IN THE
COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 1507-0230

ESTATE OF JOHN R.H. THOURON, DECEASED

IN THE
COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

NO. 1506-0305

ESTATE OF JOHN J. THOURON, DECEASED

ADJUDICATION

INTRODUCTION

This matter comes before the court on Beneficiaries' Objections to the First and Final Accounts filed in the Estates of John J. Thouron and his father, Sir John R.H. Thouron, on March 4, 2013 (the "Initial Accounts"). John J. Thouron was known as "Tiger" and is so referred to herein. Sir John R.H. Thouron is referred to simply as "Sir John." These gentlemen's beneficiaries are Rachel Vere Nichol and Rupert H. Thouron, Tiger's only children. They are referred to as "Rachel" and "Rupert" or together as "the Beneficiaries." These two Estates have been consolidated for purposes of this Adjudication.

In addition to the Objections to the Initial Accounts, certain other matters are before the court: the post-Objections legal fees that the Executor has paid to the Estates' counsel; a Motion for Sanctions filed by the Beneficiaries against the Executor and his counsel based on alleged discovery abuses and the recent Amended and Restated Accounts the Executor filed in both Estates in response to court orders entered on April 29, 2016 (the "Revised Accounts").

The parties have been engaged in contentious litigation for over nine (9) years. After fourteen (14) days of hearings, the court makes its:

FINDINGS OF FACT

I. Background

A. The Thouron Family

1. Sir John Rupert Hunt Thouron, the testator in *Estate of John R.H. Thouron, Deceased*, No. 1507-0230, originally of London, England, made his home in Chester County, Pennsylvania for many years, but never became a citizen of the United States. He remained a British subject throughout his life. OBJ 5; OBJ 164 (Valdene) at

85:22-86:1; Exec. 71, Tab P (Valdene) at 84:17-25, 85:12-19N.T. (3/16/2016) at 29:9-14 (Rachel).

2. Together with his wife, Lady Esther DuPont Thouron, Sir John owned a large estate in Chester County that came to be known as Doe Run. OBJ 162 (Whitehouse Thouron) at 29:17-23. Historically, Sir John and Esther lived at Doe Run for the warmer months of the year and there cultivated their love of gardening, creating famously beautiful gardens that have been toured by people from around the world. Exec 71, Tab H (Dieter Porter) at 19:6-20:15, 23:8-16.

3. In addition to Doe Run, Sir John and Lady Thouron owned property in Florida. Historically, Sir John and Lady Thouron lived in Florida for the colder months of the year, and there celebrated holidays, hosted family events, and joined local clubs. OBJ 161 (Dieter Porter) at 74:5-13; OBJ 162 (Whitehouse Thouron) at 27:24-28:21, 30:1-5; OBJ 164 (Valdene) at 8:20-9:21, 10:23-11:3, 16:12-19; N.T. (3/16/2016) at 52:18-53:14 (Rachel).

4. They also traveled annually to England, Canada, Saratoga, and Alabama for hunting, fishing, or other events. OBJ 162 (Whitehouse Thouron) at 27:23-28:21.

5. Sir John had one son, John Julius Thouron, known to his family and friends as Tiger. Tiger was born in Scotland, but, like his father, eventually came to own property in both Chester County, Pennsylvania and Florida. Tiger and Sir John had a close relationship and spoke to each other daily. OBJ 160 (Wiebe) at 21:15-23; OBJ 161 (Dieter Porter) at 48:21-22; N.T. (12/3/2015) at 233:21-234:2, 253:2-4 (Furman); N.T. (3/16/2016) at 29:15-16, 54:10-12 (Rachel).

6. Tiger had two children: Joanna Rachel Vere Nicoll and John Rupert Thouron, known as Rachel and Rupert respectively. N.T. (3/16/2016) at 26:23-24, 27:13-14 (Rachel); *id.* at 140:8-12 (Rupert).

7. Rachel and Rupert had close relationships with both their father and grandfather and regularly visited them, particularly towards the ends of the elder Thourons' lives. OBJ 160 (Wiebe) at 23:22-25:24; N.T. (3/16/2016) at 27:17-21, 28:3-8, 29:21-30:12 (Rachel); N.T. (3/16/2016) at 140:13-22, 141:1-10, 175:13- 176:12 (Rupert). Neither exercised any control over Tiger's or Sir John's business affairs. N.T. (3/16/2016) at 27:22-24, 28:9-29:8 (Rachel); *id.* at 140:23-24, 141:11-142:3 (Rupert).

8. Beginning in 1979, Lady Thouron suffered a number of debilitating strokes, after which she and Sir John began spending as much time as possible in Florida, where it was easier to care for her. OBJ 162 (Whitehouse Thouron) at 27:16-19, 28:22-29:16.

9. Lady Esther died in 1984, and for some time thereafter, Sir John continued to travel, golf, hunt, and fish. OBJ 162 (Whitehouse Thouron) at 29:24-25. Eventually, however, he too began to experience health problems. OBJ 161 (Dieter Porter) at 27:1-28:4, 44:25-46:9. Sir John gave up his active activities by about 1998 and did not travel (other than between Florida and Pennsylvania) after about 2000. OBJ 161 (Porter) at 49:10-50:19, 51:20-54:7, 56:16-22; OBJ 164 (Valdene) at 81:4-16, 81:18-19; OBJ 178, Tab 5 (Wilson) at 10:16-23, 11:18-23, 76:2-11; N.T. (5/6/2016) at 110:7-16, 110:24-11:3 (Norris).

B. Creation of Estate Plans

10. In approximately 2002, Edward Furman, an accountant employed by Maillie, Inc. ("Maillie") (then known as Maillie Falconiero) who had been acting as the family business office for both Tiger and Sir John for the past year, suggested that the family consider engaging in estate tax planning. At this time, Sir John was in his mid-90s. N.T. (12/3/2015) at 220:12-13, 220:17-22, 221:4-5, 222:15-223:4, 223:17-24, 225:4-8 (Furman).

11. To further this process, Furman contacted a local law firm, Fox Rothschild, on behalf of the Thourons and arranged a meeting between an attorney there, Robert Walper, and Tiger to discuss the best potential estate planning options for the family. N.T. (12/3/2015) at 226:1-227:1 (Furman); N.T. (3/14/2016) at 20:10-21:7 (Walper).

12. Furman, Walper, and Tiger ultimately decided that, given Sir John's advanced age, the best way to reduce estate taxes would be to create family limited partnerships ("FLPs") to hold the family's assets. This idea was later discussed with and agreed to by Sir John. N.T. (12/3/2015) at 227:14-228:1, 230:9-231:1, 232:21-233:1 (Furman); N.T. (3/14/2016) at 18:21-19:3 (Walper).

13. The basic structure of this estate planning approach involved placing assets into a partnership that would be controlled by a general partner. The original owner of the assets would then typically become a limited partner in the FLP. The purpose of the original owner's ceding control of these assets to the general partner was to provide a basis for a claim, by the original owner's estate, that the value of the limited

partnership interests should be discounted for purposes of calculating estate taxes. N.T. (12/3/2015) at 228:11-229:1 (Furman); N.T. (3/14/2016) at 19:8-20:9 (Walper).

14. The estate plan established for the Thourons involved the creation of several FLPs, "so everything was not just in one pot but it was in segregated pots to show that each one had its own business purpose and also to protect against if one was challenged by the IRS the others could still stand." N.T. (3/14/2016) at 25:21-26:7 (Walper).

15. Sir John and Tiger were advised that the validity of the partnerships and their ability to provide discounts would be strengthened if the controlling general partner included at least one independent person who was not a member of the family.

16. Tiger suggested that Charles Norris might fulfill this role for the Thouron partnerships and serve alongside him as co-general partner. Norris agreed to do so. N.T. (12/2/2015) at 109:14-22 (Norris); N.T. (12/3/2015) at 229:5-23, 232:4-6 (Furman); N.T. (5/5/2016) at 164:7-19, 165:15-16 (Norris).

C. Inclusion of Charles Norris

17. Charles Norris first met Sir John in the early 1970s. He came to know him better when he became a neighbor as his then-wife owned the estate adjacent to Doe Run. Initially, Norris did not know Tiger very well, but came to know him better in early 2000 as the result of a business matter in which he became involved. It was Norris who introduced the Thourons to Furman with the result that he was brought in to act as the family business office. N.T. (12/1/2015) at 213:12-214:5, 214:9-17 (Norris); N.T. (3/16/2016) at 31:11-15, 135:13-22 (Rachel); N.T. (3/16/2016) at 142:5-16, 142:23-143:13 (Rupert); N.T. (5/5/2016) at 152:22-153:3, 158:24-159:17 (Norris).

18. Tiger decided to ask Norris, a business owner and former lawyer, to be a co-general partner in some of the Thouron partnerships because he thought that Norris was a wealthy man, who, if given control of another family's assets, "would not take advantage of the situation when the time came." N.T. (12/3/2015) at 6:6-9:3 (Norris); N.T. (3/16/2016) at 146:19-147:3 (Rupert); N.T. (5/5/2016) at 151:13-18, 169:23-24 (Norris); N.T. (5/6/2016) at 113:7-20 (Norris).

D. Formation of the Family Limited Partnerships

19. The first partnerships were formed in January 2003 as the result of a meeting between Sir John, Tiger, Furman, and Norris and through the execution of documents prepared by Walper. Over time, more partnerships were formed for both Sir John's and Tiger's assets with each partnership holding a different asset. The general partner of each partnership was a limited liability company, the members of which effectively served as the partnerships' general partners. Exec. 58; Exec. 59; N.T. (12/3/2015) at 230:20-231:4, 243:4-9 (Furman); N.T. (3/14/2016) at 26:8-12 (Walper); N.T. (5/5/2016) at 15:11-15 (Donohue).

i. Tiger's Partnerships

20. In total, four (4) family limited partnerships were formed to hold Tiger's property.

21. First, Glenroy Farm, LP ("Glenroy") was formed to hold Tiger's home in Chester County, Pennsylvania. Tiger was assigned the limited partnership interests, while Thouron Family Real Estate, LLC, of which Tiger and Norris became equal members on April 22, 2003, was the general partner. Exec. 58 at 0115-0144; Exec. 59 at 0329-0357; N.T. (12/3/2015) at 233:18-234:9 (Furman); N.T. (4/29/2016) at 99:24-100:2 (Gibbs).

22. Second, Glenknockie Family LP was formed to hold additional properties acquired by Tiger. Two properties, Latham Farm and Graybill, were contiguous to Tiger's home at Glenroy. The third, Hollybrook, was a tree farm in Virginia, and the fourth, Driftwood, was a house in Florida. Tiger, Rachel, and Rupert were all limited partners in Glenknockie Family LP, and Glenknockie LLC (of which Tiger was the only member) was the general partner. Exec. 58 at 0981-1001; Exec. 59 at 1011-1021; N.T. (12/3/2015) at 206:11-23 (Norris); N.T. (12/3/2015) at 234:11-18, 253:2-4, 254:13-24, 257:7-10 (Furman); N.T. (12/4/2015) at 3:12-21 (Furman).

23. Third, Glendevron LP was formed to hold Tiger's property at 472 South Beach Road, Jupiter Island, Florida. Rupert and the Thouron Family Trust were limited partners while Glendevron LLC, of which Rupert and the Trust were the only members, was the general partner. Exec. 58 at 3482-3505; Exec. 59 at 3456-3475; N.T. (12/3/2015) at 258:18-259:5 (Furman).

24. Fourth, JJT Virginia Ventures, LP was formed to hold a farm in Virginia known as the Hale Tract. Tiger was the limited partner, and JJT Virginia Ventures, LLC, of which Rachel was the only member, was the general partner. Exec. 58 at 1034-1056; Exec. 59 at 1062-1072; N.T. (12/4/2015) at 8:16-9:1 (Furman); N.T. (3/16/2016) at 33:9-20 (Rachel).

ii. Sir John's Partnerships

25. Three (3) partnerships were established to hold Sir John's assets.

26. First, Doe Run, LP was formed to hold Sir John's house in Pennsylvania. Sir John was the limited partner and Thouron Family Real Estate, LLC was the general

partner. Exec. 58 at 0366-0393; Exec. 59 at 0329-0357; N.T. (12/1/2015) at 216:8-10 (Norris); N.T. (4/29/2016) at 99:16-100:5 (Gibbs).

27. Second, Thouron Florida Real Estate, LP ("TFRE") was formed to hold his house in Hobe Sound, Florida. As with Doe Run, LP, Sir John was the limited partner and Thouron Family Real Estate, LLC was the general partner. Exec. 58 at 0473-0500; Exec. 59 at 0329-0357; N.T. (12/1/2015) at 216:11-13 (Norris).

28. Finally, in order to separate his financial investments from his real estate, Thouron Family Investment Partnership, LP ("TFIP") was formed to hold mineral rights and Sir John's monetary investments, which consisted at the time of his death of approximately $34 million in liquid assets. Sir John was the limited partner and Thouron Family Investment, LLC, of which Tiger and Norris were equal members, was the general partner. Exec. 58 at 0290-0312; Exec. 59 at 0261-0284; N.T. (12/1/2015) at 219:21-24 (Norris); N.T. (12/3/2015) at 235:18-236:3 (Furman); N.T. (4/27/2016) at 49:5-22 (Latourette); N.T. (5/6/2016) at 132:1-16.

29. In addition to the partnerships, there was a pre-existing company named Doe Run, Inc., initially formed to run Sir John and Lady Thouron's horse racing endeavors, but which later became a management entity through which the family's expenses, such as staff salaries, were paid. N.T. (5/5/2016) at 20:20-21:15 (Donohue).

E. Norris's Role and Responsibilities Prior to Late 2005

30. At the time (or shortly after) Doe Run LP, TFRE, TFIP and Glenroy FLPs were established, Norris was an equal 50% owner with Tiger of the LLCs that were the general partners of the FLPs and, as he acknowledged, essentially a co-general partner with Tiger. N.T. (12/1/2015) 205:3-10 (Norris); N.T. (12/2/2015) at 108:5-18, 109:14-

18 (Norris); N.T. (12/3/2015) at 243:4-9 (Furman); N.T. (5/5/2016) at 15:19-16:2 (Donohue).

31. The general partner's role was defined in sum, as follows: "[t]he General Partner is charged by the Partnership Agreement and by law with the sole responsibility for the management of the Limited Partnership. The General Partner is personally liable for the obligations and liabilities of the Limited Partnership. The General Partner has business fiduciary duties to the Limited Partnership and the partners. The General Partner may not self-deal. The General Partner must act fairly with respect to all ownership interests in the organization." Exec. 41 at 59-0542, 59-0618, 59-0692, 73-0959, 73-1045, 73-1133; Exec. 58 at 0296-0299, 0308-0309 (TFIP), 0378-0380 (Doe Run, LP), 0485-0487 (TFRE), 3488-3491, 3500-3501 (Glendevron), 0987-0989, 0998 (Glenknockie), 0127-0129 (Glenroy), 1040-1042, 1052-1053 (JJT Virginia Ventures).

32. Norris signed the partnership agreements and understood that he would have fiduciary obligations to the limited partnerships and was brought in "to provide independent guidance." Norris acknowledged that he never signed any documents that would relieve him of his obligations as co-general partner. N.T. (12/2/2015) at 110:21-111:1 (Norris); N.T. (5/6/2016) at 121:3-12, 123:11-20 (Norris).

33. However, Norris has conceded that, until September 2005, he did essentially "nothing" with respect to the partnerships. He testified that he was not active in their management and did not monitor their activities. He stated that he "didn't know anything was going on."

34. Norris understood his involvement was "essential to the validity of the family limited partnership structure," and was needed to provide "the requisite degree of

independence to achieve the tax planning objectives" behind the FLPs' formation. Norris nonetheless behaved only as "a temporary placeholder," deferring to and relying upon Tiger to make all partnership decisions and to take all partnership actions. N.T. (12/1/2015) at 205:19-206:8, 208:12-15 (Norris); N.T. (12/2/2015) at 121:23 (Norris); N.T. (5/5/2016) at 17:9-17 (Donohue); N.T. (5/5/2016) at 168:6-19 (Norris); N.T. (5/6/2016) at 124:4-9, 129:9-12 (Norris).

35. Norris claims that his only involvement in the partnerships was to ask Tiger from time to time, when he and Tiger happened to see each other, what was going on in that regard. Norris testified that he would typically receive the same cursory response that "nothing [was] going on." Norris never inquired further either of Tiger directly or of Furman.

36. Norris testified that "he [Tiger] didn't seem to want to tell me more than that, and he could have if he wished, but he didn't" and "so I just let it go." Norris admitted that he could have sought information from Furman and could, for example, "have gone and looked up the deeds." N.T. (12/2/2015) at 126:24-128:15, 128:20-131:9, 130:18-21,135:13-19, 135:20-136:12 (Norris); N.T. (5/5/2016) at 168:20-169:9 (Norris); N.T. (5/6/2016) at 124:10-125:21, 126:9-127:21 (Norris).

37. Furman did not receive any instructions from Norris, and Norris did not seek any information from Furman with regard to the partnerships' activities. N.T. (12/2/2015) at 135:20-136:12 (Norris); N.T. (12/3/2015) at 236:20-237:12, 239:19-240:16, 241:4-13 (Furman).

38. Because Norris did not involve himself in the affairs of the FLPs, Furman dealt only with Tiger with regard to the partnerships, provided monthly partnership

reports only to Tiger and facilitated transactions involving the FLPs' at Tiger's sole direction until Tiger became too ill, in the Fall of 2005.

39. Although the relevant LLC agreements required the consent of a majority of the LLC's members for valid corporate action, Furman supposed that either general partner could authorize transactions. Exec. 59 at 0265 (TFI), 0340 (TFRE); N.T. (12/3/2015) at 240:19-23, 243:21-244:4 (Furman); N.T. (5/5/2016) at 16:3-5, 16:11 (Donohue).

40. Prior to Tiger's transfer of his interests in the governing LLCs to Norris in September 2005, there is no appreciable evidence that Norris performed any of his obligations as co-general partner, or made any effort to provide the "independent guidance" which he had been brought in to contribute.

