SGLK insisted on protecting the right of confidentiality with respect to the decedent’s 800 or so (winnowed from an initial list of 2400) law firm clients’ files in accordance with ethical standards and to protect the Estate against a lawsuit for a breach of that right.”<sup>15</sup> In the fee petition, SGLK now seeks \$113, 325.00, which is less than the earlier request of \$135,000 at the time of the hearings.

By early 2002, the Objectors had begun to formally demand copious information about the Fiel personal injury firm (SDFA) due to their suspicions of mismanagement. In their April 8, 2002 petition for an accounting, for instance, they alleged:

Petitioners believe that the value of Decedent’s law practice was seriously depleted by the conduct of the Executor, his attorney, and outside counsel installed by them to run the law firm. None of those fiduciaries had command of

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<sup>13</sup> Fiel Trust Adjudication at 3.

<sup>14</sup> 12/21/2007 Trustee’s Fee Petition, ¶¶ 8-9.

<sup>15</sup> 12/21/2007 Trustee’s Fee Petition, ¶ 11 & ¶¶ 8-10.

the cases of Decedent's law practice, and the practice suffered from resulting disorganization and negligence. Moreover, petitioners believe, the Executor permitted other attorneys handling the cases to plunder them. Furthermore, petitioners believe that, despite their mismanagement and incompetence, the Executor, his attorney and outside counsel hired by them will or have charged the Estate outrageous fees far in excess of those normally deemed reasonable by Pennsylvania courts.<sup>16</sup>

They were especially critical of the Trustee's decision to dismiss Carol Eyler as administrator of the law firm," which "disrupted the family in mourning" and deprived the firm of Ms. Eyler's "intimate knowledge of the firm's business" which "was needed for an orderly and profitable disposition of the Estate's interest in the law practice."<sup>17</sup> They further alleged that the Trustee "failed to maintain reasonable communications with the beneficiaries of the estate" and that the value of the estate was dissipated through mismanagement.<sup>18</sup>

The record presented during the hearing, however, undermined these allegations. Ms. Eyler, for instance, conceded that she had only a minimal knowledge of the S DFA firm's operations and had never been the firm administer.<sup>19</sup> Nonetheless, responding to these suspicions and requests for information by the beneficiaries during the years preceding the hearing was not only time-consuming; it was essential for the ultimate defense of Mr. Elfand's decisions regarding the S DFA law.

In September 6, 2002, for instance, the Objectors filed a Petition for Discovery seeking copious information about the S DFA law firm:

Petitioners [Scott Fiel, Adele Fiel, Leonard Fiel, Carol Eyler] will need to obtain discovery and documents from the Executor/Trustee, their counsel and/or third parties on the following topics:

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<sup>16</sup> 4/8/2002 Objectors' Petition for an Accounting, ¶ 13, Ex. 1 to 2/1/2008 Objectors' Memorandum.

<sup>17</sup> 4/8/2002 Objectors' Petition for Accounting, ¶ 11, Ex. 1 to 2/1/2008 Objectors' Memorandum.

<sup>18</sup> 4/8/2002 Objectors' Petition for Accounting, ¶¶ 14-15, Ex. 1 to 2/1/2008 Objectors' Memorandum.

<sup>19</sup> Fiel Trust Adjudication at 6 (citing 9/27/2005 N.T. at 33, 35-36, 45-47, 66-67, 81-83).



- (a) information needed to determine the valuation of the law firm at the date of Decedent's death. This would include, without necessarily being limited to:
  - (1) documents necessary to determine the inventory of cases being handled by the law firm at the time of Decedent's death, including without limitation, copies of all the retention letters with clients, case histories and the like;
  - (2) the original books and records of the law firm, including without limitation, financial statements, income statements, bank statements, general ledgers, cancelled checks, expense reports, account receivables, account payables, etc.;
- (b) the disposition of the law firm's cases from the death of the Decedent through the present;
- (c) the amount of fees or other income generated from those cases;
- (d) the costs incurred in running and management of the firm after the Decedent's death, including without limitation salaries, taxes, expenses, etc.;
- (e) the efforts made, if any, to sell the law firm after the Decedent's death;
- (f) offers made by others to purchase the law firm after Decedent's death;
- (g) valuations of the law firm sought or obtained for the law firm, including without limitation, any information supplied to or received from Trugman Co., to which the Estate paid \$5,000 in September 2000;
- (h) any type of analysis made including without limitation any cost benefit analysis, of the options available to the Executor/Trustee concerning the law firm, e.g., whether to close it immediately and parcel out the existing cases to the attorneys working at the firm while retaining a 1/3 referral fee, sale of the practice intact with the building that Decedent owned which housed the law practice, or sale of the existing practice in toto without the building.<sup>20</sup>