41. Tiger was left to direct the partnerships as he wished.

II. Tiger's Illness; Norris Becomes Sole General Partner

42. Norris's failure to exercise responsibility as co-general partner continued until late 2005, by which time it had become apparent that Tiger was terminally ill. In August, Tiger met with Norris and told him he would need to "take over." On September 13, Tiger signed his interests in Doe Run, Inc. and the limited liability companies over to Norris, making him the sole member of the companies and thereby effectively the only general partner in at least four (4) of the family limited partnerships. N.T. (12/1/2015) at 207:2-9 (Norris); N.T. (12/2/2015) at 113:22-114:5, 124:4-10 (Norris); N.T. (3/16/2016) at 30:1-3 (Rachel); N.T. (5/5/2016) at 15:9-18 (Donohue); N.T. (5/5/2016) at 161:8-162:16, 163:2-14 (Norris); N.T. (5/6/2016) at 111:18-112:10, 112:21-24 (Norris).

43. It was at this point that Norris started to become involved in monitoring the partnerships. Norris then began paying himself "management fees" of $30,000 per month, a figure he came up with after discussing the topic with Furman. N.T. (12/1/2015) at 206:11-14 (Norris); N.T. (12/3/2015) at 182:15-183:1 (Norris); N.T. (5/5/2016) at 175:12-176:6 (Norris).

44. Furman denied that he had any input on the amount of the fee. Furman testified that he paid Norris these fees because he believed he was obliged to follow Norris's instructions and did not possess discretion to refuse. N.T. (4/29/2016) at 128:4-9, 172:6-19 (Furman); N.T. (5/4/2016) at 9:9-21 (Furman).

III. Tiger Dies: January 18, 2006

45. Tiger Thouron passed away on January 18, 2006. In his will dated September 14, 2005, he named Norris as personal representative of his estate, thereby giving him control, after Tiger's death, over all limited partner interests Tiger had retained in the partnerships.

46. When Norris qualified as Executor in February 2006, he controlled all interests in Glenroy and Doe Run, Inc., the general partner interest and some limited partner interest in Glenknockie, LP, the general partner interest in Doe Run, LP, TFRE, and TFIP, and the limited partner interest in JJT Virginia Ventures. Exec. 37 at Box 75-0753, 0755-0756; N.T. (3/16/2016) at 34:1-2 (Rachel).

IV. Tiger's Estate Administration: January 2006 - February 2007

A. The January 30, 2006 Meeting in Florida

47. Following a January 30, 2006 memorial service for Tiger in Florida, Norris held a meeting that included Furman, Rachel, Rupert, and Stephen Trudeau, a

family wealth management advisor from Merrill Lynch. Walper may also have been at this meeting. During the meeting, Furman summarized all of the partnership entities, owners, holdings, and operating costs. N.T. (12/3/2015) at 237:14-238:18 (Furman); N.T. (3/15/2016) at 56:17-18, 57:9-13, 97:23-98:11 (Trudeau); N.T. (3/16/2016) at 34:3-7 (Rachel).

48. Other topics discussed in this meeting included Rachel's ability and desire to disclaim part of her inheritance from Tiger in favor of her children, inventories of items at Glenroy and Doe Run, and the potential purchase of a property adjacent to Sir John's home in Florida. N.T. (3/16/2016) at 34:21-35:15 (Rachel).

49. There also were initial discussions about where probate of Tiger's and Sir John's wills should take place.

50. Norris ultimately decided to probate Tiger's will in Pennsylvania (the propriety of which is not in dispute). N.T. (5/6/2016) at 21:13-21 (Norris).

B. The Executor Fee Agreement; Fees Actually Paid

51. Norris had not discussed an executor fee with Tiger before Tiger died. However, in early April 2006, he, Furman, Walper and William Lamb, a lawyer and partner in the West Chester law firm, Lamb McErlane PC, (hereinafter "the Lamb firm"), discussed an appropriate fee, and on April 4, 2006, Furman emailed Rachel and Rupert on the subject.

52. Rachel and Rupert did not have their own attorneys at this time.

53. Furman noted that under a scale for such fees "Carl would be in the range of 250k to 500k," but that "Bill Lamb believes that 250k is reasonable." Exec. 31; N.T. (5/6/2016) at 22:2-5 (Norris).

54. Rupert had been somewhat disturbed by the concept of an executor fee, but, having been "reassured that there were limits," accepted this figure. N.T. (3/16/2016) at 155:21-156:21, 171:6-8 (Rupert).

55. On April 6, 2006, Rachel responded that she had discussed the fee issue with Rupert and that they were agreeable to the $250,000 fee. Exec. 31; N.T. (3/16/2016) at 40:1-41:3, 82:19-83:14 (Rachel); N.T. (3/16/2016) at 156:2-21.

56. The next day, April 7, 2006, Norris wrote to William Lamb, Furman, and Walper to thank them for their support, noting that he had been "taken aback" by Rachel's and Rupert's earlier reaction to paying an executor fee but ascribed it to their "lack of experience." Exec. 30.

57. Norris ultimately charged Tiger's Estate more than twice the amount of $250,000, receiving from Tiger's Estate a total $543,000. Stipulation re: Revised Accounts, ¶ 90. Of this amount, $418,000 was paid in April 2007 and the remaining $125,000 was paid in July 2009. Tiger's Revised Account (on file with the court) at p. 107.

C. Additional "Management Fees" Paid Norris

58. At the time the parties were discussing Norris's proposed $250,000 executor fee for Tiger's Estate, Norris had not disclosed to Rachel and Rupert that since September 2005 he had been taking a separate $30,000 monthly "management fee" for his involvement in the FLPs. Rachel and Rupert did not learn of this separate fee until March 2007. N.T. (3/16/2016) at 49:17-50:8, 50:22-51:6, 89:3-17 (Rachel); *id.* at 158:16-159:7 (Rupert).

59. Norris claimed at the hearing that this management fee was on par with what Tiger had received during his lifetime. N.T. (12/3/2015) at 180:19-182:9 (Norris) (claiming Tiger paid $25,000-$26,000 per month).

60. There was no evidence presented to support Norris's assertion. To the contrary, Furman testified that the fees Tiger received were paid as wages and were significantly less than $30,000 per month. Furman's figures are supported by the relevant tax returns, which show payments to Tiger that totaled $100,000 in 2003, $125,000 in 2004, and $100,000 in 2005. Exec. 69; N.T. (4/29/2016) at 132:16-133:3, 133:24-134:3, 136:23-138:11 (Furman). This averages roughly $9,000 a month.

61. The additional management fees paid to Norris from February 2006 until Sir John's death in February 2007, at $30,000 per month, amount to $360,000.

D. Absence of Written Records of Norris's Time

62. William Lamb advised Norris regarding executor fees and counseled him to keep detailed records of the time he spent on both Estates. N.T. (3/14/2016) at 165:4-7 (Donohue). But Norris did not do so. N.T. (12/2/2015) at 166:6-9 (Norris).

63. Norris claimed he prepared and sent to Furman or the Lamb firm episodic memoranda or progress reports of the work he did as Executor. *Id.* at 167:13-168:11. However, no such memoranda were proffered or put in evidence at the hearing with respect to Tiger's or Sir John's Estate. Nor were any documents offered detailing or summarizing work Norris claimed to do in his role as general partner.

E. Absence of Prior Court Approval

64. Norris did not seek prior court approval of any of the executor or management fees he paid himself from Tiger's Estate and Sir John's Estate. Nor did he,

the Lamb firm or Maillie make any effort to secure prior approval for any fees he paid them prior to the filing of Initial Accounts.

V. Professionals Engaged for Tiger's Estate and Their Fees

A. The Lamb Firm and Its Fees

65. Norris engaged a number of professionals to perform various functions with regards to Tiger's Estate. First, he engaged William Lamb and the Lamb firm as counsel. Norris had a long relationship with the Lamb firm: it had represented Norris in a lengthy divorce and in subsequent personal matters, and also represented his company, a trust for his daughter, and his family in a real estate transaction.

66. The Lamb firm billed the Estate on an hourly basis. OBJ 10; Exec. 23 at 41250-41251; N.T. (5/6/2016) at 26:13-27:2, 165:13-19 (Norris).

67. A number of the Lamb firm's attorneys and paralegals were engaged for various aspects of Tiger's Estate administration and later Sir John's Estate, which was administered simultaneously after February 2007.

68. The fees invoiced and paid by Tiger's Estate to the Lamb firm through April 2016 total $335,882. Stipulation re: Revised Accounts, ¶ 92.

B. Maillie Falconiero and Its Fees

69. Norris retained Maillie to provide accounting services to the Estate. He did so even though he was concerned about Furman's performance before Tiger died, particularly with regard to communication and documentation. Maillie billed Tiger's Estate monthly.

70. None of Maillie's bills provide any detail of the work that underlies or supports its charges. Exec. 60; N.T. (12/2/2015) at 226:10-236:20, 244:18-247:21 (Norris); N.T. (4/29/2016) at 166:23-167:1 (Furman).

71. The total fees paid by Tiger's Estate to Maillie through April 2016 were $86,325. Stipulation re: Revised Accounts, ¶ 91.

C. Cecil Smith, Larry Gibbs and Other Counsel

72. Norris engaged Cecil Smith ("Smith") and Larry Gibbs ("Gibbs") to provide tax and valuation services to the Estate. As with the Lamb firm, Norris had worked with Smith in the past. N.T. (5/6/2016) at 18:8-18, 19:1-8 (Norris). The January 2007 engagement letter specified that they would prepare Tiger's federal estate tax return, handle any IRS audit, and value the assets of the Estate for a fee of $200,000. Exec. 23 (marked as CHN-4). This was the total fee the Estate paid to Smith and Gibbs. Stipulation re: Revised Accounts, ¶ 93.

73. Norris engaged two other law firms, Charles Russell LLP and Fox Rothschild, to provide specialized services, the former in Great Britain and the latter in connection with the Thouron family's estate plan. First and Final Account for Estate of John J. Thouron, filed July 13, 2016 (on file with court) at pp. 113-114. Their fees, paid by the Estate, were $39,520 and $25,519, respectively. Stipulation re: Revised Accounts, ¶¶ 94-95.

74. The total executor fees and professional fees paid by Tiger's Estate were $1,230,246. The total Principal Receipts of the Estate were $13,321,173. Tiger's Revised Account at p. 2. Total fees paid represented 9.23% of the gross value of Tiger's Estate.

D. Rachel's Disclaimer Request

75. Rachel made Norris aware of her wish to disclaim part of her interest in Tiger's Estate in favor of her children as early as July 2006. OBJ 171; Exec. 55; N.T. (5/6/2016) at 161:6-164:7 (Norris).

76. It was undisputed that neither Rachel nor Rupert had retained or had been advised to retain independent counsel at this point. It appears Rachel and Rupert believed that the Lamb firm was representing their interests. William Lamb had told them the Lamb firm was working for them, and offered them reassuring advice with regard to their concern about fees. *See* Findings of Fact Nos. 83-94, 90, *infra*.

77. Norris passed along to Furman the fact that Rachel wished to make a disclaimer, but did not do anything else about Rachel's wishes. N.T. (3/16/2016) at 132:14-16 (Rachel).

78. The record reflects that, after the period had elapsed in November 2006, and following a meeting in the Lamb firm's office during which Rachel again raised the issue, Furman asked John Kehner, an estates attorney from the Lamb firm, what would be necessary for Rachel to disclaim part of her estate. Exec. 55; N.T. (3/16/2016) at 42:1-5, 43:16-23 (Rachel).

79. Kehner responded, not by confirming that a disclaimer was no longer possible, but by sending Furman a form and noting that it would have to be dated as of a date that had then passed. Furman then instructed Rachel she should backdate the disclaimer form. Exec. 55; N.T. (3/16/2016) at 116:22-117:17; 131:21-133:18 (Rachel).

80. After Drinker Biddle & Reath LLP became involved on behalf of the Beneficiaries, Rachel contacted its attorney William Bullitt, Esq. about her wish to

disclaim. Bullitt explained that what she had been advised to do would be wrongful, with the result that no disclaimer was claimed. N.T. (3/16/2016) at 133:19-134:4 (Rachel).

E. The November 2006 Meeting at the Lamb Firm's Office

81. In November 2006, Norris and William Lamb convened an organizational meeting with the Beneficiaries at the Lamb firm's office in West Chester. In attendance were Norris, William Lamb, Kehner, Furman, Walper, Rachel and Rupert. N.T. (3/16/2016) at 41:14-24 (Rachel).

82. In addition to discussion of Rachel's disclaimer, there was a general discussion at this meeting of distributing the JJT Virginia Ventures partnership, merging R&R Management (a limited liability company formed by Norris, the purpose of which was to pay salaries to Rachel and Rupert) with Doe Run, Inc. for purposes of the pension plan, and options for the Glenroy property. N.T. (3/16/2016) at 42:1-14, 43:8-44:3 (Rachel); *id.* at 153:6-154:1 (Rupert).

83. After the group meeting, William Lamb met with Rachel and Rupert separately in his office to reassure them that they "were in good hands" and that his firm was "working for you," because they were the beneficiaries of Tiger's Estate. *Id.* at 44:4-14 (Rachel); *id.* at 156:22-157:7 (Rupert).

84. Following the meeting, in January 2007, William Lamb wrote the Beneficiaries to respond to an inquiry they had made concerning executor fees for Tiger's Estate and Sir John's Estate when he passed. Lamb advised them that all executor fees and attorneys' fees "are very carefully and seriously considered AND are ultimately approved (or disapproved) by the Court." OBJ 128-2 (1/19/2007 email).

85. Walper had undertaken to represent Rachel and Rupert at the suggestion of Messrs. Lamb and Norris, since the Lamb firm would be representing Norris as Executor. N.T. (3/16/2016) at 46:3-9 (Rachel); N.T. (3/14/2016) at 43:18-44:14 (Walper),

F. The March 15, 2007 Meeting at the Lamb Firm's Office

86. Norris, William Lamb, Kehner, Furman, Walper, Rachel and Rupert all attended a meeting on March 15, 2007. N.T. (12/3/2015) at 99:18-100:2 (Norris); N.T. (3/16/2016) at 52:1 (Rachel).

87. At the meeting, Walper and the Beneficiaries raised the issue of the location of probate and expressed their concern that the will should be probated in Florida. N.T. (3/14/2016) at 49:15-50:3 (Walper); N.T. (3/16/2016) at 47:7-12 (Rachel); N.T. (3/16/2016) at 159:22-160:8 (Rupert).

88. The group also discussed the fees that would be charged for Norris's work in connection with the Estates. Norris gave a lengthy presentation in which he stated his expectation that total administrative fees – not merely executor fees -- would range $5 million to $7 million for Sir John's Estate based upon an estimated value of $90 - $100 million, and $600,000 for Tiger's Estate, plus "a premium that they would charge for what he considered good results." Exec. 31; N.T. (3/16/2016) at 48:3-24; 56:9-57:11; 87:18-88:11 (Rachel); N.T. (3/16/2016) at 157:16-158:15 (Rupert); N.T. (5/5/2016) at 58:17-23 (Donohue).

89. The actual gross value of Sir John's Estate was $40 million. Sir John's Revised Account (on file with the court) at p. 2. Even before the Revised Account was

prepared, Donohue conceded the Estate's value was less than $50 million. N.T. (5/5/2016) at 59:3-8 (Donohue).

90. The Beneficiaries were shocked by these figures, but decided to wait for guidance from Walper. No agreement to Norris's projected fees was requested or given at the meeting. N.T. (3/16/2016) at 49:1-12 (Rachel); *id.* at 157:16-158:15, 181:8-15 (Rupert). William Lamb had already reassured Rachel and Rupert that they should not be concerned because any fees charged would ultimately have to be passed upon and approved by the Orphan's Court. OBJ 128-2.

VI. Sir John Dies; The Threshold Issue of Domicile

A. Findings of Fact: Domicile

91. Sir John was a Pennsylvania domiciliary beginning in 1953.

92. Sir John was still a Pennsylvania domiciliary in 2002. OBJ 3; N.T. (12/3/15) at 159:19-24.

93. After marrying his wife Lady Thouron in 1953, Sir John chose Unionville, Chester County, Pennsylvania, to create an English styled 250-acre estate they named "Doe Run". N.T. (3/16/16) at 95:14-19.

94. After 2002 and until his death, Sir John continued to own his estate at Doe Run (through a family limited partnership) and lived there for approximately five (5) or six (6) months of the year, while spending the remainder in Florida. N.T. (3/16/16) at 54:12-16.

95. Doe Run was where substantially all of his possessions that had sentimental value were located, including the room of Lady Thouron that Sir John had kept undisturbed since her death in 1984. N.T. (5/6/16) at 44:10-11; Exec. 71, Tab H, p. 82.

96. Doe Run had world-renowned gardens that Sir John created and enjoyed immensely throughout his life. N.T. (12/1/15) at 66:7-11; Exec. 45 (Doe Run photographs.)

97. Doe Run is a much grander property than the Hobe Sound property in Florida, which does not compare in size, grandeur or beauty. N.T. (5/6/16) at pp. 97:18-24, 182:3-7; Exec. 71, Tab I, p. 25; Tab G, pp. 18-24, 37-39; Tab L, pp. 25, 45-46; Tab N, pp. 126-127, and Tab P, pp. 72-74, 82-83, 87-89.

98. In May 2002, Sir John's attorney was Robert Walper. Walper wrote a letter stating that Doe Run was Sir John's "principal residence" and analyzing the federal and Pennsylvania inheritance tax rates as a result. Exec. 4.

99. In the letter, Mr. Walper did not address the Florida inheritance tax rates, which evinces that Mr. Walper believed at the time that Sir John was domiciled in Pennsylvania.

100. A number of documents were executed by Sir John after 2002 with varying declarations of domicile, including:

a. March 20, 2003 Codicil to a 2001 will stating "I, John R.H. Thouron of Chester County, Commonwealth of Pennsylvania . . ." (Exec. 38);

b. April 22, 2003 Healthcare Power of Attorney of John R.H. Thouron of Martin County, Florida (OBJ 121);

c. October 4, 2005 Last Will and Testament of John R.H. Thouron stating "I, John R.H. Thouron, now of Palm Beach County, Florida . . ." (OBJ 1);

d. October 4, 2005 Revocable Trust of John R.H. Thouron "now of Palm Beach County, Florida" (OBJ 2);

e. Undated Declaration of Domicile and Citizenship stating that Sir John R.H. Thouron changed his domicile and has been a bonafide resident of the State of Florida since January 1, 2002 (OBJ 3);

f. November 16, 2006 Healthcare Directive stating Sir John R.H. Thouron "of Chester County, Pennsylvania am spending the winter in Hobe Sound, Florida." (Exec. 21.)

101. As a close friend, neighbor, confidant, advisor and almost "like a son" to Sir John, Norris had numerous occasions over many years to observe Sir John live his life both in Pennsylvania and in Florida. N.T. (5/5/16) at 153:11-23; N.T. (5/5/16) at 153:1-12; N.T. (5/6/16) at 182:15.

102. He was very familiar with domicile issues as a result of his own personal experience. He had been married to a member of the Dorrance family whose patriarch's estate led to the seminal Pennsylvania Supreme Court domicile case *In Re Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932), *cert. denied*, 288 U.S. 617 (1932). N.T. (5/6/16) at 49:17-21.

103. Norris believed in 2007, and still believes today, that Sir John considered Pennsylvania to be his home and domicile. N.T. (5/6/16) at 48:4-7, 53:13-54:1, 57:11-22.

104. Up until his passing, Sir John frequently referred to returning to his "home", Doe Run, in Pennsylvania. Exec. 71, Tab H, pp. 30-31; Tab L, pp. 32, 72-73.

105. Sir John spent his winters in Florida as he became older, primarily in order to escape the cold weather in Pennsylvania. Exec. 71, Tab N, pp. 122-123; Tab O, p.1.; N.T. (5/6/16) at 48:15-20.

106. Sir John also spent his winters in Florida in an effort to avoid paying Pennsylvania resident state income taxes. N.T. (12/4/15) at 13:11-17.

107. According to Claus Dieter Porter, who was superintendent of the gardens and greenhouse at Doe Run for 46 years, Sir John went to Florida, but would say "I'll be back in the spring," "I'll be back home" in Pennsylvania and "I'm glad to be back home" at Doe Run. Exec. 71, Tab H, pp. 6, 30-31.

108. Richard Wilson, who was Sir John's friend and a golf professional, testified that Sir John always called Doe Run "home"; "his life was to watch the flowers progress into the season" and stated that Sir John did not refer to changing his home to Florida. Exec. 71, Tab L, pp. 7-8, 32, 35-36, 44-45.

109. According to Sir John's physician, Dr. Edward Theurkauf, "Sir John preferred to be at Doe Run. The only reason Sir John went south for the winter was because of the weather." Exec. 71, Tab O, p. 1.

110. Even though Sir John's physical limitations and medical needs required him to move to separate quarters at Doe Run during his later years, Sir John continued to return to Doe Run every year. N.T. (5/6/16) at 48:12-20.

111. On November 16, 2006, Sir John executed a healthcare directive stating in relevant part that "I, SIR JOHN R. H. THOURON, of Chester County, Pennsylvania, am spending the Winter in Hobe Sound, Florida…." Exec. 21, N.T. (5/6/16) at 52:13-53:4.

112. During his last winter in Florida, Sir John expressed his intention to return "home" to celebrate what would have been his 100th birthday on May 5, 2007. Exec. 71, Tab H, pp. 35:12-36:2.

113. Paul McCallister, whose firm provided nursing assistance to Sir John around the clock for the last seven (7) months of his life, understood from Sir John that

his home was at Doe Run and that he went to Florida to avoid the cold winters. Exec. 71, Tab K, paragraph 20.

114. Guy de la Valdene and Mary Wiebe testified that Sir John told them he had decided to make Florida his home. OBJ 160, Wiebe at 81, 18-82, 8; OBJ 164, Valdene, at 35: 3-36, 22, 37.

115. Edward Furman, Sir John's accountant and office manager of many years, also believed in 2007, and still believes today, that Sir John considered Pennsylvania to be his home. N.T. (4/29/16) at 149:7-17; Exec. 19.

116. Sir John was not reading toward the end of his life and would have documents explained to him. Exec. 71, Tab G, pp. 30-33.

117. Sir John had signed a Declaration of Domicile (Exec.71, Tab F), presented to him by Furman.

118. Sir John did not read it. After he was handed the declaration by Furman and signed it, Sir John was told by Furman that it was only for income tax purposes. N.T. (4/29/16) at 147:23-148:20; Exec. 19, at ¶ 22.

119. The declaration was drafted by Robert Walper's office. Robert Walper only met Sir John twice and then only on social occasions; he never had any discussions with Sir John about his will, domicile or estate planning. Exec., Tab A, pp. 20-21, 38-42, 105; N.T. (3/14/16) at 71:12-14.

120. All of Robert Walper and Fox Rothschild's communications regarding Sir John's estate planning were through a non-lawyer intermediary, Ed Furman. Exec. 71, Tab A, pp. 14-15, 22.

121. During such communications, Robert Walper never explained to Furman the difference between residence and domicile. Exec. 71, Tab A, pp. 21-22.

122. None of the estate planning documents prepared by Fox Rothschild accurately state Sir John's address. Exec. 71, Tab A, pp. 23-24, 37-38; Tab G, p. 39.

123. Despite Walper's law firm, Fox Rothschild, having an office and attorneys licensed to practice in Florida, neither Sir John nor any of his representatives ever filed the Declaration of Domicile in Florida, which was notarized by a Pennsylvania notary, not a Florida notary as required by Florida law. N.T. (12/3/16) at 158:21-159:3; Exec. 71, Tabs A and L.

124. For the last few years of his life, Sir John ceased filing state income tax returns in Pennsylvania.

125. He began filing intangible tax returns in Florida, including not just intangibles, but all of his tangible assets, something required only of Florida domiciliaries. OBJ 118, 119, N.T. (3/14/16) at 28: 19-29.

126. Because he was not a U.S. citizen, Sir John could not vote; no voter registration was available for consideration.

127. Sir John could not drive and did not have a driver's license during these last years.

128. Norris sought to explore in 2006 with the Lamb firm what steps might be taken to support Sir John's domicile in Pennsylvania.

129. The 2006 Healthcare Directive was prepared and sent out for Sir John's signature, less than three (3) months before his death.

130. In his last will, Sir John chose Norris to be his executor and Furman to be his substitute executor.

131. Under Florida law, neither Norris nor Furman would have been eligible to serve as executor of Sir John's estate if probated there. N.T. (3/14/16) at 52:22-53:7, 97:4-9.

132. In March 2007 when Walper, on behalf of the Beneficiaries, expressed the belief that probate should occur in Florida rather than Pennsylvania, Norris considered the question, analyzed the situation, consulted with counsel, and concluded that Pennsylvania was the proper location for probate. N.T. (12/3/15) at 108:21-109:22.

133. On May 7, 2007, Norris filed a petition with this court seeking a declaration to the effect that Sir John was a domiciliary of Pennsylvania and not of Florida.

134. On May 21, 2007, Norris instituted a lawsuit against the Beneficiaries in Pennsylvania in which he affirmatively sought to establish that Sir John was a Pennsylvania domiciliary. Exec. 54 at 17:2-5; N.T. (3/16/16) at 64:13-15, 103:13-15 (Rachel); N.T. (3/16/16) at 163:13-15 (Rupert).

135. The Beneficiaries also filed an action, this one in Florida in 2007, seeking to transfer probate of Sir John's Estate to Florida.

136. The primary reason the Beneficiaries sought to transfer probate of the will from Pennsylvania to Florida was to reduce inheritance taxes, not out of a conviction that Sir John had changed his domicile from Pennsylvania to Florida. N.T. (3/14/16) at pp. 49:17-50:3; N.T. (3/16/16) at pp. 46:23-47:4.

137. Mediation was attempted in both the Florida and the Pennsylvania proceedings, neither with success.

138. Ultimately, the Florida court refused to exercise jurisdiction over the Estate and instead deferred to the Chester County Orphans' Court. *See* Exec. 54 (N.T. of the Florida proceedings).

139. Nine (9) years later, this court has been put to the task of resolving that issue in connection with the Objections.

B. Discussion: Domicile

None of the parties have addressed, and possibly have overlooked, a fundamental point: where the administration of a decedent's estate is at issue, domicile is a jurisdictional prerequisite for the court to act. Where domicile is claimed to be in Pennsylvania, and contested, the problem should be regarded as a threshold issue. It may be determined by a Pennsylvania court without regard to the ruling of a different state court. *In Re Pusey's Estate*, 321 Pa. 248, 269, 184 A. 844, 853 (1936), *cert. den.* 299 U.S. 572 (1936). No citation is needed for the proposition that subject matter jurisdiction cannot be waived, nor can it be conferred by agreement.

Simply put, without domicile in Pennsylvania, this court cannot exercise jurisdiction over the estate, and all of the parties' litigation efforts and other exertions over the past nine (9) years would be for naught.

The court is quick to add that this consideration has not entered into its decision on a determination of domicile, which instead has been made based entirely on the credible evidence adduced at the hearings.

The domicile of a person is "where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning." *In re Dorrance's Estate*, 309 Pa. 151, 173, 163 A. 303, 310 (1932), *cert. den.*, 287 U.S. 660 (1932). Domicile is determined by the law of the forum, which in this case is Pennsylvania. *Greenwood v. Hildebrand*, 357 Pa. Super. 253, 258-59, 515 A.2d 963, 965 (1986), *app. den.*, 515 Pa. 594, 528 A.2d 602 (1987). Determining a person's domicile raises a mixed question of law and fact. *Estate of Getz*, 148 Pa. Commw. 393, 397, 611 A.2d 778, 780 (1992). Once a domicile is acquired, it is presumed to continue until it has shown to have been changed. *In Re Estate of Loudenslager*, 430 Pa. 33, 38, 240 A.2d 477, 479 (1968).

A heavy burden rests upon him who alleges a change in domicile to establish not only that the decedent had acquired another domicile, "but that he *manifested and carried into execution an intention of abandoning his former domicile*." *In Re Obici's Estate*, 373 Pa. 567, 572, 97 A.2d 49, 51 (1953) (emphasis in the original).

To change one's domicile there must be a concurrence of the following factors: (1) physical presence in the place where domicile is alleged to have been acquired, and (2) an intention to make it his home without any fixed or certain purpose to return to his former place of abode. *In Re Publicker's Estate*, 385 Pa. 403, 405-06, 123 A.2d 655, 658 (1956). Intentions alone cannot establish domicile. Instead, a person's conduct is critical in establishing domicile. As a consequence, "a man cannot elect to make his home in one place for the general purposes of life, and another place for the purposes of taxation." *In Re Dorrance's Estate, supra*. Being a resident of a place for tax purposes does not make that state a person's legal domicile unless all other requirements of legal domicile have

been met. *McLarin v. McLarin*, 350 Pa. Super. 153, 159, 504 A.2d 291, 294 (1986); *Stamburgh v. Stamburgh*, 458 Pa. 147, 329 A.2d 482, 486 (1974); *In Re Stabile*, 348 Pa. 587, 36 A.2d 451 (1944).

Pennsylvania case law is clear that "domicile" differs from "residence." "Residence" is a factual place evidenced by a person's physical presence in a particular place, whereas "domicile" requires intent to return. *Id; In Re Resident's Hearing Before the Bd. of School Dirs.*, 560 Pa. 366, 369, 744 A.2d 1272, 1274 (2000). While a person may have many residences, he can have only one legal domicile. *In Re Lesker*, 377 Pa. 411, 416-17, 105 A.2d 376, 379-80 (1954).

Mere absence from a fixed home, however long continued, cannot work a change of domicile. Until the new one is acquired, the old one remains. *Estate of McKinley*, 461 Pa. 731, 737, 337 A.2d 851, 855 (1975). Again, a person asserting a change of domicile must demonstrate such change by clear and convincing evidence. *Zinn v. Zinn*, 327 Pa. Super. 126, 130, 475 A.2d 132, 133 (1984).

"A person's expressions of desire may not supersede the effect of his conduct." *In re Dorrance's Estate*, 309 Pa. at 165, 163 A. at 308 (decedent was meticulous about declaring in writing the intended place of domicile – New Jersey – but this declaration was ineffective in preserving his preferred domicile). Resolution of the issue depends not upon proving a particular set of facts, but whether all the facts and circumstances taken together that tend to show a man has his home or domicile in one place outweigh all the like proofs that tend to establish it in another. *In Re Obici's Estate*, 373 Pa. at 571, 97 A.2d at 51.

As observed already, there were sharp conflicts in the evidence. The Beneficiaries castigate Norris and the Lamb firm for taking steps to undermine Sir John's "decision" that he was a Florida domiciliary and "by doctoring the facts" so as to enhance Norris' ability to probate the will in Pennsylvania. The court sees the matter somewhat differently.

It escaped no one's notice that looming before them was the administration of a huge multi-million dollar estate. Walper and the Beneficiaries tried to create a scenario for domicile in Florida to avail, if possible, favorable tax treatment. Temporally, they were out of the gate first. Norris and his counsel jockeyed to retain recognition that domicile remained in Pennsylvania.

In the middle with no clear direction upon the issue, was Sir John in his great old age. There is no evidence that any lawyer explained to him what domicile was. He was a rich man in terms of assets, and a poor man in terms of legal advice. Compounded was his inability to see. He was relegated to signing what was put in front of him. He was a virtual marionette.

It is true that he escaped the sometimes brutal winters at Doe Run for the sunny clime of his Martin County house, but he had done so for decades apparently so this was no profound life change that the court can see. Sir John seems to have understood that there could be certain tax advantages under Florida law. Under the foregoing principles, that in itself is insufficient to demonstrate a change in domicile.

At any rate, the tax returns and other documentary evidence are equivocal and do not, in the court's estimation, indicate Sir John's settled consideration on the issue of domicile.

Looking forward to returning to Pennsylvania, and choosing his Pennsylvania residence at Doe Run as the locus for his momentous 100th birthday, the court views as determinative: Sir John simply did not manifest and carry into execution "an intention of abandoning his former domicile," *In Re Obici's Estate*, 373 Pa. 567, 572, 97 A.2d 49, 51 (1953), without any fixed or certain purpose to return to it, *In Re Publicker's Estate*, 385 Pa. 403, 405-06, 123 A.2d 655, 658 (1956). The court credits those witnesses who testified to this effect.

C. Conclusions of Law: Domicile

1. Sir John's domicile was in Pennsylvania.

2. This court consequently has subject matter jurisdiction over this estate.

3. Executor's defense of the domicile litigation and his response to the Beneficiaries' objection to domicile were not unreasonable considering the facts known to him then, as well as borne out by the entire record.

4. The Beneficiaries did not carry their burden of proof that there had been a change of domicile, for which the evidence was inconclusive, not clear and convincing.

VII. Sir John's Estate Administration: February – November 2007

A. Executor Fees Paid

140. Among Norris's first acts as Sir John's Executor was to pay himself an executor fee.

141. On May 3, 2007, before any domicile litigation began, but with full knowledge that the Beneficiaries believed administration should proceed in Florida, Norris paid himself $200,000. A little over a month later, Norris paid himself another $200,000. In September 2007, while the Pennsylvania domicile litigation was still active,

he paid himself $250,000, and in December 2007, he paid himself $350,000. This continued through 2008, when Norris paid himself roughly $300,000 per quarter, and in 2009 and 2010, when he paid himself a further $575,000. Sir John's Revised Account (on file with court) at pp. 26-27. The executor fees Norris received from Sir John's Estate totaled $2,793,000. Stipulation re: revised Accounts, ¶ 54.

B. Additional Management Fees Paid

142. Norris's payments, however, were not limited to these sums. Commencing in 2009 when he was still receiving executor fees, Norris resumed paying himself or his company, Norris Investment Company, a "management fee." Although he previously had paid himself $30,000 per month, the management fees he paid himself between January 8, 2009 and January 12, 2012 ranged from $33,000 to $45,000 per month, and in one month totaled $55,912.89. Sir John Revised Account (on file with the court) at pp. 34-35.

143. The management fees charged after Sir John's death were treated as executor fees by Norris and the IRS and were deducted on Sir John's Form 706. N.T. (12/3/2015) at 11:21-14:6 (Norris). The court will treat these fees in like manner.

144. Furman did not question Norris's fees, but simply paid whatever Norris asked for. N.T. (4/29/2016) at 129:14-130:5 (Furman).

145. The management fees Norris received from Sir John's Estate totaled $1,507,913. Stipulation re: Revised Accounts, ¶ 55.

C. Total Fees Paid to Norris by Sir John's Estate

146. The total compensation paid by Sir John's Estate to Norris is $4,300,913. Stipulation re: Revised Accounts at ¶ 56.

147. The Principal Receipts in Sir John's Estate were $40,290,470. Sir John Revised Account (on file with the court) at p. 2. Norris's compensation alone is 10.7% of the gross value of Sir John's Estate.

VIII. Administration of Sir John's Estate: Hiring Professionals

148. When Norris began his work as Executor of Tiger's Estate, Norris told Lamb and Furman that "This is not, in reality, the beginning of the administration of 'an estate'. It is the beginning of a substantial project, for all of us, over the next few years . . . ." Exec. 30 (April 7, 2006 email). Once he became Executor of Sir John's Estate, Norris began in earnest to make good on his intention not to treat his duties in reality as the administration of an estate but, rather, as an opportunity to engage as a sort of CEO in a "substantial project."

A. The Lawyers: The Lamb Firm

149. Although he had no power of attorney or other legal authority do so, Norris contracted with the Lamb firm to represent "Sir John's interests" even before Sir John passed. OBJ 51; N.T. (12/1/2015) at 209:9-210:7, 211:3-7 (Norris). Norris was shortly to be Sir John's Executor, however.

150. The Lamb firm assigned most administration matters to two shareholders and estate attorneys, John Kehner and Stacey McConnell, and a business lawyer, Vincent Donohue. The Lamb firm's litigation attorneys James Sargent, Joel Frank, John Cunningham and appellate attorneys Maureen McBride and Scot Withers were primarily involved in the domicile litigation, the litigation dealing with the tax penalty incurred by the Sir John's Estate, or the litigation aimed at defending the Initial Accounts and the fees Norris, the Lamb firm and Maillie charged the Estates. The Lamb firm's shareholders

were supported by more than a score of associates and paralegals. *See* Exec. 61, 76 (collected invoices of the Lamb firm). All of the Lamb firm's attorneys and other professionals billed by the hour. *Id.*

151. Vincent Donohue, Esquire described himself as "the hub of the wheel" or "point person" for all of these professionals. N.T. (3/14/2016) at 160:24-163:4 (Donohue). He billed the Estates 4,594 hours through June 2015, which equates to more than two years' worth of forty hour weeks. OBJ 10; OBJ 12; OBJ 16; OBJ 18 (Invoices of the Lamb firm).