This demand for information made at the beginning of the period for which SGLK defense fees are now sought perhaps best illustrates what the Trustee was up against. Although this court initially granted the Objectors' discovery request by order dated October 23, 2002, the Trustee's attorneys subsequently persuaded this court on the necessity of protecting the confidentiality of the SDFA firm's clients. During a January 27, 2003 hearing to consider the Objectors' motion to compel and the Trustee's request for a confidentiality order, this court warned:

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<sup>20</sup> 9/6/2002 Objectors' Discovery Request, ¶ 8.

The last thing I want to have done here is to have needless attorney time charged to the estate over and above the what's likely to be hundreds of thousands of dollars that's going to be involved in the substantive charges....

They (i.e. the Trustee/Executor) have some legitimate issues in terms of breaching client confidentiality; you don't. And they have to worry about it for ethical reasons; you don't. So I have to worry on their behalf for them; you don't.<sup>21</sup>

By the end of the hearing, the Trustee's counsel persuaded this court to issue an order to protect the exchange of confidential information, essentially in the form suggested by the SGLK firm.<sup>22</sup> Although the Objectors attempt to minimize the accomplishments of SGLK during this discovery period as a "modest contribution,"<sup>23</sup> that characterization is belied by the record. As the Objectors relentlessly exercised their requests to obtain broad discovery, the Trustee and his counsel were forced to respond. It is unseemly that the Objectors now resist paying for the services they demanded.

***a. SGLK's Defense Counsel Fees Were Incurred in the Defense of the Trustee to the Surcharge Defense and not as Defense for SGLK***

Another argument Objectors assert to challenge SGLK's surcharge defense fees is that "SGLK's activities were, in part, in defense of its own fees relating to the S DFA firm" and those contested fees were cut in half so that SGLK did not successfully defend its excessive fee.<sup>24</sup> This argument confuses the surcharge action with the prior fee requests and distorts the facts relating to the surcharge action. SGLK forcefully represented the Executor/Trustee in the critical pre-hearing period of intense discovery. As the Trustee notes, the Objectors' discovery request in 2002 and the court's October 23, 2002 discovery order did not seek information about SGLK's fees but focused instead on the costs and valuation of the Fiel personal injury firm. Admittedly, the Objectors'

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<sup>21</sup> 1/27/2003 N.T. at 13-14, attached as Ex. 1 to Objectors' 3/30/2004 Motion to Compel.

<sup>22</sup> See January 27, 2003 Order under O.C. No. 851DE of 2000 caption.

<sup>23</sup> 2/1/2008 Objectors' Memorandum at 4..

<sup>24</sup> 2/1/2008 Objectors' Memorandum at 3.

initial petition for a citation for an accounting presented dual attacks against the Trustee and his counsel—the SGLK law firm, but in responding the SGLK was defending its client, the Trustee. Although the Objectors suggest that it was the COGR firm that successfully defended Mr. Elfand during the hearing phase of the defense litigation, a misstep during the critical discovery period would have undermined any subsequent defense.

The Objectors assert that the fees requested for SGLK are unreasonable because in defending Mr. Elfand, the SGLK firm was also defending itself from allegations by the objectors. They concede, however, that Ms. Koplín and Mr. Levine seek no compensation for time spent preparing and attending their own depositions or for time attending the actual hearing.<sup>25</sup> While it is true that the Objectors' earliest petitions were critical of both the Trustee and his counsel,<sup>26</sup> there was no citation directed against the law firm as a party defendant. As a practical matter, counsel fees are frequently an issue in orphan court matters without turning an attorney into a party defendant.