152. Total fees charged by the Lamb firm and paid by Sir John's Estate for the period June 2007 through April 2016 are $5,238,798. Of these, $2,861,585 relate to the period June 2007 through December 2012 (the period covered by Sir John's Initial Account), and $2,377,214 relate to the period January 2013 through April 2016. Stipulation re: Revised Account ¶¶ 62-64.

153. In addition, the Lamb firm claims unpaid fees of $79,327 on its February 2016 invoice (not included in the above totals) and $564,217 for the period March 2016 through August 2016. *Id.* at ¶¶ 65-66.

154. The legal fees The Lamb Firm has invoiced to Sir John's Estate total almost $6,000,000, specifically, $5,888,342. *Id.* at ¶ 67.

B. The Lawyers: Cecil Smith and Larry Gibbs

155. Smith and Gibbs, who had been retained for Tiger's Estate, were again retained to provide tax and valuation services for Sir John's Estate. Their June 2007 engagement letter specified that they would prepare Sir John's federal estate tax return, handle any IRS audit, and value the assets of the Estate for a fee of $450,000. OBJ 53;

Exec. 23 (marked as CHN-3). Sir John's Estate paid Smith and Gibbs $451,100 for their services. Stipulation re: Revised Accounts ¶ 68.

C. The Lawyers: Other Counsel; Buckley Reimbursement

156. Norris retained four (4) other law firms to perform specified tasks and paid them as follows: The Florida firm Crary Buchanan was paid $88,078 for its work in the domicile litigation; the Florida firm of Jeck Harris was paid $6,719 for real estate work; the Unruh Turner firm in West Chester, PA was paid $12,708 for unspecified services; and Charles Russell LLP and Peterkins Solicitors, both in the United Kingdom, were paid $37,914 and $1,962, respectively, for work in connection with assets located in the United Kingdom. Stipulation re: Revised Accounts ¶¶ 68-73. The total of these expenditures is $147,381.

157. Norris later engaged a law firm to represent him personally, the Buckley Brion McGuire & Morris, LLP in West Chester, PA. When the Beneficiaries objected to Norris using Estate funds to pay for personal counsel, the court directed that all funds the Estate had paid to Buckley, which totaled $59,441.70, be reimbursed to the Estate. October 11, 2013 Order. Norris refunded some of this money in 2013, and the balance of $2,441.70 was paid in 2016 after the Beneficiaries reviewed the Revised Account. Stipulation re: Revised Accounts ¶¶ 43-47.

D. Total Invoiced for Law Firms and Legal Support

158. The total legal expenses through August 2016, including the unpaid invoices submitted by the Lamb firm as noted above, is $6,496,476. Stipulation re: Revised Accounts at ¶ 76.

159. Lastly, Sir John's Estate paid $15,653 in duplicating expenses for legal purposes. Stipulation re: Revised Accounts ¶ 74.

E. The Accountants: Maillie

160. Norris retained Maillie as the accountant for Sir John's Estate, as he had for Tiger's. N.T. (12/2/2015) at 157:10-12. As with Tiger's Estate, Maillie billed monthly, but provided no detailed description of its work. Executor Ex. 60.

161. The total amount paid to Maillie by Sir John's Estate for the period June 2007 through April 2016 is $1,279,139. Of this, $1,002,449 is attributable to the period June 2007 through December 2012, and $276,900 is attributable to the period January 2013 through April 2016. Stipulation re: Revised Accounts ¶¶ 57-59.

F. The Accountants: Morison Cogen

162. Norris also engaged a second accounting firm, Morison Cogen, and caused the Estate to pay Morison Cogen $100,219. *Id.* at ¶ 61.

G. Total Fees Paid for Accounting Services

163. The total paid to accountants by Sir John's Estate through April 2016 is $1,379,358.

H. Total Professional Fees

164. The total charged Sir John's Estate by the above professionals is $7,875,843. These professional expenses alone are 19.5% of the gross value of Sir John's Estate. *See* Sir John's Revised Account (on file with the court) at p. 2 (principal receipts of $40,290,470).

I. Total Executor/Management Fees and Professional Expenses

165. The total charged Sir John's Estate by Norris and the above professionals is $12,176,747. This total is 30.2% of the gross value of Sir John's Estate. *See* Sir John's Revised Account (on file with the court) at p. 2 (principal receipts of $40,290,470.)

IX. Administration of Sir John's Estate: Replacing Existing Financial Advisors

166. Norris also decided to replace Sir John's financial advisors with others with whom Norris had a prior relationship.

A. TFIP under Merrill Lynch

167. The TFIP portfolio had been managed for some years by Stephen Trudeau, a Merrill Lynch wealth management advisor. N.T. (3/15/2016) at 58:18-60:11 (Trudeau).

168. Trudeau identified family limited partnerships as an option for estate tax planning. Furman ultimately pursued this course with the family. *Id.* at 63:23-65:10 (Trudeau).

169. In terms of diversification, Trudeau advised Tiger to consider options that would not incur capital gains, given the low cost basis of many of the family's holdings. Trudeau and Furman proposed that the family invest in pre-paid forward contracts, a common strategy for individuals in Sir John's circumstances. *Id.* at 65:11-68:18, 71:16-21, 72:5-13 (Trudeau).

B. Norris Directs a Change

170. Sometime after Tiger died in January 2006, Norris engaged a financial advisor to conduct a review of the TFIP portfolio. N.T. (5/6/2016) at 34:8-35:4 (Norris).

171. After review, Norris decided to make additional switches, moving Merrill Lynch accounts to Smith Barney.

172. Norris testified that he regarded Merrill Lynch's performance as "appalling" and believed the pre-paid forward contracts and private equity and hedge fund investments were "inappropriate." N.T. (5/6/16) at 35:23.

173. William Lamb wrote Merrill Lynch's chairman in June 2007 and threatened suit based on Merrill Lynch's recommendations of the pre-paid variable forward contracts and the private equity funds. N.T. (3/15/2016) at 99:21-100:3 (Trudeau).

174. Norris was not familiar with these esoteric investments and although their inappropriateness was not proven in court, he exercised his discretion to replace them with investments with which he was more comfortable.

175. The Beneficiaries were not happy with these changes or with the unceremonious way in which Merrill Lynch and its advisor, Mr. Trudeau, were removed.

176. The Beneficiaries demonstrated no financial harm to the Estate however; such as that the fees charged by the new financial advisors were excessive in some appreciable way.

X. Sir John's Estate Administration: Pre-Death Transactions and "Complexity"

177. During the hearings, Norris and his counsel sought to justify their fees based upon the "complexity" they say was created by various pre-death partnership transactions that were not adequately documented.

178. Two (2) categories of pre-death transactions, one involving salaries paid by certain operating companies and the other involving real estate-related transactions, were highlighted.

A. Pre-Death Salary Payments to the Beneficiaries

179. Doe Run, Inc. was a management company for the large Chester County residence, Doe Run, and several family limited partnerships. N.T. (12/3/2015) at 144:13-21 (Furman).

180. Furman paid salaries of $210,000 each to Rachel and Rupert from Doe Run, Inc. in December 2005 and in the same amounts in January 2006, totaling $840,000. The Beneficiaries received the salaries because they were providing some services. N.T. (12/4/2015) at 113:17-114:18 (Furman).

181. In late 2005, Norris set up a second company, R&R Management Inc., the purpose of which was to pay salaries to Rachel and Rupert. N.T. (12/3/2015) at 245: 5-246:9 (Furman). Salaries of $210,000 each were paid at the end of 2005 and the beginning of 2006 for services rendered.

182. Norris knew about the salaries and authorized them. N.T. (12/4/2015) at 115:4-24 117:7-121:24 (Furman).

183. Rachel and Rupert confirmed they received these payments for their work in managing the properties and that they paid income taxes on them. N.T. (5/6/2016) at 42:18-43:7, 105:5-108:8 (Rachel). Furman confirmed that they did not ask for any of these payments. N.T. (12/3/2015) at 252:19-22 (Furman).

184. Norris was the sole member of Doe Run, Inc. at the time the 2005 and 2006 salaries were paid. N.T. (12/2/2015) at 124:5-19 (Norris). Norris admitted forming

R&R Management before Tiger died. *Id.* at 125:3-126:5 (Norris). He testified he did not do anything to substantiate the salaries, but was aware Rachel and Rupert were doing some things Tiger asked them to do, like running the fowl shoots. *Id.* at 146:4-148:12 (Norris). Norris also admitted he had no evidence that Rachel and Rupert had initiated the salary payments. *Id.* at 149:20-151:16 (Norris). Nor did he ever tell Furman they were unlawful or collusive. N.T. (12/4/2015) at 89:21-91:5 (Furman).

185. Norris claimed, however, in contradiction of Furman that he did not approve of the salary payments or learn of them until March 2007. Originally, and more plausibly, Norris had said he learned of these payments in March 2006, and would not have authorized a further distribution to Rachel and Rupert had he known about the salaries. But, when it was pointed out to him that the other distribution he said he would not have made had in fact been made *after* March 2006, Norris changed his testimony to claim that he did not learn about the salaries until March 2007 – about eighteen months after he took over control of the partnerships and related entities. N.T. (5/6/16) at 64:16-20, 66:5-15 (Norris).

186. Norris admitted that the booking of these payments as salaries never changed, and he consistently endorsed them as salaries before the IRS, and they were accepted as such. N.T. (12/2/2015) at 155:12-156:8 (Norris).

187. Donohue also gave evidence, over a hearsay objection, that Furman told him in the summer of 2007 that, in 2005, when Tiger learned he was terminal, Tiger wanted to be sure to have money moved to his children. Furman did not mention then that Norris knew about or had authorized these salaries. N.T. (5/5/2016) at 128:17-131:4 (Donohue).

188. Furman's testimony that Norris specifically authorized the salary payments for both Doe Run, Inc. and R&R Management was credible, and Norris's denials were neither credible nor plausible.

189. There was nothing unduly complicated about the salary transactions in any event.

B. Pre-Death Transactions: Lack of Documentation of Partnership Transactions

190. As discussed above, Norris was a co-general partner of all of the Thouron family partnerships since their formation in the early 2000s, but testified that he did nothing other than making episodic casual inquiries of Tiger to acquaint himself with their activities or practices, and did not participate in the transactions in which they engaged prior to September 2005. *See* FOF 30-44.

191. After he succeeded to sole control of the partnerships in September 2005, Norris still made no concerted effort to educate himself as to the activities of the partnerships prior to his taking sole control.

192. As Norris describes it, he would consult with Furman when circumstances required and would learn that Furman did not have a transactional document that Norris would have expected him to have. N.T. (12/3/2015) at 44:17-46:15 (Norris); N.T. (5/6/2016) at 146:21-147:21 (Norris).

193. Furman would sometimes refer Norris to Walper, who occasionally had been asked by Furman to prepare documents regarding the pre-death transactions. N.T. (3/14/2016) at 33:23-35:11, 36:5-16, 37:9-19 (Walper). Walper, however, was not responsible for accounting for the transactions. *Id.* at 37:20-38:6, 39:16-20 (Walper).

Walper could help in some instances, but in most instances he could not. N.T. (12/3/2015) at 66:7-67:9 (Norris).

i. Available Documentation vs. Available Information

194. Norris testified he had a hint of a widespread issue with documentation in August 2006 when he was involved with selling 472 South Beach Road. N.T. (5/6/2016) at 145:15-146:9 (Norris); *see also* N.T. (12/3/2015) at 54:8-19 (Norris). Despite this, he made no organized effort to address this issue until after Sir John's death in February 2007. N.T. (12/3/2015) at 58:7-23 (Norris). Norris did not alert his attorneys to documentation issues prior to 2007.

195. Donohue, who began working with Norris in the fall of 2006 (a year after Norris succeeded to sole control of the partnerships), testified that he was unaware of any documentation problems until after Sir John died. N.T. (5/5/2016) at 32:23-33:5 (Donohue). When this issue did come to Donohue's attention, it was not because Norris told him about it, but because Donohue began to seek evidence of how real estate had been placed into the partnerships. *Id.* at 35:7-36:22 (Donohue).

196. Donohue began his investigation in February or March 2007. It consisted of conferring with Furman and learning "dribs and drabs" of information. *Id.* at 134:5-135:13 (Donohue). Even then, neither the search nor the analysis of what was available went forward promptly. Walper's complete files were obtained in June 2007, N.T. (5/4/2016) at 22:8-23:16 (Donohue), but Donohue did not meet with Furman to learn what documents Furman did and did not have until early August 2007.

197. An August 10, 2007 letter from William Lamb to Bullitt, which Donohue helped write, records that "Vince Donohue met with Ed Furman on Wednesday [August

8, 2007] in an attempt to better understand what documents did and did not exist, how transactions were booked, and how they were reported for tax purposes." Exec. 25 at 2640. Donohue did not remember any earlier meetings with Furman on documentation, despite having an indication of the absence of documentation from the Walper files. N.T. (5/5/2016) at 53:4-8 (Donohue); *id.* at 53:18-54:7 (Donohue).

198. The August 10, 2007 letter also outlined the facts Donohue had gathered from Furman about various transactions involving the partnerships, as well as what documents were and were not then available. Exec. 25. Donohue also described seeking documentation from Len Togman, a prior counsel to Sir John, and from title companies and other service providers involved in the real estate transactions. N.T. (5/5/2016) at 40:20-41:15 (Donohue).

199. These documents – from Furman, Walper and a few other sources – were all that could be found. Donohue did not recall locating any additional documents after November 2007 (when Sir John's estate tax returns were due). *Id.* at 41:16-24. There is no evidence that any additional documents relating to the pre-death transactions were found after Donohue's review of Walper's and Furman's files.

200. While Norris and Donohue could not find complete documentation of some partnership transactions, they had ample *information* about them, as William Lamb's August 10, 2007 letter shows.

201. The August 10, 2007 letter addresses Tiger's FLPs, the source of the documentation concerns. It records the following.

202. The acquisitions of **Driftwood** and **Latham Farm** by Tiger in 2002 were financed by loans from Sir John to the Glenknockie FLP. Exec. 25 at 2640-41. Norris

testified that the Driftwood transaction was fully documented. N.T. (12/2/2015) at 97:12-21, 101:21-102:4; 102:23-24 (Norris). The Latham transaction was not fully documented, but was booked as an advance by Furman and treated as a loan. N.T. (5/4/2016) at 30:21-32:9 (Donohue).

203. The **472 South Beach Rd**. property in Florida was purchased through a mortgage loan to Tiger and a further loan from TFIP, to which Furman attested, with the intent that the property be held and loans assumed by Glendevron LP. Exec. 25 at 2641. The transaction was booked as a loan, though there was no note. N.T. (12/2/2015) at 96:5-97:11, 98:22-99:22 (Norris). Glendevron was owned by Tiger and his children, not Norris, and when the 472 South Beach property sold in 2006, the proceeds went to Rupert and to Rachel's children in trust. *Id.* at 95:15-23 (Norris).

204. Tiger's 2005 acquisition of **Graybill Farm** was accomplished through a loan from TFIP to the Glenknockie FLP. Exec. 25 at 2642. Like Latham, this transaction was not fully documented, but was booked as an advance by Furman and treated as a loan. N.T. (12/4/2015) at 165:12-167:7 (Furman); N.T. (5/4/2016) at 34:16-35:4 (Donohue).

205. The 2005 acquisition of **Hollybrook** by Glenknockie FLP was booked as a loan from TFIP. Exec. 25 at 2642. There were no loan documents or approvals. N.T. (5/4/2016) at 37:14-38:7 (Furman).

206. The 2005 acquisition of the **Hale Tract** by JJT Virginia Ventures LP was financed by another loan from TFIP. Exec. 25 at 2642. Furman booked it as an advance and it was treated as a loan. N.T. (12/4/2015) at 137:20-138:11 (Furman).

207. Furman attested the transactions were loans. And, there were no documents that showed they were gifts, N.T. (5/5/2016) at 45:14-17, 46:1-11 (Donohue), and no documents that otherwise contradicted Furman's account. *Id.* at 47:4-48:22 (Donohue).

208. Thus, while the documentation was incomplete, Donohue and Norris knew from Furman, Walper and others what was intended and by August 2007 at the latest, they knew what there was to know about the available documentation.

209. Gibbs confirmed that the 2007 investigation located no further documents relating to the pre-death transactions and that he valued the partnerships based on what he understood the parties had intended in acquiring the properties. N.T. (4/29/2016) at 106:6-107:15 (Gibbs).

210. Although Norris sought to excuse the confusion that existed on November 6, 2007, the original due date for the filing of Sir John's Estate, on late-breaking developments that suggested that the pre-death transactions had not been handled properly, the record does not reflect that any new or additional facts were learned, or were available to be learned, after the date of William Lamb's August 10, 2007 letter to Bullitt.

ii. Norris's Responsibility for Lack of Documentation

211. Norris contends that the lack of documentation of the pre-death transactions rendered his administration of the Estates inordinately "complex" and that this justifies the substantial fees he has charged the Estates. While the absence of complete documentation undoubtedly posed some challenges, chiefly vis-a-vis the tax

authorities, Norris is at least partly responsible for the "complexities" he complains of and seeks a "premium" for addressing.

212. The FLPs were managed as they were prior to Tiger's death because Norris, a 50% general partner there to provide independent business judgment to ensure the integrity of the FLPs from a tax planning standpoint, "had ceded all decision-making authority to Tiger." N.T. (5/5/2016) at 30:4-31:13 (Donohue).

213. The partnership agreements required consent of a majority of the general partners to partnership decisions. *See* FOF 39. Norris, however, by his own testimony, disregarded his duties and responsibilities as a general partner. While he seeks to justify this failure on diffidence – he said he did not press Tiger for information about what was going on with the partnerships because he did not think it was any of his business – Norris was an attorney and experienced businessman and surely knew that in abandoning his duties as a general partner he was breaching his duties to both Tiger and Sir John in their capacities as limited partners and to the partnerships themselves.

214. When Norris took over complete control of the partnerships in late 2005, it became clear that he was not up to the job.

215. Norris knew about the transactions involving the partnerships and the related advances from meetings with Furman before and after Tiger's funeral. N.T. (12/3/2015) at 237:24-238:18 (Furman); N.T. (12/4/2016) at 87:6-89:8 (Furman).

216. Norris learned of the 472 South Beach Road transaction in mid-2006 and determined it had not been properly documented and that there were no appropriate records of partnership actions. Soon thereafter he learned of another documentation problem when Furman raised another question. N.T. (12/3/2015) at 54:8-55:3 (Norris).

217. Norris claimed he thereafter took steps to learn about other issues with the partnerships, but testified that he "came to realize those weren't adequate steps." *Id.* at 55:4-56:5 (Norris).

218. For example, although he was given complete control over all of the partnerships in late 2005, Norris acknowledged that he did not ask Furman to identify all of the transactions in which the partnerships had engaged pre-death until after Sir John died in February 2007. *Id.* at 58:7-15, 59:19-60:5 (Norris). Before then Norris claims he received information episodically and did not obtain any comprehensive account of past transactions from Furman. *Id.* at 63:6-23 (Norris). Furman testified that he provided Norris with a comprehensive, but apparently general, overview of the partnerships during the Florida meeting following Tiger's memorial service. N.T. (12/3/2015) at 238:6-18 (Furman).

219. Norris did not promptly investigate and learn the partnerships' history and dealings and thus he transacted in ignorance.

220. In 2006, for example, while sole general partner and Executor, and in ignorance of the potential adverse consequences, Norris sold the Driftwood and Hollybrook properties to TFIP, supposedly to provide Tiger's Estate with liquidity. As a result, both Tiger's and Sir John's Estates were subject to federal estate taxes on the value of both properties, one as real estate and the other as a loan receivable. N.T. (5/4/2016) at 38:8-39:17 (Donohue).

221. Norris's early dealings with Donohue also show that he was not up to the task of investigating the partnerships. In January 2007, when Norris wanted the TFRE partnership to borrow funds to acquire the Sutphin tract for Sir John, Donohue told Norris

he would need to prepare a promissory note for the loan, something "any attorney with knowledge of an FLP and planning strategy would do in the ordinary course." N.T. (5/5/2016) at 34:14-35:1 (Donohue). Norris, however, "was unaware that was necessary." *Id.* at 35:2-6 (Donohue).

222. There is no evidence that Norris attempted any comprehensive investigation of the partnerships until Donohue became involved in such an undertaking sometime after Sir John died. Further, since the Lamb firm was engaged to do the investigation in 2007, it does not appear that Norris's personal involvement in sorting out the pre-death transactions was particularly substantial.

223. Nor did Norris do anything to remedy any deficiencies in the transactions that Donohue's investigation turned up. Specifically, he did not ratify or correct the undocumented transactions he learned of from Donohue, although he could have done so. N.T. (3/14/2016) at 171:2-12 (Donohue). Donohue testified he and Norris were advised by Gibbs and Smith that a "restorative" effort if undertaken at this time could, even if openly and honestly presented, be misperceived in the context of an IRS audit. N.T. (5/5/2016) at 143:4-25 (Donohue).

224. There was, however, no testimony about whether restorative steps might have been more effective had Norris promptly looked into the deficiencies in documentation rather than doing so only about one and one half years after he took full control of the partnerships (Donohue recalled that his investigation began in March or April 2007).

225. Further, the pre-death transactions had been effected and the documents were as they were, and the Estates were in the position they were in only because Norris

made no substantial effort to fulfill his duties as co-general partner from the inception of the partnerships and, when he became sole general partner, failed to act diligently to identify and address any problems, instead making foolish decisions without adequate information. The amount of fees to which Norris should be entitled must be considered in this light.

XI. Other Alleged "Complexities"

226. Norris and the Lamb firm claimed that there were several other areas of "complexity" in administration of the Estates:

227. *Failure to Record Driftwood and Hollybrook Deeds:* When Norris caused Glenknockie FLP to sell Driftwood and Hollybrook back to TFIP to obtain liquidity in Tiger's Estate, Walper failed to record the deeds. This was discovered in 2007, and Donohue had the deeds recorded then. N.T. (5/4/2016) at 39:1-17 (Donohue); N.T. (5/5/2016) at 42:8-45:2 (Donohue).

228. *Sir John's ATM Card:* Sir John had an ATM card that was tied to Doe Run, Inc., which was in turn funded by TFIP. Sir John had no ownership interest in Doe Run, Inc. or TFIP, and hence these might appear as unaccounted-for partnership distributions, N.T. (4/29/2016) at 127:13-128:1 (Furman); N.T. (5/4/2016) at 41:16-42:10 (Donohue), as well as a "2036 issue" with the IRS. N.T. (5/4/2016) at 41:8-15 (Donohue). Norris, however, did nothing to straighten this out when he became sole general partner of TFIP and the sole owner of Doe Run, Inc. N.T. (4/29/2016) at 171:9-172:5 (Furman) (Norris never instructed Furman to not allow Sir John to use his ATM card).

229. *Doe Run Sale:* The sale of Doe Run in 2008 was characterized as "multi-part" and "multi-faceted." The Lamb firm handled the transaction. N.T. (5/4/2016) at 98:7-101:11 (Donohue). There proved to be a problem of a mismatch between the partnership's description of the property and the deed. *Id.* at 103:10-106:4 (Donohue). The mismatch was not picked up by the Lamb firm, only by the title company and the buyer. N.T. (5/5/2016) at 83:19-84:13 (Donohue). As a result, the closing was delayed from October to December 2008, and there was a $60,000 charge for wasted surveys. *Id.* at 106:5-108:18 (Donohue).

230. *Overseas Assets:* Tiger and Sir John each had certain assets located overseas: Tiger had a Scottish property called Knockiemill Cottage, while Sir John had fishing rights on a Scottish river (the Forglens property). N.T. (5/4/2016) at 42:23-43:15 (Donohue).

231. *Motor Vehicles:* Tiger and Sir John between them owned 20 motor vehicles, not all of which were properly titled and registered. *Id.* at 43:16-45:7 (Donohue).

232. *Other Assets:* Finally, Sir John owned various pieces of artwork, artifacts, antiques, books, cash and trust accounts outside the United States, and a coin collection. *Id.*

233. Although some of these items are not of a garden variety, they do not appear to present inordinate complexity or to have required more attention than their nature would dictate. The Executor and the Lamb firm produced no evidence that they did.

234. Moreover, with regard to artwork, antiques, books, cash, coin collections and trust accounts outside of the United States, there is no evidence that Norris or the Lamb firm did anything material to handle those issues. The record reflects that Norris hired United Kingdom attorneys to address these issues.

XII. Liquidity Issues

235. Norris testified that he faced severe liquidity problems with respect to Sir John's Estate in November 2007, when Sir John's federal estate taxes were due, as well as at later times, and that his challenges in addressing these problems justifies in part the extra-ordinary fees he charged as Executor.

A. Thouron Family Cash Position and Liquidity Issues in 2007

236. Norris testified that in September 2005, when he became sole general partner, Sir John's investment portfolio consisted of about $34 million, and was subject to a $17 million line of credit, against which $4.5 million had been drawn. N.T. (5/6/2016) at 5:5-6:1 (Norris).

237. A year and one half later, when Sir John died, Norris testified that Sir John's investment portfolio, including TFIP, remained "largely cash or near cash." N.T. (12/2/2015) at 84:22-85:6 (Norris). This is confirmed by Sir John's Revised Account, which shows that at death Sir John's cash accounts totaled $2,117,527 and values his interest in TFIP, which consisted mainly of investment securities, at $22,627,350 (using Gibbs's discounted valuation). Sir John Revised Account (on file with the court) at p. 3.

238. Although it would appear there was ample cash available to the Estate at the time of Sir John's death, Norris and Donohue claim that when Sir John's estate tax return was originally due on November 7, 2007, the Estate faced significant liquidity

issues. N.T. (3/14/2016) at 198:20-199:7 (Donohue); N.T. (5/5/2016) at 68:22-69:16 (Donohue); N.T. (5/6/2016) at 73:21-74:7 (Norris) ("deferring tax payment … was critical to us from a cash flow standpoint").

239. Norris contends that he bears no responsibility for these liquidity issues, if any there were.

240. However, as detailed in the following paragraphs, Norris made almost $10 million in discretionary payments after he took charge of the partnerships and has only himself to reproach for illiquidity in the Estate in November 2007.

241. In late 2005 and early 2006, Norris made $1.68 million in salary payments to the Beneficiaries, drawing on funds from TFIP. N.T. (12/2/2015) at 122:24-123:21 (Norris); N.T. (5/6/2016) at 6:21-7:8 (Norris).

242. Likewise, in 2006, Norris distributed $1.5 million from TFIP to the Beneficiaries following the sale of 472 South Beach Road. Exec. 6, p.1 (3/30/2016 entry).

243. In December 2006, shortly before Sir John passed away, Norris purchased the Sutphin property, which lay across the road from Sir John's Florida home. Norris directed that the purchase price, $4.2 million, be paid with a loan from TFIP. N.T. (12/2/2015) at 187:15-188:3 (Norris).

244. Norris admitted this purchase reduced the Estate's liquidity by $4.2 million. He also conceded that to the extent the combined properties were worth more than the sum of their parts (as Norris insisted), by consummating the transaction before Sir John died he further reduced the Estate's liquidity by increasing the estate tax that would be due as a result of the enhanced value. *Id.* at 188:4-189:5 (Norris). Gibbs confirmed this. N.T. (4/29/2016) at 111:22-112:13, 113:16-114:5 (Gibbs).

245. Norris also admitted that he had refused a proposal Rupert made to have Rachel and Rupert buy the Sutphin property, a solution that would have avoided depletion of the Estate's liquidity and preserved the ability to create increased value for the combined property after Sir John's death.

246. Norris gave Rupert's offer, relayed by Furman, *see* OBJ 82-2, short shrift, advising Furman and William Lamb that "His [Rupert's] suggestion reflects his level of knowledge and experience, which is zero, and his analytical ability" and "Rupert's skills are not needed to manage the estate either before or subsequent to SJ's death." OBJ 82-1.

247. And, lastly, prior to November 6, 2007, Norris made discretionary payments to himself of executor fees of $418,000 in Tiger's Estate and $650,000 in Sir John's Estate, for a total of $1,068,000. Tiger's Revised Account at p. 107; Sir John's Revised Account at p. 26.

248. These expenditures, all of which were discretionary, total $9,000,000, an amount sufficient with other available cash on hand to address any taxes due November 6, 2007.

249. Moreover, prior to November 6, 2007, Norris paid the Lamb firm a total of $1,003,652 ($191,770 for work in Tiger's Estate and $811,882 for work in Sir John's) and had paid Maillie a total of $209,250 ($57,500 in for work in Tiger's Estate and $151,750 for work in Sir John's). *See* Tiger's Revised Account (on file with the court) at pp. 113-114, 115; Sir John's Revised Account (on file with the court) at pp. 29, 32.

250. Although these $1.2 million in further expenditures were not illegal, it is bad practice for executors to make such payments when estates face liquidity issues as a result.

251. There was no immediate liquidity issue, however, in November 2007. If Norris believed he had paid all taxes due November 6, 2007 with the Form 4768 he submitted, there was no liquidity crisis. If, on the other hand, Norris did not believe he had paid all taxes then due, but properly requested an extension to pay those taxes, there likely would have been no liquidity issue until the taxes were due in 2008. And, significantly, there was no need to borrow any funds in November 2007 – or indeed at any time prior to 2010 when the Bancorp loan was taken.

B. Later Liquidity Issues; Bancorp Loan

252. Norris contends that whatever liquidity problems the Estate had in 2007 did not improve when the economy went into severe recession in 2008. This decreased the value of both the Estate's investment portfolio and real estate holdings, thus reducing liquidity. N.T. (5/4/2016) at 97:19-98:7 (Donohue).

253. Yet, between November 2007 and September 4, 2008, Norris paid himself an additional $1.2 million in executor fees, bringing the total paid to him from Sir John's estate to $1,898,000. N.T. (5/5/2016) at 108:12-109:7 (Donohue). Sir John's Revised Account at p. 26. During the same period, he paid the Lamb firm another $600,000 to $700,000, raising the total it had received from the Estate to $1.4 million. N.T. (5/5/2016) at 109:8-24 (Donohue); Sir John's Revised Account at pp. 29-30.

254. As a practical matter, the Estate did not encounter any liquidity problems it was unable to handle until the summer of 2010, when the IRS audit concluded and the Estate had to make final payment of its tax and penalty obligations. Prior to that time, the Estate had generated necessary liquidity by selling assets, most significantly Doe Run.

255. As a result of the final resolution of the IRS audit and in order to pay the tax due and the almost $1 million penalty that had resulted from the failure to request an extension to pay in November 2007, the Estate borrowed $3.9 million from Bancorp Bank. N.T. (5/5/2016) at 110:23-111:1 (Donohue).

256. The Bancorp loan was the only loan the Estate ever had to take. *Id.* The borrowing cost of the loan consists of interest charges of $263,947.25. Sir John's Revised Account (on file with the court) at p. 39.

257. By September 2010, when Sir John's Estate took the Bancorp loan, the executor and management fees that the two Estates had paid to Charles Norris totaled $3.9 million – the amount of the loan. N.T. (5/5/2016) at 111:2-14 (Donohue); Sir John's Revised Account at pp. 26 ($2.43 million in executor fees), 34 ($923,000 in management fees); Tiger's Revised Account at p. 107 ($543,000 in executor fees).

XIII. Misrepresented Distributions

258. To defend their administration of the Estates, and to depict the Beneficiaries as "greedy" for expecting Norris to deliver to them their inheritance, Norris and the Lamb firm mischaracterized the distributions Norris made to the Beneficiaries.

259. Executor 6 is a schedule prepared by Furman's staff for Norris and the Lamb firm's use at a February 28, 2014 hearing. They brought this schedule forward again at the hearing on the Objections, and Furman represented it was "accurate to the best of his knowledge." N.T. (4/29/2016) at 151:17-152:16 (Furman).

260. Yet, as cross-examination confirmed, Executor 6 was prepared at the Lamb firm's request to summarize "*any* activity that was benefiting the beneficiaries," *id.*

at 176:14-19 (emphasis added), regardless of whether Norris was entitled to take credit for it.

261. In fact, as Furman acknowledged, most of the purported "distributions" were not from the Estates and did not involve any exercise of discretion on Norris's part.

262. Thus, the first group of listed disbursements was made before Tiger died – and hence "were not made or authorized by Mr. Norris as executor of either estate." *Id.* at 177:1-9 (Furman). Furman again affirmed that Norris had approved these payments as general partner of the partnerships—these were the salaries from Doe Run, Inc. and R&R Management, as well as a further transfer from TFIP. *Id.* at 177:10-22 (Furman).

263. The second group of disbursements, reportedly made between Tiger's death and Sir John's death, included two distributions to the Beneficiaries from trusts Tiger had established. Those were required to be distributed under Tiger's will, subject to any tax obligations, and not matters over which Norris had any discretion. *Id.* at 178:2-19 (Furman).

264. The third group of disbursements was made after Sir John's death. Furman admitted the entries for "JJT Personal Property" and "Knockiemill Cottage" reflected distributions of property under Tiger's will. Similarly, the entry for "Personal Property" and "Forglen Fishing Rights" reflected distributions of property under Sir John's will. *Id.* at 178:23-180:2 (Furman). Norris had no discretion over these. *Id.* at 180:10-15 (Furman).

265. The two further entries, for "Texas Mineral Rights" and "One Atlanta Associates," refer to investments held by TFIP. *Id.* at 180:3-9 (Furman).

266. There follow a set of disbursements headed "2007 JRHT Estate Distribution. But, here again the first entry is "E. DuPont Trust." Rachel and Rupert received those sums as principal beneficiaries of this trust, not under Sir John's will. *Id.* at 180:22-181:15 (Furman). The 960 shares of Countrywide financial were also trust assets, and went directly to the Beneficiaries. *Id.* at 182:8-20 (Furman). So did the remaining assets under this heading; they were all held in trust, and Norris had no discretion over them, except to withhold for taxes. *Id.* at 182:21-184.1 (Furman). Despite the heading Norris, Furman and the Lamb firm gave this section, none of these items were in fact Estate distributions.

267. The next set of disbursements is headed "2008 JRHT Estate Distributions." Executor 6. All three of these disbursements were also trust – and not Estate – disbursements. *Id.* at 184:2-24 (Furman).

268. The category "2008 TFIP Distributions" reflected in kind distributions of three (3) private equity investments that Norris did not want TFIP to continue to hold. *Id.* at 185:2-187:6 (Furman).

269. The categories "2009 JRHT Estate Distributions," "2010 TFIP Distributions," "2011 JRHT Estate Distributions," "2012 Estate Distributions," and "Thouron Florida Real Estate LP" (also in 2012, and reflecting distribution of certain proceeds from the sale of 416 Hobe Sound) were Estate distributions. *Id.* at 187:8-188:12 (Furman).

270. The final category, on page 2 of the schedule, titled "Distributions for Legal Fees," shows payments made by Sir John's Estate to the Beneficiaries' counsel. *Id.* at 188:13-189:7 (Furman).

271. Page 3 of Executor 6 represents "amounts already distributed" totaling $28,513,967. The amount of the items identified above as pre-Tiger and Sir John's deaths, or non-discretionary trust distributions, is $19,166,734. The total distributions made to the Beneficiaries before February 28, 2014 *from both Tiger's and Sir John's Estates* over which Norris had any discretion were $9,347,233. This is less than one-third of the amounts for which Norris and the Lamb firm sought to take credit in Executor 6, less than $5 million each to Rachel and Rupert, and less in total than Norris, the Lamb firm and Maillie have charged in fees to the Estates.

XIV. Sir John's Estate Administration: Sir John's Estate Tax Filing Fiasco

A. The November 6, 2007 Extension Request; The Plan for Filing November 6, 2007

272. On November 6, 2007, Sir John's federal estate tax return was due to be filed with the Internal Revenue Service ("IRS"). On that day, Norris executed and sent to the IRS a Form 4768 that requested an extension of time to file the return but neglected to request an extension of time to pay taxes due.