Moreover, in this case, the SGLK firm resigned as litigation counsel in April 2005 but continued as administration counsel.<sup>27</sup> As counsel for SGLK explained in an April 22, 2006 petition seeking a continuance of the hearing on the objections to the account, the SGLK firm elected not to serve to as “trial counsel” for Mr. Elfand once they concluded that they would “necessarily be fact witnesses at the hearing regarding the valuation, management and disposition of Decedent’s law firm.”<sup>28</sup> At that point, the SGLK firm hired its own counsel and was represented by the Mannion firm. SGLK

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<sup>25</sup> 2/1/2008 Objectors’ Memorandum at 4-5.

<sup>26</sup> See 2/1/2008 Objectors’ Memorandum at 4.

<sup>27</sup> 2/25/2008 Trustee’s Reply Memorandum at 5. See also 4/8/2002 Objectors’ Petition for Accounting, ¶ 13, Ex. 1 to 2/1/2008 Objectors’ Memorandum.

<sup>28</sup> 4/22/2005 Trustee’s Motion for a Continuance, ¶ 10.

seeks no recovery for the expenses it incurred due to Mr. Mannion's services.<sup>29</sup> After April 2005, therefore, the Trustee was represented by the COGR firm as to the surcharge claim, and those fees are properly set forth as a discrete cost.

***b. The Fee Petition Establishes that the Fees Sought by SGLK Were Not Duplicative***

The Objectors argue that the fee petition requests fees for the SGLK law firm that were duplicative in various ways. They assert, for instance, that the fees sought for the surcharge defense duplicate fees previously obtained for administrative services.<sup>30</sup> They also maintain that the fee requests for Bernice Koplin duplicate those sought for Ronald Levine.<sup>31</sup>

In support of their argument that the fee petition seeks duplicative fees that were previously paid for administration of the estate, the Objectors reference Ex. R-11 and Ms. Koplin's affidavit which they characterize as stating that she "inadvertently included about \$21,000 of defense time in the estate/trust time that was previously submitted to the court." By various obscure mathematical calculations regarding this \$21,000, the objectors then maintain that "the maximum SGLK can possibly seek in this petition is \$80,550."<sup>32</sup>

The Trustee persuasively clarifies this alleged duplication. He notes that when preparing the present fee petition it was discovered that 82.5 hours had inadvertently been included twice in the defense time, and never in the hours designated for administration. To clarify this point, Ex. R-11 has been marked to reflect the deductions.<sup>33</sup>

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<sup>29</sup> 12/21/2008 Trustee's Petition, n.3.

<sup>30</sup> 2/1/2008 Objectors' Memorandum at 3.

<sup>31</sup> 2/1/2008 Objectors' Memorandum at 13.

<sup>32</sup> 2/1/2008 Objectors' Memorandum at 6-7.

<sup>33</sup> 2/25/2008 Trustee's Reply Memorandum at 11 & Ex. A.

The Objectors also assert that numerous activities that SGLK now claim as defense services were actually administrative services performed for the Estate. In particular, the Objectors focus on the “Case Tracker” that SGLK created in response to the October 2002 discovery request to keep track of the SDFA law firm’s files. They emphasize that the adjudication credited Ms. Koplin’s testimony that “the main purpose of the case tracker was to make sure the ‘beneficiaries get every penny we can out of the cases.’”<sup>34</sup> This does not mean, however, that the case tracker did not also serve as a basis for defending Mr. Elfand from claims of negligent operation of the law firm. During the hearing, Carol Eyler admitted that there was no list of open SDFA cases, thereby confirming the need for a system to track cases. Moreover, as the Trustee notes, “R-16 and the time records clearly reflect that the total number of hours spent on the Case tracker were allocated between the two fees petitions, and were not duplicated.”<sup>35</sup>

Finally, the Objectors’ claim that SGLK defense fees should be reduced due to the duplication of efforts by Mr. Levine and Ms. Koplin.<sup>36</sup> The Trustee, however, properly notes that given the massive amount of discovery, it was appropriate for two attorneys to divide the work and occasionally confer about it.<sup>37</sup> Courts have concluded that it is not improper for executors to retain more than one attorney to work together on nonroutine matters. Browarsky Estate, 437 Pa. 282, 288, 263 A.2d 365, 367-68 (1970). The discovery of information related to the complex issues raised by the continued operation of the SDFA law firm raised issues that were far from routine in defending the Trustee from surcharge. Both Ms. Koplin and Mr. Levine were litigators, with different

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<sup>34</sup> 2/1/2008 Objectors’ Memorandum at 8.

<sup>35</sup> 2/25/2008 Trustees’ Reply Memorandum at 13.

<sup>36</sup> 2/1/2008 Objectors’ Memorandum at 13.

<sup>37</sup> 2/25/2008 Trustee’s Reply Memorandum at 7.

orientations: while Ms. Koplin practiced primarily in Orphans' Court, Mr. Levine did so in the Civil Trial division. More specifically, in the deposition of Mr. Elfand, it was important that Ms. Koplin be present since she could verse Mr. Levine as to complex estate and tax considerations in both Philadelphia and New Jersey.<sup>38</sup>

To evaluate the reasonableness of the fees claimed for the SGLK law firm, however, it is not enough to address the Objectors' arguments. The specific LaRocca criteria must also be addressed, starting with the amount of work performed.

#### Amount of Work Performed

The SGLK law firm spent 508.3 hours defending the Executor from the surcharge claim as reflected Ms. Koplin's affidavit and the detailed SGLK time records attached to the Trustee's fee petition. These hours were broken down as 398.3 attorney hours and 110 paralegal hours.<sup>39</sup> This work was necessitated by the intense discovery sought by the objectors concerning, in particular, the Trustee's continued operation of the SDFA law firm after the death of Stuart Fiel.

#### Character of the Services Rendered

The SGLK law firm's work in the pre-hearing phase of the litigation was critical to the successful defense of the Trustee. The complex issues raised by the continued operation of the SDFA law firm were handled with skill and sensitivity especially to the ethical concerns for maintaining the confidentiality of client records.

#### Difficulty of the Problems Involved

The June 4, 2007 Adjudication outlines in detail the difficult issues encountered by the Trustee and the SGLK law firm in the continued operation of the SDFA law firm.

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<sup>38</sup> 2/25/2008 Trustee's Reply Memorandum at 8-7.

<sup>39</sup> See Affidavit of Bernice Koplin, ¶ 9, Ex. A. to 12/21/2007 Trustee's Fee Petition.

Characterized as “the elephant in the room,” the law firm had the potential of being a liability—or an asset—to the trust and its beneficiaries. The SGLK law firm skillfully steered the Trustee through the potentially conflicting tasks of maximizing the law firm as an asset for the beneficiaries while safeguarding the interests of the law firm clients as required by the Pennsylvania Rules of Professional Conduct.

Importance of the Litigation and Amount of Money or Value of the Property In Question

The stakes were quite high for the Trustee in this litigation. Not only did the objectors seek a surcharge of \$1,650,000 plus “additional damages” because a substantial asset to the Estate—a law firm—was negligently administered, but they sought to deprive Mr. Elfand of his commission request in the amount of \$275,000.00.<sup>40</sup> The SGLK law firm’s careful management of the pre-hearing discovery was a critical element in the ultimate success of the surcharge defense. In terms of the gross estate, it was listed as \$12,810,972.45 on the 706 federal tax return.<sup>41</sup>

Degree of Responsibility Incurred

The SGLK assumed responsibility for defending the Trustee in the period prior to the hearing by skillfully managing and responding to voluminous, complex discovery requests.

Professional Skill and Standing of the Attorney in the Profession and the Results Obtained

Both Ms. Koplín and Mr. Levine are well regarded in the profession. Bernice Koplín graduated in 1981 from Temple University School of Law where she served on the Board of the Law Review. She was subsequently awarded two Masters of Law:

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<sup>40</sup> Fiel Trust Adjudication at 13 & 28.

<sup>41</sup> Fiel Trust Adjudication at 35.

Taxation in 1984 and Trial Advocacy in 1995. Mr. Levine graduated from Villanova University Law School in 1974 and received a Master of Law (Taxation) in 1981.<sup>42</sup>

The Results the Attorney Was Able to Obtain

The pre-hearing work by SGLK was instrumental in the successful resolution of the surcharge claim, with the court concluding that the Trustee did not negligently administer the law firm asset.