273. Cecil Smith, tax counsel to Sir John's Estate, prepared the Form 4768 which was submitted to the IRS.

274. Before it was submitted to the IRS, the form passed through the hands not only of Norris but also of experienced lawyers at the Lamb firm, none of whom caught the oversight.

275. Donohue acknowledged that if he had read the form, he would easily have seen that the box indicating that an extension of time to pay as well as to file should have been checked. N.T. (5/5/2016) at 71:3-11, 72:11-73:4 (Donohue).

276. As a result of the failure to file a request for extension of time to pay, Sir John's Estate had to pay $1,000,000 in tax penalties and interest, and was saddled with three (3) years of litigation against the government and Smith that resulted in the Lamb firm charging the Estate and being paid at least $1,032,000 in additional legal fees. The Estate ultimately recovered from these litigations $1,474,999, leaving a net unrecovered loss to the Estate and the Beneficiaries of at least $557,001. *See* FOF 279.

277. The court does not give Norris and the Lamb firm any "credit" for the IRS's voluntary payment of interest on top of the settlement by which it agreed to a 50% reduction in the tax penalty, because the Estate did not receive interest on the 50% that was not recovered.

278. Further, the loss was "at least" $557,001 because the Lamb firm did not keep separate records of the work it did to address the filing blunder until counsel for the Beneficiaries pointed out that it should have been doing so.

279. Since learning of the penalty in October 2008, the Lamb firm had been engaged in seeking administrative relief from the IRS, and since at least December 2008 it was in discussions with Smith related to Smith's liability for any loss. N.T. (5/4/2016) at 78:20-79:3, 81:21-82:21, 83:13-84:19 (Donohue). However, the Lamb firm did not begin to record its time on the matters separately until May 2010. OBJ 16 (IRS Penalty Invoice).

280. Both Norris and the Lamb firm disclaim any responsibility for these losses and insist the Estate should bear them.

281. Smith and Gibbs, aided by the Lamb firm, devoted substantial time to prepare Sir John's Estate tax return prior to November 6, 2007. Smith and Gibbs had

been working since April 2007 on the estate tax return (the Form 706) and the partnership valuations that were integral to its preparation. They were communicating with Donohue several times a week and daily toward the end. N.T. (5/4/2016) at 58:15-60:1 (Donohue).

282. Norris was communicating with Donohue, Smith and Gibbs on the Form 706 and the valuations with equal frequency, though Donohue stated that some of the information exchanged "wasn't something that a layman might readily understand." *Id.* at 60:2-61:8 (Donohue).

283. Donohue testified his job was to assure that Smith, Gibbs and Gibbs's colleague, Robert Loalbo, had all of the information they needed to prepare the valuations and the Form 706. William Lamb was also involved in the run-up to the fling as a "confidante" of Norris, counseling him on risks he could subject himself to with the Form 706 filing. *Id.* at 52:12-53:23 (Donohue).

284. The plan was to file the Form 706 on November 6, 2007 and according to Norris that remained the plan until November 6 arrived. N.T. (12/2/2015) at 19:207 (Norris).

285. Donohue testified that a week before the due date, the team did not have valuations completed and had only just received date of death values from Citigroup for Sir John's investments. N.T. (3/15/2016) at 41:5-42:5 (Donohue). The valuations were essential not only to establish the value of the partnerships in the Estate, but also to determine whether the Estate could take advantage of an installment payment of estate taxes under Section 6166 of Internal Revenue Code. N.T. (3/14/2016) at 198:20-199:7 (Donohue).

286. On November 5, 2007, during a break in a mediation of the domicile dispute, Donohue saw that Loablo had sent an email raising a list of questions that needed to be resolved to complete the partnership valuations. This caused Donohue further anxiety since, Donohue said, "we [Norris and the Lamb firm] did not want to go into November 6 knowing we were going to have to amend because we didn't have perfect information." So, after the afternoon mediation session, they reconvened and discussed putting the return on extension. N.T. (5/4/2016) at 62:7- 64:6 (Donohue).

287. The next day, there was no mediation session. OBJ 12-138 to 140; N.T. (5/5/2016) at 68:9-19 (Donohue). An "all hands call" was arranged with Smith midday. N.T. (3/14/2016) at 200:10-201:18; 212:11-213:10 (Donohue). On the call were Smith, Norris, Donohue and William Lamb. N.T. (12/3/2015) at 86:16-87:15 (Norris). Donohue noted that John Kehner of the Lamb firm also was in the room. N.T. (5/5/2016) at 73:15-18 (Donohue).

288. During the call it was decided they could not file because Gibbs and Smith had been unable to complete the valuations and the Estate could not determine what tax would be due. N.T. (5/5/2016) at 68:20-69:2 (Donohue).

289. Norris testified that Smith told those assembled they could get an extension. Smith then offered to fax a Form 4768 to the Lamb firm's offices and "that's all you need to do, sign it." Norris asked whether there was "anything else we have to do?" and "[Smith] said, no." Norris thereafter asked "we don't need to do anything else?" and Smith said no. Donohue asked if Smith was sure, and Smith repeated "this is all you need to do." N.T. (12/3/2015) at 27:19-29:19 (Norris).

290. Donohue testified that Smith said "it's a very simple process, you file a one-page document and you get six more months to finalize and file the return." Donohue then noted to Smith that the plan had been to file the return and seek added time to pay under Section 6166 or by some other means and he wanted to be sure what became of the payment deadline.

291. Smith responded that any request for additional time to pay tax was to be filed when the return was filed. N.T. (3/14/2016) at 201:24-203:2 (Donohue); *see also* N.T. (5/4/2016) at 66:13-67:18 (Donohue).

292. According to Donohue, the faxed form arrived and was brought to the conference room where he, Norris and others were meeting. Donohue said that when the form arrived it was already filled in and Norris signed it and it was thereafter mailed by the Lamb firm to the IRS. N.T. (5/4/2016) at 67:19-68:19 (Donohue).

293. Donohue, however, also testified that he never looked at the form after it arrived and was not aware that anyone at the Lamb firm did. N.T. (3/14/2016) at 203:3-204:2 (Donohue). It is not clear then how Donohue could know the form was already filled in.

294. Norris testified that "the [Lamb Firm's] secretary brought this form in. I looked at the title and glanced at it. I must have reviewed the page and I signed it." N.T. (12/3/2015) at 29:20-30:4 (Norris); *see also* N.T. (5/6/2016) at 73:15-20 (Norris).

295. The Form 4768 that Norris received and signed on November 6, 2007 is titled "Application for Extension of Time To File a Return and/or Pay U.S. Estate . . . Taxes." OBJ 43; N.T. (5/5/2016) at 72:11-18 (Donohue).

296. Part II concerns an extension of time to file. It has a box to apply for an automatic extension of time to file a Form 706. This box is checked on the form. OBJ 43.

297. Part III concerns an extension of time to pay under Section 6161 of the Internal Revenue Code. Part III states "You must attach your written statement to explain in detail why it is impossible or impractical to pay the full amount of the estate (or GST) tax by the return date." It offers a series of boxes to check to affect the extension of time to pay, the first of which reads: "If this request is for the tax that will be or was due with the filing of Form 706, check here." *Id.*

298. Nothing in the form states that asking for an extension to file will extend the time to pay. *Id.; see also* N.T. (5/5/2016) at 70:21-71:18, 72:19-73:9 (Donohue). The form provides that users will separately request extensions to file and extensions to pay, if both are desired.

299. No box was checked or other information supplied in Part III of the form. OBJ 43.

300. Donohue acknowledged it was not the Lamb firm's practice, when it received a document of some importance that a client needed to sign, not to look at it. N.T. (3/14/2016) at 204:14-205:8 (Donohue). In fact, an experienced attorney with the Lamb firm did review the Form 4768 before it was sent to the IRS.

301. The time records for November 6, 2007 of John Kehner, a shareholder at the Lamb firm and head of its trusts and estates practice with experience in federal estate tax filings, state:

> 11/06/07 JTK 4.25 Meeting with Vincent T. Donohue, Carl Norris re federal estate tax return and Pennsylvania

> inheritance tax return; meeting with William H. Lamb, Vincent T. Donohue and Carl Norris re extending tax returns due to discussion at 11/5 meeting; draft extensions; review tax payments; draft transmittal letters for extensions and tax payments

OBJ 12-140; *see also* N.T. (5/5/2016) at 73:11-75:9 (Donohue); N.T. (5/5/2016) at 73:19-24 (Donohue); *see also* N.T. (12/1/2015) at 113:12-19 (McConnell) (Kehner was a "very thorough . . . trust and estates lawyer" who was involved in both Thouron Estates from their inception).

302. Kehner's entry shows that he, for the Lamb firm, drafted and reviewed the Form 4768 before it was sent to the IRS.

303. He transmitted the form to the IRS under the Lamb firm letterhead without completing Part III, even though from the meetings he attended he knew an extension of time to pay was important to his client.

304. Norris paid the bill for Kehner's November 2007 time in full, after assuring that all charges were for services that he had rendered the Estate. N.T. (12/3/2015) at 154:11-19 (Norris).

305. From November 2007 through April 2008, the Lamb firm then billed Sir John's Estate a total of $319,344. *See* OBJ 12-144, 149, 154, 159, 165, 172 (final pages with invoice totals for each month in period). Most of this work is related to the Form 706, which was supposedly approaching completion in early November 2007. The return was filed May 6, 2008. OBJ 12-174 (entries for WHL, VTD, CD).

B. Tax Penalty Litigation

306. In October 2008, Norris received a Notice of Intent to Levy from the IRS, based on Sir John's Estate's failure to pay its federal estate taxes. N.T (5/6/2016) at 77:22-78:1 (Norris). For this failure, the IRS had assessed a $1,000,000 penalty. *Id.*

307. When Donohue was advised of this, he contacted Smith who said it was a mistake by the IRS. N.T. (5/4/2016) at 78:20-80:14 (Donohue). Donohue followed up with Smith regularly and pressed him to deal with it for fear a levy might interfere with the impending sale of Doe Run (though he ultimately learned no lien was possible). *Id.* at 81:1-83:8 (Donohue).

308. At this point, Donohue consulted the IRS regulations and realized that the IRS was correct: the Estate's request to extend the time to file did not extend the time for payment. Donohue explained this to Smith and Smith said Donohue was correct. *Id.* at 83:21-84:19 (Donohue).

309. Smith disputed whether he had given advice to Norris that Norris did not need separately to request an extension to pay. OBJ 179, Tab C (Smith) at 14:16-20, 15:3-8 (testifying that he did not "recall giving that advice at all"); *see also id.* at 29:24-30:15, 30:20-31:9, 31:17, 31:19-25, 57:8-22, 90:2-22, 90:25-91:4, 91:8-92:8, 108:13-109:7. He also questioned whether the form filed on November 6, 2007 had been prepared by his office. OBJ 179, Tab E (Smith) at 46:19-47:2, 47:4-21.

310. Smith, however, subsequently admitted responsibility. Exec. 51.

311. Norris and the Lamb firm did not advise the Beneficiaries of the deficiency notice or the penalty for over five (5) months. OBJ 169; N.T. (5/5/16) at

84:14-19 (Donohue). In describing the matter to Bullitt a month later, Donohue suggested the issue was about an underpayment of tax. OBJ 169-1.

312. Smith, with the Lamb firm, pressed an administrative appeal of the penalty before the IRS, without success.

313. At an initial appeal conference in June 2009, the IRS representative advised he was a "splitter" and was prepared to compromise, but Norris was not prepared to consider anything other than full abatement. N.T. (5/4/2016) at 88:9-94:1 (Donohue). After further proceedings, the appeal was rejected. *Id.* at 95:21-96:17 (Donohue).

314. In November 2010, Norris filed a formal claim for a refund, asserting reliance on Smith's advice. *Id.* at 157:7-17 (Donohue). The IRS responded six months later, and the claim was then denied. *Id.* at 158:10-159:3 (Donohue).

315. In June 2011, after paying the $1 million penalty plus interest, Norris sued the IRS in federal court in Philadelphia. *Id.* at 159:4-160:7 (Donohue); N.T. (5/5/2016) at 91:14-18 (Donohue).

316. Following discovery, the government moved for summary judgment and the district court granted that motion. N.T. (5/4/2016) at 165:9-21 (Donohue); *Estate of Thouron v. United States,* 2012 WL 5426807 (E.D. Pa. Nov. 7, 2012).

317. Norris appealed to the United States Court of Appeals for the Third Circuit. N.T. (5/4/2016) at 165:22-166:3 (Donohue). On May 13, 2014, the Court of Appeals reversed and remanded to allow consideration of Norris's advice of counsel position. *Id.* at 167:2-23 (Donohue); *Estate of Thouron v. United States,* 752 F.3d 311 (3d Cir. 2014).

318. Norris then settled the case with the IRS for an agreed penalty of $499,999 plus interest – a split of the difference between the parties' positions. N.T. (5/4/2016) at 171:13-173:1 (Donohue). The IRS subsequently refunded $580,689 of the Estate's prior penalty payment. Exec. 53.

C. The Smith Litigation

319. In June 2012, Sir John's Estate, represented by the Lamb firm, commenced a suit against Smith and Gibbs in federal court, seeking damages for Smith's incorrect advice. N.T. (5/5/2016) at 167:24-168:21 (Donohue). Gibbs was subsequently dismissed. N.T. (4/29/2016) at 30:24-31:9 (Gibbs).

320. On October 31, 2013, following some discovery, the Estate settled the Smith litigation with Smith and his insurers for $975,000. Exec. 34.

321. The Smith settlement stipulated that if the amount recovered by the Estate in the tax penalty litigation exceeded $525,000, the amount above $525,000 would be paid back to Smith's insurers. *Id.* at ¶4. Thus, Norris limited the Estate's potential recovery from the IRS to no more than $525,000 of the $1 million penalty he claimed the IRS had improperly imposed.

322. Norris and the Lamb firm reasoned that at $1.5 million, "the estate had been made whole on the penalty, the interest on the penalty and some of its costs." N.T. (5/5/2016) at 171:2-12 (Donohue).

323. However, the effect of the IRS and Smith litigations was to cost the Estate approximately $550,000.

324. The Estate had suffered a $1 million penalty and expended at least $1,032,000 in legal fees.

325. Some of the attorneys' fees the Estate incurred in the IRS tax penalty litigation and related litigation could not be readily determined, so the parties stipulated as follows: $585,000 billed to the Lamb firm's tax penalty litigation matter; $337,000 billed to the Lamb firm's Smith litigation matter; and $111,000 billed to the Sir John or Tiger Estate administrative files and deemed to relate to either the tax penalty litigation or the Smith litigation matters. N.T. (5/5/2016) at 93:9-94:23 (Donohue).

326. The Estate recovered $499,999 from the IRS and $975,000 from Smith and his insurers. The $2,032,000 in expenditures, offset by $1,474,999 in recoveries, yielded a net cost to the Estate of $557,001.[1]

XV. Sir John's and Tiger's Estate Administration: The IRS Audit

327. The IRS's notice of deficiency was followed by an IRS audit of the two (2) Estates.

328. The IRS attorney in charge of the audit, Kate Boyle, began the process with a lengthy request for information directed to Smith in February 2009. N.T. (5/4/2016) at 108:19-109:24 (Donohue). The list showed that the IRS was focused on the partnerships, the appraisals, and comparing income tax information with that provided in the estate tax returns. *Id.* at 111:24-113:5 (Donohue).

A. IRS Meetings

329. In November 2009, Norris, Furman and Donohue had an initial meeting with Boyle and her supervisor in Portland, Maine to discuss the audit. Norris and

[1] This analysis does not consider interest the IRS paid on the refunded penalty of approximately $80,000. If the IRS interest paid was included, the Estate's interest costs of $68,758 on $1 million of the Bancorp loan, borrowed to pay the Estate's tax liabilities, should also be included, and these would substantially offset the IRS interest "recovery." N.T. (5/5/2016) at 97:14-99:23 (Donohue).

Donohue wanted Furman involved because he was the repository of critical information on the partnerships and the pre-death transactions. *Id.* at 116:22-118:11, 131:20-132:11 (Donohue).

330. Boyle took an aggressive position on the pre-death transactions. She contended the family limited partnerships were a "sham" and hence there would be no discounts. *Id.* at 118:12-119:18 (Donohue). She identified problems with each of the real estate transactions, and threatened to characterize these as gifts. *Id.* at 122:20-123:2, 127:9-19 (Donohue). The cash transfers to Glenknockie between 2002 and 2005 were also characterized as gifts and, since no returns were filed, would result in interest. *Id.* at 12:10-23 (Donohue). Boyle also challenged the salaries paid to Rachel and Rupert in 2005 and 2006. *Id.* at 120:24-122:7 (Donohue).

331. Boyle also identified accounts owned by TFIP but omitted in the valuations. She proved correct about this, as the account information had not been provided by Furman and Donohue to Smith or Gibbs. *Id.* at 122:8-20 (Donohue).

332. Boyle also questioned the Estates' valuations of personal property, pointing to a catalog showing some property had been sold by the Beneficiaries at values exceeding the appraisals. *Id.* at 122:21-125:3 (Donohue).

333. Donohue was not surprised that Boyle was accusatory. The purpose of the meeting was for Norris, Furman and Donohue to learn the IRS's concerns so that they could thereafter address them. *Id.* at 111:15-112:13 (Donohue).

334. Gibbs also was not surprised that the IRS would initially take the position the partnerships should have a zero discount: "It is a typical position the IRS took." N.T. (4/29/2016) at 108:11-109:4, 109:12-22 (Gibbs).

335. Donohue and Norris, however, were disappointed in Furman. They felt Boyle did not have a good impression of him as a result of his inconsistent bookkeeping. N.T. (12/2/2015) at 223:1-14, 225:15-116:9 (Norris). At the meeting, Boyle had shown Furman income tax filings he had made for the decedents that contradicted the Estates' tax positions on the transfers, and Furman did not know what to say. N.T. (5/4/2016) at 139:1-21 (Donohue).

336. Furman nonetheless remained involved behind the scenes because he was at the "epicenter" of the transactions. *Id.* at 137:10-138:17 (Donohue).