The Ability of the Client to Pay a Reasonable Fee for the Services Rendered

According to the Trustee, the Trust is currently worth in excess of \$3,375,000 and therefore is able to pay the attorneys' fees sought.<sup>43</sup>

Based on this record, the Trustee has sustained his burden of proof as to the \$113,325.00 in surcharge defense fees sought by SGLK.

**2. The Attorney Fees Sought for the Services of Conrad O'Brien Gellman & Rohn, P.C. for the Defense of the Executor Are Reasonable But Fees Incurred Regarding the Sale of the Margate Property Do Not Fall Within Surcharge Defense**

Beginning in April 2005, Mr. Elfand retained the law firm of Conrad O'Brien Gellman & Rohn, P.C. (hereinafter "COGR") to defend him against the surcharge claim.<sup>44</sup> By the time that COGR had been retained, a hearing had already been scheduled for May 17, 2005. Two attorneys from COGR represented the Trustee: John A. Guernsey, a senior partner and Colleen M. Johns, a mid-level associate. Mr. Guernsey's discounted hourly rate for the period April 2005 through February 2006 was \$250. Between March 2006 through May 2006, that hourly rate increased to \$380. During the period April 2005 through mid-January 2006, Ms. Johns' hourly rate was \$195.00, with a

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<sup>42</sup> Trustee's 2/25/2008 Reply Memorandum at 7; Trustee's 12/21/2007 Fee Petition, ¶ 95.

<sup>43</sup> 12/21/2007 Trustee's Fee Petition, ¶ 102.

<sup>44</sup> 12/21/2007 Trustee's Fee Petition, ¶ 28.



rate increase to \$230.00 beginning in mid-January 2006 through May 2006. In addition, four paralegals and a summer associate with hourly rates of \$120.00 worked on the Trustee's defense. The hourly rate for the paralegals increased to \$135.00 beginning in mid-January 2006.<sup>45</sup>

Both Mr. Guernsey and Ms. Johns spent the month of April 2005 preparing for the hearing by communicating with Ms. Koplin, Mr. Levine, and Mr. Mannion, who represented SGLK, reviewing and analyzing documents and researching precedent.<sup>46</sup> In his fee petition, the Trustee carefully outlines the services performed by COGR counsel and the hours billed with exhibits presenting invoices for the period April 2005 through June 2006 which encompassed hearings and post-hearing activities.<sup>47</sup>

According to COGR's invoices, Mr. Guernsey spent a total of 360.1 hours working on the defense of the Trustee; Ms. Johns spent a total of 428 hours; the paralegals and summer associates spent a total of 65.8 hours. The Trustee therefore seeks court approval for a total of \$190,110.50 for fees paid to COGR.<sup>48</sup> In addition, he seeks approval for the payment of \$82,089.19 from the Trust for the following costs: filing fees (140.00), Copying (\$11,984.94), Telecopy (\$115.15), Subpoenas (\$40.00), Witness Fee (\$30.00), Transcripts (\$6,612.80), Messenger (\$469.84), Postage (\$23.38), Meals/Parking/Transportation (\$1,539.27), Secretarial overtime (\$293.55), On-line Research (\$258.40), Telephone (\$1.77) as well as the following Expert Witness Fees:

Lawrence J. Fox, Esquire	\$30,797.00
Martin Heckscher, Esquire	\$17,032.99
Joseph F. Ricchiuti, Esquire	\$12,750.00 <sup>49</sup>

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<sup>45</sup> 12/21/2007 Trustee's Fee Petition, ¶¶28-33 & Ex. B.

<sup>46</sup> 12/21/2007 Trustee's Fee Petition, ¶34.

<sup>47</sup> 12/21/2007 Trustee's Fee Petition, ¶¶ 36-70.

<sup>48</sup> 12/21/2007 Trustee's Fee Petition, ¶¶ 69-70.

<sup>49</sup> 12/21/2007 Trustee's Fee Petition, ¶ 71.

The reasonableness of the attorney fees the Trustee seeks for COGR must also be analyzed under the LaRocca standard.

*a. The COGR Attorney Fees Sought for the Surcharge Defense Are Reasonable But Hours Attributed to the Margate Property Transaction Do Not Constitute Defense Fees*

**Amount of Work Performed**

In paragraphs 35 through 68, the Trustee gives a detailed breakdown by month of the defense services provided by COGR attorneys and paralegals from April 2005 through May 2006. In addition, he attached copies of the monthly COGR invoices to flesh out this narrative. Except for the time attributed to the Margate property transaction, the fees charged for these services are reasonable under LaRocca and recoverable due to the success of the surcharge defense. The petition's detailed narrative of the services rendered when combined with the invoices clearly support the fees claimed for 839.9 hours working of the surcharge defense.

This 839.9 figure is slightly lower than the petition's request that this court approve 853.9 hours for "working on this case." While the Trustee can recover for attorney fees expended on a successful surcharge action, in this case the Trustee is also seeking to recover for time spent by the COGR law firm on the sale of a Margate property that Stuart Fiel had owned. The Trustee argues that the objectors "made the sale of the Margate property an issue in the surcharge litigation when Objectors' counsel sent a letter to Mr. Guernsey and James Mannion on January 9, 2006 questioning Mr. Elfand's fiduciary duties in connection with the sale,"<sup>50</sup> but the sale of the property in reality was an administrative matter. The Objectors claim that Mr. Guernsey devoted 17.4 hours to

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<sup>50</sup> 2/25/2008 Trustee's Reply Memorandum at 21.

Margate, but an analysis of the invoices indicates that 14 hours were billed for Margate. The entry of 3/14/2006 that the Objectors claim billed 1.7 hours on Margate, in fact, makes no mention of that issue. Moreover, as the Trustee notes, the entry for January 9, 2006 indicates that Mr. Guernsey spent 1.2 hours on the Margate sale and not 2.1 hours as claimed by the Objectors. Similarly, while the Objectors characterize the February 7, 2006 invoice as indicating that Mr. Guernsey spent 1.7 hours on Margate, upon closer analysis the invoice indicates that he spent .9 hours on Margate. Consequently, the fees requested will be reduced by \$ 3,695 for the time spent on the Margate sale which is broken down as 12.5 hours at \$250 (= \$3,125) and 1.5 hours at \$380 (= \$570).<sup>51</sup>

#### **Character of Services Rendered**

The COGR successfully defended the Trustee from the surcharge claim during the intense hearing and post-hearing phases. Its task was challenging because COGR was retained at a time when a hearing had already been scheduled after SGLK learned that it could no longer serve as litigation counsel due to the likelihood members of the firm would be called as fact witnesses for the defense. Mr. Guernsey effectively managed his time with that of his associate Colleen Johns so that critical background preparation could be completed efficiently by an associate at the lower rate when possible.

#### **Difficulty of the Problems Involved**

As the June 4, 2007 Adjudication details, the surcharge litigation raised complex issues about the Trustee's management of the SDF law firm after the death of Stuart Fiel. Among the issues raised in that litigation were whether the Will authorized the continued operation of the firm; whether the law firm had been properly valued; whether

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<sup>51</sup> See 2/1/2008 Objectors' Memorandum at 20-21; Ex. B - 1 (Conrad O'Brien Gellman & Rohn, P.C. 2/14/2006 Invoice, 3/8/2006 Invoice and 4/19/2006 Invoice) attached to 12/21/2008 Trustee's Fee Petition; 2/25/2008 Trustee's Reply Memorandum at 21-22.

a supervising attorney should be appointed; whether it was necessary to evaluate the SDFA files to ferret out potential malpractice claims; whether the law firm could be quickly sold without valuing and evaluating the client files; whether and how the confidentiality of the SDFA law firms' client could be protected. The COGR firm—building on the strong support provided by the SGLK firm during the prior discovery period-- presented a masterful defense both during the days of hearings and during the post-trial briefing period.

**Importance of the Litigation and Amount of Money in Question**

The Objectors were seeking to surcharge the Trustee \$1,650,000 plus “additional damages” and sought to deprive him of a \$275,000 commission. Moreover, the gross estate as listed on the federal tax return was \$12,810,972.45. The defense was therefore very important to Alvin Elfand.

**Degree of Responsibility Incurred**

The COGR law firm represented the Trustee during the critical hearing and post-hearing stages of the surcharge defense.

**Professional Skill and Standing of the Attorney in His Profession and the Results Obtained**

Mr. Guernsey graduated from the United States Military Academy at West Point and then from Harvard Law School in 1977. Ms. Johns graduated from Villanova University in 1996 and from the John Marshall Law School in 1999.<sup>52</sup> They achieved excellent results since the surcharge claim was denied.