337. The objective following the first meeting was to preserve the discounts on the family limited partnerships that Boyle had threatened. N.T. (5/4/2016) at 126:15-127:8 (Donohue). Donohue undertook to respond promptly to Boyle's requests for further information and to proceed partnership by partnership and transaction by transaction to preserve positions the Estates had taken in their tax returns. *Id.* at 115:22-116:5, 128:2-135:13 (Donohue).

338. The Estates thus pressed positions that these were validly formed partnerships under state law, controlled by the general partner, and the IRS could not connect a gift from the alleged transferors to the transferees; the salaries were treated appropriately, with income taxes paid, and they could not have been a gift because Sir John did not know of them; and the intentions when the partnerships were created were clear but the partnerships were not properly maintained and decisions documented because their advisors failed them. *Id.* at 139:22-142:13 (Donohue); *see also* N.T. (5/5/2016) at 117:13-118:24, 119:3-120:7, 121:3-122:6 (Donohue).

339. In February 2010, a second meeting with Boyle took place in Boston. Donohue and Gibbs attended for the Estates; Norris did not. N.T. (5/4/2016) at 138:18-24 (Donohue).

340. After the parties reviewed their positions, Boyle presented some offers, including discounts on TFIP, Doe Run LP, TFRE LP, and Glenroy, LP. *Id.* at 144:20-145:13 (Donohue). Discounts on the partnerships in Tiger's Estate were not a focus because, when the debts owed by those partnerships were recognized, they were "under water." *Id.* at 145:14-146:18 (Donohue). The appraisals that Boyle had challenged were also negotiated. *Id.* at 147:1-25 (Donohue).

B. Audit Settlement

341. A settlement was reached on these and other terms in July 2010. All of the advances were treated as loans. The salaries were treated as salaries. No unreported gifts were assessed. The IRS accepted the Estates' claimed administrative costs. *Id.* at 148:1-149:9 (Donohue). The personal property appraisals were accepted, with exceptions for missed items. *Id.* at 150:2-24 (Donohue).

342. The Estates also were not taxed twice for Norris's decision to sell Driftwood and Hollybrook, financed by TFIP and held in Tiger's Estate, back to Sir John's Estate. N.T. (3/14/2016) at 219:9-221:8 (Donohue).

343. The settlement meant a refund in Tiger's Estate and a compromise result for Sir John's Estate. *Id.* at 216:5-218:8 (Donohue). The net increase in tax due was about $2 million – a $2.4 million increase in tax for Sir John's Estate was offset by a $400,000 decrease in Tiger's Estate's tax liabilities. Interest and penalties on the unpaid

taxes took the final amount due to $3.9 million. N.T. (5/4/2016) at 152:7-153:23. (Donohue).

344. Donohue conceded that with respect to the audit, the Estates' interests and the Beneficiaries interests were aligned, and not adverse. N.T. (3/14/2016) at 218:19-219:3 (Donohue).

345. While they do not agree that the fees charged by all of those involved in dealing with the IRS audit were appropriate, the Beneficiaries have not disputed that the results of the IRS audit were good for the Estates. N.T. (4/29/2016) at 77:2-13.

XVI. Sir John's and Tiger's Estate Administration: The Executor's Initial Accounts

346. On March 4, 2013, the Executor filed with the Register of Wills his First Account of the Estate of Sir John R.H. Thouron (OBJ 6) and his First and Final Account of the Estate of John J. Thouron (OBJ 7) (the "Initial Accounts").

347. The Beneficiaries objected to both Initial Accounts in numerous respects. *See* Objections to First and Final Account of Charles H. Norris, Jr. No. 1506-0305, filed April 4, 2013; Objections to the First Account of Charles H. Norris, Jr., No. 1507-0230, filed April 4, 2013.

348. After hearing testimony for eight (8) days on the Beneficiaries' Objections, the court found "it is abundantly clear that [each] Account cannot possibly be audited because of its format and content," and ordered the Executor to file Amended and Restated Accounts within forty-five (45) days. Orders dated April 29, 2016; *see also* N.T. (4/29/2016) at 3:17-4:19 (court ruling).

349. Both Initial Accounts were flawed in methodology and presentation, contained numerous material errors, and failed to give a fair or accurate picture of the two Estates at death or of the Executor's administration.

350. The fees charged by Norris, Maillie and the Lamb firm to prepare the Initial Accounts and the fees charged by the Lamb firm to defend them are in issue.

A. Engagement of Maillie to Prepare Initial Accounts

351. The Executor engaged Furman of Maillie to prepare the Initial Accounts. N.T. (12/4/2015) at 16:19-17:3, 39:14-18 (Furman). Furman was assisted by and supervised two paraprofessionals, Karen Truckley and Debbie Dudsinski, who were not CPAs. For Sir John's Estate, Furman also supervised two staff CPAs. *Id.* at 17:4-18:9; 39:18-41:4 (Furman).

352. Furman testified that he principally provides accounting services for businesses, but that he had provided what he called "court accountings" for three (3) other estates in the past. N.T. (12/3/2015) at 221:11-14 (Furman). However, the last "court accounting" he had done before the Thouron accounts was "at least ten or twelve years ago." N.T. (12/4/2015) at 18:14-20 (Furman).

353. Neither Furman nor the staff CPAs that he used had any specialized training in fiduciary accounting. *Id.* at 18:6-9, 40:22-41:4 (Furman). Maillie has no software accounting programs designed for estate accounting; it must translate its general accounting programs to an estate accounting format. *Id.* at 18:21-19:13 (Furman).

354. Norris and the Lamb firm knew from their dealings with Furman and Maillie in the early administration of Sir John's Estate that there were problems with Maillie's accounting.

355. Norris admitted he had been concerned about Furman and Maillie's performance even before Tiger died, particularly with regard to communication. N.T. (12/2/2015) at 116:10-236:20, 144:18-247:21 (Norris). Furman was not able to able to provide basic information concerning transactions and this "went on day after day, week after week, month after month." N.T. (12/3/2015) at 45:23-47:9, 50:2-9 (Norris).

356. Donohue, who had an accounting background and was the "point person" on Thouron matters, testified that "they [Furman and Maillie] had muddled the accounting for the partnerships." N.T. (3/14/2016) at 173:23-174:9 (Donohue). Donohue described Maillie's accounting presentations as "overly complicated for what seemed to me were pretty simple recording of transactions that should have been done." *Id.* at 189:16-190:19 (Donohue). This lack of clarity was never fixed. Donohue dealt with it only by having Furman explain to Donohue what he was doing. *Id.* at 190:22-191:19 (Donohue).

357. Norris, with whom Donohue was in regular communication, and who had participated with Furman and Donohue in the initial meeting with the IRS audit team concerning the Estates, knew of the problems with Furman's and Maillie's accounting practices as well. N.T. (5/4/2016) at 53:6-10, 73:24-74:4 (Donohue); *see* FOF 69.

358. Both Norris and Donohue knew from their dealings with Furman in the course of the IRS audit that his accounting was sloppy, inconsistent, and embarrassing when subjected to any careful scrutiny. *See* FOF 336-337.

359. Another fact that should have called into question Maillie's competence to prepare proper fiduciary accounts for the Estates was Maillie's production in late March

2012 of what the Lamb firm described as "the financials for the Thouron Estates." *See* Exec. 32.

360. Furman described this massive 742-page report as "our [Maillie's] draft of the court accounting as of December 31, 2011," which provided a "mini accounting for each of the bank accounts," that is, each of the more than 60 separate bank accounts held by the Thouron family. N.T. (4/29/2016) at 160:19-161:17 (Furman).

361. The very first page of the listing (the third page of Exec. 32), as well as subsequent pages, identify transactions in two (2) large accounts associated with the "Esther DuPont Thouron Trust." This trust stands outside of both Estates for estate accounting purposes. Furman testified the further pages showed transfers going back and forth between and among these and other Thouron accounts. *Id.*

362. Exec. 32 is not organized in the manner of a "court accounting," showing receipts, income, distributions and the like, and it includes items like the Esther DuPont Trust that would not be part of such an accounting. The fact that Furman thought he was providing a "draft of a court accounting" ought to have sent a clear signal to Norris and his lawyers in March 2012 that Furman was out of his depth in preparing fiduciary accounts for the Estates, especially in view of their past experience with Furman's accounting.

363. Furman did not provide detailed billing records for the time he and other Maillie staff spent preparing the accounts filed with the court. N.T. (5/4/2016) at 4:11-5:9 (Furman); *see also* Exec. 60. At the hearing, Furman estimated that the total amount Maillie charged for preparing the Initial Accounts was 10% of Maillie's total charges to the Estates. N.T. (4/29/2016) at 167:3-10 (Furman). Maillie's total charges through

February 2016 were $1,153,595. *See* Exec. 29 at 2-3. Accordingly, Furman's estimate of the amount his firm charged for preparing the Initial Accounts is $115,360.

B. Participation of the Lamb Firm in Preparing Initial Accounts

364. Norris engaged Furman and Maillie to prepare the Initial Accounts and at the hearing he and the Lamb firm contended that Furman and Maillie alone were responsible for those accounts.

365. Norris verified in each of the Initial Accounts that he had "fully and faithfully discharged the duties of his office" and that they were "true and correct and fully discloses all significant transactions occurring during the accounting period; that all known claims against the Estate have been paid in full; that, to his knowledge, there are no claims outstanding against the Estate; [and] that all taxes presently due from the Estate have been paid." OBJ 6-314; OBJ 7-92.

366. Norris testified that to assure his verification of Tiger's account was correct he talked with Furman and Donohue. N.T. (12/2/2015) at 6:1-7:2, 8:11-13 (Norris). He did not check each underlying transaction because, he said, he had "every reason to believe that Mr. Furman was accurate." *Id.* at 8:14-9:1 (Norris).

367. Norris testified his verification of Sir John's Initial Account was based "on information and belief," although the executor's oath required by the rules is not so limited. *Id.* at 30:19-31:15 (Norris). He said his verification was based on reviewing a 700+ page version of the account and reliance on Furman. *Id.* at 31:16-20 (Norris).

368. The Lamb firm's time records reflect only one (1) pre-filing conference with Norris concerning the Initial Accounts. OBJ 10-135 (2/12/2013 SWM entry); OBJ 12-362 (2/12/2013 VTD entry). They also reflect two conferences between William

Lamb and Norris on "accounting issues" shortly after the March 4, 2013 filing. OBJ 12-366 (3/5/2013 and 3/6/2013 WHL entry).

i. Stacey McConnell

369. Furman sent all drafts of the Initial Accounts to the Lamb firm seeking general input from it and its review of his work. Initially Furman said he dealt with John Kehner. Later, he dealt with Stacey McConnell, Esquire. N.T. (12/4/2015) at 20:6-19 (Furman).

370. McConnell is a shareholder in the Lamb firm who has practiced trusts and estates law for more than thirty years. N.T. (12/1/2015) at 88:3-89:2, 89:7-8 (McConnell).

371. McConnell testified that she "was only relied upon to prepare the petition [Petition for Adjudication]" that preceded each Initial Account. *Id.* at 92:19-93:9 (McConnell). She knew that her client, Norris, was required to verify the truth of the information in the accounts, but she did not assist him in doing so. "I relied on Maillie Falconiero to make certain it was true and correct." *Id.* at 99:19-23 (McConnell).

372. She testified that she reviewed the accounts "in conjunction with Mr. Bullitt [one of the Beneficiaries' counsel]" to come up with the format, but did not otherwise review Maillie's work. *Id.* at 101:19-24 (McConnell).

373. McConnell testified she had no understanding of the contents of Tiger's Initial Account, *id.* at 127-136, or Sir John's Initial Account. *Id.* at 156-160 (McConnell). She initially described an exhibit that she had attached to her Petition for Adjudication of Sir John's Estate (Exhibit D) as Sir John's Estate's account. *Id.* at 156:18-158:14 (McConnell). She later recognized that the actual Initial Account began

subsequently in her filing, (*see* OBJ 6-231) but said she could not explain how the actual account differed from the exhibit. N.T. (12/1/2015) at 159:21-160:4 (McConnell). McConnell likewise said she could not explain any of the flaws in the Initial Accounts. *See id.* at 136:10-138:19, 1401:7-142:13, 143:13-144:23, 150:3-19 (discussing Tiger's Initial Account) and 160:12-176:10 (discussing Sir John's Initial Account).

374. Furman, however, testified that in revising drafts of the Initial Accounts, including what items to include, delete or summarize, Maillie took direction from McConnell. N.T. (12/4/2015) at 46:17-47:3 (Furman) ("Anything that was condensed from the larger document to the smaller document was at the direction of Ms. McConnell"), 67:14- 68:1 ("We were provided direction by Ms. McConnell."). McConnell dealt initially with Furman and thereafter directly with Karen Truckley of his staff. *Id.* at 42:15-21, 46:22-47:3 (Furman).

375. Furman testified that Maillie did not have final responsibility for properly categorizing items as receipts, disbursements or distributions. Rather, all information was provided to the Lamb firm for review.

> Q. Did she [McConnell] review this document [a page from Tiger's Initial Account categorizing a payment from the Estate to the Beneficiaries' counsel as a legal expense rather than a distribution]?
>
> A. It was sent down for review.
>
> Q. Okay. Well, did you sit down –
>
> A. We had received comments from her to make changes.
>
> Q. To make changes on the account itself?
>
> A. Our original draft.

Q. Okay. But this wasn't one of the comments you received?

A. If she had asked us to move it, it would have moved.

Q. I see.

A. I would have made the change.

Q. Okay. So was it Maillie's job to properly characterize items as disbursements, distributions or receipts, or was it Lamb's job?

A. Well, we laid out all the activity so that 100 percent of the activity was accounted for, and then drafts were issued for review.

Q. Thank you.

A. So we did not make the final conclusion as to the category, we presented all of the information for review.

N.T. (12/4/2015) at 35:1-20 (Furman).

376. Furman also testified that in past estate matters he handled with the Lamb firm it had been customary for his office to do a line-by-line, page-by-page review of an accounting with attorneys involved. This was true even where the account spanned four or five hundred pages. Furman, however, did not personally do that in the Thouron cases. He did not know if his staff did. N.T. (12/4/2015) at 148:3-24 (Furman).

377. McConnell billed 34.55 hours, valued at $12,012.50, to Tiger's Estate during the period from December 2012 through March 6, 2013, when the Initial Accounts were being prepared and filed. *See* OBJ 10-131 to 143 (entries for "SWM"). Her entries include "review accounts prepared by E. Furman, CPA," "conference with E. Furman regarding format for accounting," emails "regarding accountings," "work on

accountings," "review updated accountings," "work with K. Truckley CPA on accountings," and "review account revisions."

378. McConnell also billed 18.3 hours, valued at $6,487.00, to Sir John's Estate during the period from January 2013 through March 6, 2013 when the Initial Accounts were being prepared. *See* OBJ 12-357 to 366 (entries for "SMW"). These entries show she was engaged in conferences regarding "accounting revisions," a review of comments on "accounting," a "telephone conference with accountants regarding accounting," and "review final version of accounting; conference with V.T. Donohue Esq., regarding same; revisions to same."

379. The total time and fees McConnell charged to both Estates for work on the accounts was 52.85 hours, valued at $18,499.50.

380. McConnell's investment of nearly 53 hours of time seems at odds with her testimony that she was relied on solely to prepare the petitions for adjudication and addressed only the format of the accounts she filed. If her testimony is true, then her time charges appear substantially overstated. If, as Furman testified and McConnell's time entries show, McConnell reviewed, worked on and revised the accountings with Maillie personnel, then McConnell's time entries would be more reasonable.

381. McConnell should not, in any event, have allowed the Initial Accounts to go out the Lamb firm's door; she knew better.

ii. Vince Donohue

382. Donohue testified that his role with regard to the Initial Accounts was to enlist McConnell's help, talk to Furman about Furman's component of the planned filings, consult with Bullitt, lawyer for the Beneficiaries, and get the Initial Accounts

filed. N.T. (3/15/2016) at 4:4-12 (Donohue). Donohue described his firm's role in the accounts as "minimal." N.T. (5/4/2016) at 176:1-12 (Donohue).

383. For work during the period February-May 2012 on the "accounts," "accounting" or "financial summary," including Exec. 32, the asserted precursor to the Initial Accounts, Donohue billed Sir John's Estate 6 hours, valued at $2,100.00. *See* OBJ 12-344 (2/22/12 entries for "VJD"), OBJ 12-346 (3/29/12 entry for "VJD"), OBJ 12-350 (5/1/12 and 5/21/12 entries for "VJD").

384. For work during the period January 2013 through March 6, 2013, when the Initial Accounts were prepared, Donohue billed 22.1 hours, valued at $8,065.00, to Sir John's Estate. *See* OBJ 12-357 to 366 (entries for "VTD").

385. The total of Donohue's time for accountings-related work, based on the identified time records, is 28.1 hours, valued at $10,165.00. His investment, along with McConnell's and William Lamb's time, is inconsistent with the "minimal" role Donohue asserted the Lamb firm played in the accounts.

iii. William Lamb

386. William Lamb was also involved in the preparation of the Initial Accounts. His time entries for the period December 1, 2011 through May 31, 2012, when Exec. 32 was produced, show he billed to Sir John's Estate a total of 3.5 hours for "accounting issues," "accounting status," or "account issues," valued at $2,275.00. OBJ 12-343 (12/1/11, 1/4/12, 1/9/12, 2/2/12, and 2/15/12 entries for "WHL").

387. William Lamb's time entries for the period January 2013 through March 6, 2013, when the Initial Accounts were prepared and filed, show he billed the Estate a further 18.75 hours, valued at $10,968.50, to "estate accounting issues," "issues re:

accounts," conferences with Norris, McConnell and Donohue regarding "accountings" and "accounting issues," and "final review of account." *See* OBJ 12-357 to 366 (entries for "WHL").

388. Based on the foregoing, the total time William Lamb devoted to the preparation of accounts was 22.25 hours, valued at $12,973.50.

389. Based on the above, the Lamb firm charged at least $41,638.00 in total fees in connection with preparation of the accounts.

390. The combined fees charged by Maillie and the Lamb firm in connection with preparation of the accounts were at least $156,998.00.