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<sup>52</sup> 12/21/2007 Trustee's Fee Petition, ¶¶ 99-100.

## **Ability of the Client to Pay a Reasonable Fee**

According to the Trustee, the Trust has a value in excess of \$3,375,000 and thus has assets available to pay the costs for defending against the surcharge claim. Moreover, the COGR fees have already been paid.<sup>53</sup>

### ***b. The Expenses Incurred by COGR***

#### ***1. Heckscher Expert Witness Fees***

The Objectors also challenge certain expenses claimed by COGR, and in particular the expert witness fees in the amount of \$17,032.99 for Martin Heckscher and \$30,797 for Lawrence Fox. No objection has been posed to Joseph Ricchiuti's expert witness fees.

The Objectors argue that no award should be made for Martin Heckscher's expert opinion because it was not relevant to the surcharge action. They note that Mr. Heckscher split his time 60% to SGLK and 40% to Efland.<sup>54</sup> The portion dedicated to the Mr. Efland's commission, they argue, was "very limited and specifically excluded any consideration of the subject matter of the surcharge action: waste arising from the 'operation and closure of the Stuart D. Fiel & Associates law firm following the death of Mr. Fiel.'"<sup>55</sup>

In framing his report, Heckscher was very careful to limit the scope of his opinion since he observed "you have not asked me to comment on certain aspects of the estate administration related to the operation and closure of the Stuart D. Fiel and

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<sup>53</sup> 12/21/2007 Trustee's Fee Petition at 1, n.1.

<sup>54</sup> The billing correspondence attached as Ex. B to the 12/21/2007 Trustee's Fee Petition indicates that Mr. Heckscher billed for his services according to a 40 (Efland)/60 (SGLK) division. See, e.g., 7/27/2005 letter from Heckscher to Mannion and Guernsey.

<sup>55</sup> 2/1/2008 Objectors' Memorandum at 21 (quoting Trial Ex. R-18 at 1, Ex. 3).

Associates law firm following the death of Mr. Fiel.”<sup>56</sup> Hence, his expert report does not address the heart of the surcharge, but merely suggests that if the court approves the continued operation of the SDFa, then the attendant legal fees were reasonable.

The Heckscher opinion explicitly did not address the services provided in the defense of the surcharge. As Mr. Heckscher observed:

Mr. Elfand seeks the Court’s approval of the attorney’s fees in the amount of \$625,000 and the payment of the executor’s/trustee’s commission of \$275,000. Of the \$625,000, Mr. Elfand attributes \$134,650 to attorney/paralegal activities related to defending the Executor against the beneficiaries allegations of misconduct. **It is my understanding that Mr. Elfand is not seeking approval of those fees at this time and will address his claim for reimbursement of those fees in a subsequent proceeding. Thus, this report does not address those fees....**

As noted above, it is my understanding that the Attorneys will defer to a later date their efforts to be compensated for the \$134,650 that has been designated as “Defense” on the attached summary.”<sup>57</sup>

In a sole paragraph, Mr. Heckscher does offer a limited opinion that attorney fees in the amount of \$252,250 would be reasonable for services related to the operation of the law firm if a court concludes such operation to be reasonable. The services he references, however included “extensive efforts in operating, winding down and resolving disputes related to the law firm<sup>58</sup>”—and not surcharge defense activities. His focus therefore was on attorney fees incurred in administering the law firm. Consequently, the \$17,032.99 that the Trustee seeks to recover for this report and/or witness fees cannot be approved as a surcharge defense. This in no way reflects on the quality of the expert report, which is excellent, but merely on its relevance to the fees incurred in the surcharge defense issue. It is unclear whether the Trustee previously sought approval for Mr. Heckscher’s fees and

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<sup>56</sup> 2/1/2008 Objectors’ Memorandum, Ex. 3, 7/8/2005 Heckscher opinion at 1, n. 1.

<sup>57</sup> 2/1/2008 Objectors’ Memorandum, Ex. 3, 7/8/2005 Heckscher opinion, at 7 (emphasis added).

<sup>58</sup> 2/1/2008 Objectors’ Memorandum, Ex. 3, 7/8/2005 Heckscher opinion at 21.

report in the context of his commission and administration of the trust and estate. If he has not, this opinion is without prejudice for him to seek such approval.

## ***2. Fox Expert Witness Fees***

The Trustee seeks approval for Lawrence Fox's expert witness fee in the amount of \$30,797.00. The Objectors, however, contend that the award for Mr. Fox's opinion should be reduced to \$15,398.50 to reflect that half of it was written in defense of SGLK with the other half in defense of the Executor. Although they concede that the Fox opinion was relevant to the surcharge action,<sup>59</sup> the Objectors advocate an arbitrary division of costs. This is not practical because the Fox opinion presented a comprehensive analysis of the difficult issues the Trustee faced in dealing with the law firm "asset." It focused on the heart of the surcharge action: "the standard of care in connection with their administration of the law practice of Stuart D. Fiel & Associates, P.A. ("the Fiel firm") subsequent to his death."<sup>60</sup> Because the Trustee properly relied on the advice of counsel in his dealings with the SDFA law firm asset, any attempt to divide the costs of the Fox opinion would be both arbitrary and unrealistic. That expert opinion was crucial to the surcharge defense and its costs are therefore fully recoverable from the estate.

## ***2. The Claimed Costs for Copying, Subpoena/Witness Fees, Messenger, Transcripts, Meals, Parking and Transportation***

The Objectors assert that the Trustee's request to seek payment from the Estate for miscellaneous expenses incurred in the course of the surcharge defense are either improper or excessive. More specifically, they object to copying costs of \$11,984.94, subpoena and witness fees totaling \$70, messenger fees of \$469.84, transcript fees of

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<sup>59</sup> 2/1/2008 Objectors' Memorandum at 21-22.

<sup>60</sup> Ex. 4, Expert Report of Lawrence Fox at 1, 2/4/2008 Objectors' Memorandum.

\$6,612.80, and charges of \$1,539.27 for meals, parking, and transportation.<sup>61</sup> The Trustee’s reply memorandum adequately explains the necessity for each of these charges,<sup>62</sup> which are reasonable and approved.

**3. Mr. Elfand’s Request for Reimbursement for the Time He Lost Servicing Other Clients Due to the Surcharge Defense Cannot Be Granted Due to the Lack of Precedent**

The fee petition also seeks to reimburse “Mr. Elfand for the time he spent away from his accounting practice and clients while defending the surcharge action.”<sup>63</sup> According to Ex. C.1 attached to the petition, Mr. Elfand spent a total of 285.75 hours working on the surcharge action. His billing rate is \$150 per hour, so that he seeks to recover a total of \$42,862.50.

In support of this claim, the Trustee initially cited Philadelphia Orphans’ Court Rule 1.2D to the effect that “[w]hen not otherwise regulated by law, the Court will allocate costs in such manner as it deems equitable.” Phila. O.C. Rule 1.2.D. Instead of citing any precedent in support of his claim, he states that “[t]he undersigned is unaware of any rule providing or case in Pennsylvania holding that a Court may not reimburse a fiduciary for the actual hours he spent working with his attorneys to defend a surcharge action.”<sup>64</sup>

The Objectors vigorously contest such an award in the absence of any supporting authority. The only precedent the Trustee presents in response is a federal case that recognizing “an incentive award, a special payment to the successful representative

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<sup>61</sup> 2/1/2008 Objectors’ Memorandum at 19.

<sup>62</sup> 2/25/2008 Trustee’s Reply Memorandum at 20-21.

<sup>63</sup> 12/21/2007 Trustee’s Fee Petition, ¶¶ 115-16.

<sup>64</sup> 12/24/2007 Trustee’s Fee Petition, ¶ 112.



plaintiff in a class action.”<sup>65</sup> In the absence of supporting precedent, the Trustee’s request for an award of \$42,862.50 cannot be approved.

Date: \_\_\_\_\_

BY THE COURT:

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John W. Herron, J.

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<sup>65</sup> 2/25/2008 Trustee’s Reply Memorandum at 26 (citing In re Automotive Refinishing Paint Antitrust Litig., 2008 WL 63269, at \* 7 (E.D. Pa. Jan.3, 2008).