C. Role of the Beneficiaries' Counsel in Preparing Initial Accounts

391. At the hearing, the Beneficiaries called William Bullitt, Esquire as a witness, a recently retired Drinker Biddle partner and of counsel. Bullitt is a trusts and estates lawyer with forty years of experience in such matters, and had served as one of the Beneficiaries' counsel. N.T. (3/15/2016) at 139:4-10 (Bullitt).

392. McConnell testified that in preparing the Initial Accounts "there was some editing working with Mr. Bullitt in your office," which shortened Sir John's account from "700 some pages . . . to 300 some pages." N.T. (12/1/2015) at 93:18-94:2 (McConnell). She also stated that "in conjunction with Mr. Bullitt . . . together we came up with the format of this [account] to submit," *id.* at 101:19-24, adding that "we had conversations with Mr. Bullitt and the accountants" on abbreviating the accounts. *Id.* at 121:24-122:6 (McConnell); *see also id.* at 139:3-9 (McConnell) ("I know we had conversations with Mr. Bullitt of your office about it, and that the accountants incorporated changes as a result of those conversations."). On cross, McConnell estimated that she had "maybe

three or four" conversations with Bullitt, *id.* at 184:7-11, but she was uncertain whether Maillie was involved in any of them. *Id.* at 185:13-19 (McConnell).

393. McConnell further testified on cross that all recommendations or suggestions made by Bullitt were adopted. *Id.* at 186:1-4 (McConnell). She also stated she "believed" that Bullitt saw the final versions of the Initial Accounts before they were filed and that he did not tell her not to file them. *Id.* at 186:8-15 (McConnell).

394. Bullitt disputed McConnell's testimony. He testified he never had any conversations with McConnell or Furman on the accounts. N.T. (3/15/2016) at 149:9-142:10, 142:16-20 (Bullitt). He stated the communications he had concerning the accounts Furman and the Lamb firm were preparing were with Donohue and were chiefly by e-mail. *Id.* at 142:11-15 (Bullitt).

395. Consistent with Bullitt's testimony, McConnell's time records contain no references to any conversations between her and Bullitt, and McConnell admitted that if she had had such a conversation, she would have referenced it there. Her time records refer only to emails received from Bullitt. N.T. (12/1/2015) at 121:7-15 (McConnell).

396. Bullitt also provided details about the correspondence he exchanged with Donohue concerning the accounts. Donohue's testimony confirmed Bullitt's testimony.

397. On October 17, 2012, Bullitt wrote a letter to Donohue requesting that appropriate accounts be filed by December 1, 2012, something Bullitt thought Donohue had agreed to do. OBJ 134; N.T. (3/15/2016) at 146:13-147:20, 175:23-176:19 (Bullitt). The letter suggested that the partnerships might be accounted for separately from the estate itself. OBJ 134.

398. In January 2013, no accounts having been filed, the Beneficiaries wrote to ask that accounts be filed by the end of that month. OBJ 136-2. Donohue responded that the accounts were in process, with McConnell working with Furman. He stated that "doing the accountings as Bill B. had requested . . . would resulted in 600 pages of filings. I trust none of us wants to see that. So, we [Furman, McConnell and Donohue] decided it made more sense to exclude the transactions involving the securities within TFIP . . . We are, however, listing the partnership transactions over which Charles Norris had input/decisional control." He then added that "the plan is to submit both accountings by March 6 so that we are on the audit list for April 3 before Judge Tunnell." OBJ 136-1.

399. Bullitt responded on January 24, 2013 by stating, as he had in October 2012, that he thought the Thouron family partnerships might be accounted for separately from the estate. OBJ 136-1. Bullitt had suggested showing each partnership as a separate entity, so that one could follow that activity in the accounting for that partnership. The estate accounting would incorporate parts of each of the partnership accounts, but would not need to present all details of all transfers. N.T. (3/15/2016) at 148:19-150:2 (Bullitt).

400. The suggestions were not followed and the decisions to abbreviate the accounts, and how to abbreviate them, were made by Furman, McConnell and Donohue and did not involve Bullitt.

401. Donohue, without further input from Bullitt, emailed revised draft accounts to Bullitt on February 8, 2013. OBJ 138. Bullitt testified that the draft provided for Sir John's Estate is the same as Exhibit D to the Petition for Adjudication – both were 187-page submissions. OBJ 6-26 to 214; N.T. (3/15/2016) at 150:3-151:10 (Bullitt).

402. On February 25, 2013, after reviewing the 187-page draft account for Sir John's Estate, Bullitt emailed Donohue that the draft was "grossly misleading." Bullitt pointed to the facts that principal receipts included items held in separate trusts and distributions from those trusts. He noted that there was a "churning" of assets whereby assets were double-counted as "principal receipts" and as transfers into the estate. He noted that the partnerships were not properly accounted for, that several other assets appeared to have been counted twice, and that the account was not in a form contemplated by the Supreme Court's rules. Many entries had no dates. One could not from the draft tell how the estate had actually been administered. OBJ 139; N.T. (3/15/2016) at 151:11-154:15 (Bullitt).

403. Donohue conceded that Bullitt did not endorse or approve the February 8 draft account. N.T. (3/15/2016) at 12:9-13:10 (Donohue).

404. Donohue pointed out that Bullitt had to have information about the estate's value to conclude that the draft was inaccurate. *Id.* at 31:4-9 (Donohue). But Bullitt knew that the draft was wrong because it included non-estate assets and duplicative transfers which combined to yield total reported assets of $190 million. *Id.* at 178:15-181:10 (Bullitt). This was an improbable figure, more than four (4) times the date of death asset values that Gibbs had calculated for purposes of Sir John's estate and inheritance tax obligations. *See* Exec. 41.

405. Also on February 25, 2013, Bullitt provided comments on the draft of Tiger's account Donohue had sent. Bullitt noted that this draft did not list the contents of Tiger's investment accounts, did not contain a listing of gains and losses, and included a

number of post-death transfers in from TFIP that were not explained. OBJ 140; N.T. (3/15/2016) at 154:16-156:16 (Bullitt).

406. Donohue answered Bullitt over the next three (3) days with interlineated responses and a suggestion that the parties have a conference call. OBJ 140; OBJ 142; OBJ 143. However, no such call was held because Furman was not available. N.T. (3/15/2016) at 156:24-158:12 (Bullitt); *id.* at 22:8-9 (Donohue).

407. Bullitt followed up with further questions regarding the drafts in the morning of February 28, 2013. OBJ 144; OBJ 145.

408. During this three-day period there were no conversations with Donohue or McConnell concerning further abbreviations of the draft accounts, only the exchanges of emails noted above. Bullitt testified he was providing comments and suggestions to help Furman and the Lamb firm understand how the accounts were supposed to be done if they were going to be done properly. N.T. (3/15/2016) at 145:20-146:9 (Bullitt); *see also id.* at 12:19-13:10 (Donohue).

409. On February 28, 2013 at 3 p.m., Donohue sent Bullitt a revised version of Sir John's account, this one comprising 85 pages. OBJ 146. This draft was accompanied by a markup Donohue had made of the Summary of Accounts page and the Principal Receipts. OBJ 147. The markup shows that Donohue was questioning the inclusion of a $25.6 million disbursement titled "Net Thouron Family Investment LP Activity," OBJ 147-1, as well as the presentation of the Principal Receipts. OBJ-147-2; *see* N.T. (3/15/2016) at 24:24-25:5 (Donohue).

410. Bullitt responded later that day that he would review and respond to the new Sir John account draft, questioning again why the Esther DuPont Trust continued to be included in Sir John's Estate. OBJ 149.

411. On March 4, 2016, Bullitt forwarded to Donohue a list of further questions and comments on the new draft. OBJ 149; N.T. (3/15/2016) at 158:8-160:12 (Bullitt).

412. On March 6, 2016, Donohue responded, reporting that the Petitions for Adjudication and accounts had been filed on March 4, 2013 and enclosing a copy. OBJ 150. Hence, Bullitt's further questions and comments were not taken into account prior to filing. N.T. (3/15/2016) at 27:12-28:19 (Donohue).

413. Bullitt was surprised by the March 4 filing because Donohue had previously stated that the Executor intended to file by March 6. OBJ 137; N.T. (3/15/2016) at 158:13-21 (Bullitt); *id.* at 27:12-28:19 (Donohue).

414. Under this court's rules, accounts must be filed four (4) Wednesdays before the next audit list call date to be heard on that date. Chester County Orphans' Court Rule L6.4A-L6.4B. Hence to be heard at the Wednesday, April 3, 2013 audit call, the accounts could have been filed on Wednesday, March 6, 2013.

415. As counsel for the Beneficiaries, Bullitt acted only in a consultative capacity, commenting on drafts provided to him by Executor's counsel. Bullitt did not "edit," endorse or approve any forms of the accounts the Executor's counsel provided to him.

416. It was the Executor's team – Furman, McConnell and Donohue – who prepared and revised the draft accounts and who decided the manner in which they would

be revised, and they alone are responsible for the Initial Accounts filed with the court in March 2013.

D. The Beneficiaries' Alleged Knowledge of Information in Initial Accounts

417. The Executor and his counsel argue that the Beneficiaries, through their counsel, had available from sources other than the Initial Accounts information sufficient to understand them, pointing specifically to Exec. 32. N.T. (3/15/2016) at 184:17-185:16 (Bullitt).

418. As Bullitt observed when Executor's counsel presented him with this 742-page single-spaced catalog of accounting entries as of December 2011, Exec. 32 is "essentially meaningless in the way it's presented." N.T. (3/15/2016) at 191:2-5 (Bullitt).

419. Exec. 32 does not permit ready cross-reference from summary sheets to detail or within detail – as was vividly illustrated by Executor's counsel's effort to point Bullitt to "changes in investment holdings" located on "page 5," which established that there are multiple (in fact, hundreds) of page 5's in the document. *Id.* at 191:14-192:17 (Bullitt); *see also* Exec. 32. Further, the specific page 5 Executor's counsel referenced, although titled "change in investment holdings," showed not a change in the nature of the holding, but transfers of assets from one Sir John or Tiger account to another. N.T. (3/15/2016) at 192:18-24 (Bullitt); *see also* N.T. (3/16/2016) at 18:22-19:3 (Bullitt).

420. More fundamentally, as Bullitt explained, the 742-page report is meaningless because it was "impossible to figure out what it was trying to tell us." It was a "data dump," and not an accounting. N.T. (3/16/2016) at 19:10-20:1 (Bullitt). Further, as Bullitt stated, the Beneficiaries' objections were to the accountings the Executor had provided, not the raw data they contained. *Id.* at 23:12-16 (Bullitt).

E. Deficiencies in Sir John's Initial Account

i. Obvious Flaws

421. Sir John's Initial Account (OBJ 6-229 *et seq*.) contains fundamental errors that are obvious on an initial review.

422. The most glaring of these errors requires no familiarity with the family's assets and liabilities or the Estate's administration. The Summary of Accounts page (OBJ 6-230) lists – as the first of several categories of disbursements – "Net Thouron Family Investment LP Activity," which reportedly totals $25,636,526.96. This total, which represents over-half of the Estate's reported principal receipts of $50,087,109.49, is not supported by any schedule in the Account itself, the Petition for Adjudication or any other filed document that would allow the court to audit it.

423. Furman explained that the $25.6 million figure was inserted when his initial draft was reduced in size. He admitted there was nothing in the Initial Account itself or in Exhibit D to Sir John's Petition (an earlier draft of the account) that would explain the number. N.T. (12/4/2015) at 53:14-54:13 (Furman).

424. Furman did not dispute that this was contrary to fiduciary accounting principles. However, he claimed the decision to reduce the size of the Initial Account was not his, but was made "between the two law firms – Drinker and Lamb." *Id.* at 53:14-21 (Furman). Furman was told this by the Lamb firm. He admitted that he never had any discussions with Bullitt or others at Drinker Biddle. *Id.* at 55:2-56:1 (Furman).

425. Donohue knew that the $25.6 million figure was not explained by the Initial Account. When he forwarded what proved to be a near-final draft of the account to Bullitt on February 28, 2013, OBJ 146, he included a markup of the Summary of

Accounts page in which he himself circled the $25.6 million number. OBJ 147-1. Donohue asked if items listed below the $25.6 million number were included in that number – because there was nothing that showed what the $25.6 million comprised. N.T. (3/15/2016) at 24:24-25:5 (Donohue).

426. Bullitt likewise questioned the number when he responded to Donohue on March 4, 2013: "I note that you question the $25.6 million figure, as do we. Have you found out what it is?" OBJ 149 (first para.). But, by this date, the Lamb firm had filed the accounting.

427. A second obvious deficiency in Sir John's Initial Account relates to the line in the Summary of Accounts under the heading "Principal" labeled "Cash Transfers to Estate" of $16,252,527.91. *See* OBJ 6-230. Here, the account provides a cross-reference to page 3 (OBJ 6-232), where this figure is shown to be comprised of $16,056,571.04 in transfers from Thouron Family Investment LP.

428. Yet, the Thouron Family Investment LP liquid assets (equities/bonds/cash) and an associated line of credit – the net value of which is exactly $16,056,571.04, N.T. (12/4/2015) at 52:5-11 – are already included in the "Receipts" entry in the Summary of Accounts. One need only look at the itemization of "Receipts" on page 2, OBJ 6-231, to determine this. The Summary of Accounts on OBJ 6-230 thus "double-counts" the Estate's net interest in TFIP, dramatically overstating the value of the Estate. Furman had no answer why the TFIP interest was counted twice. *Id.* at 58:4-15, 60:3-8 (Furman).

ii. Deficiencies in Reporting of Principal Receipts

429. There are a number of deficiencies in Sir John's Initial Account beyond these patent anomalies. Chief among these is that the Principal Receipts were in other

respects inflated and depicted an Estate that was markedly larger than what Norris and his retainers were required to administer.

a. TFIP Misvalued

430. Furman testified that the asset values used in the Initial Account matched the Sir John's audited Form 706. N.T. (12/4/2015) at 52.24-53:1 (Furman). In fact, they do not.

431. The total value of TFIP stated in the Initial Account is $35,686,231.54. OBJ 6-231 (Thouron Family Investment LP Receipts). Yet, the value of TFIP established through the IRS audit was $22,627,350. Thus, the Initial Account overstated the value of TFIP by $13,058,882. Stipulation and Order Regarding Revised Accounts Filed July 13, 2016 and Hearing and Adjudication of Objections, dated September 30, 2016 ("Stipulation re: Revised Accounts") at ¶¶ 1-2. It yielded an inflated and misleading picture of Sir John's Estate.

432. The correct lower value for TFIP was known to Furman, Norris and the Lamb firm years before the Initial Accounts were filed in March 2013. This was the value Gibbs calculated for the Estate in April 2008. It was the value Smith used in the Form 706 the Estate filed in May 2008. It was the value the Lamb firm used in preparing and filing the Pennsylvania Inheritance Tax return the Estate filed in August 2009. It was the Value the IRS accepted in its Audit Report in May 2010. *Id.* at ¶¶ 2-7, 9. And, as the date of death value the IRS accepted, Furman and the Lamb firm should have used it in the Initial Account. N.T. (4/27/2016) at 36:21-37:4 (Latourette).

b. Note Receivable on 472 South Beach Omitted

433. TFIP advanced $2.2 million to Tiger to acquire the property at 472 South Beach Road in Hobe Sound, Florida. N.T. (12/4/2015) at 3:17-4:14 (Furman).

434. This advance was treated by the Executor and the IRS as a loan from Sir John to Tiger. But, while other loans made by TFIP or Sir John were included among Sir John's Principal Receipts in his Initial Account, *see* OBJ 6-231, this $2.2 million note receivable and accrued interest thereon were omitted entirely. Stipulation re: Revised Accounts at ¶ 18. As a result, the Estate's Principal Receipts were understated by $2,828,528. *Id.*

435. The IRS Audit Report issued in May 2010 specifically identified this loan and interest amount. Thus, the information to correctly state and include this $2,828,528 asset was available to Furman, Norris and the Lamb firm years before the Initial Account was filed. *Id.* at ¶¶ 19-20.

c. Pennsylvania Inheritance Tax Payment Omitted

436. The prior draft of the account attached to the Petition as Exhibit D (OBJ 6-30 *et seq.*) showed a payment of Pennsylvania inheritance taxes was made by Sir John's Estate on 11/6/2007 in the amount of $1,349,774. OBJ 6-204. The Petition for Adjudication also includes an accounting from the Commonwealth of Pennsylvania showing this payment. OBJ 6-215.

437. However, as Furman admitted, Sir John's Initial Account does not include this $1,349,774 tax payment in summary (OBJ 6-276) or detail (OBJ 6-286), resulting in an overstatement of the value of the Estate. Furman suggested the payment could be part

of the unexplained $25.6 million disbursement; but there is no detail for that figure. N.T. (12/4/2015) at 72:15-73:23 (Furman).

d. Missing Cash and Investment Accounts

438. A comparison of the prior draft with the Initial Account also disclosed a number of cash and investment accounts that were included in Exhibit D as Receipts or Receipts of Income, but omitted from the filed version. *Compare* OBJ 6-28 and 6-30 *with* OBJ 6-230, 6-231 and 6-236. Furman was unable to explain these deletions. N.T. (12/4/2015) at 66:10-68:5 (Furman).

439. At least three (3) of these omissions, Merrill Lynch account 649-11C06, 649-11C07 and 649-47612, were cash and investment accounts with an aggregate value at death of $162,263. Although referenced in Exhibit D (OBJ 6-28), they do not appear in Sir John's Initial Account. Thus, the Initial Account understated the value of Sir John's assets by $162,263. Stipulation re: Revised Accounts at ¶¶ 10-11.

440. Each of these three (3) accounts was specifically identified by Norris, Furman and the Lamb firm in the IRS audit process and each is specifically listed in the IRS Audit Report issued in May 2010. Their aggregate value was $162,263, and the failure to include them understated the value of the Estate. This information was thus available to Norris, Furman and the Lamb firm years before Sir John's Initial Account was filed. *Id.* at ¶¶ 12-13.

e. Glenknockie FLP Note Receivable Misvalued

441. Sir John's Initial Account did include a $500,000 note receivable from Glenknockie FLP. OBJ 6- 231 (Other Receipts). However, the IRS audit process had determined the correct value of the Glenknockie note receivable was $518,687,

consisting of $430,000 in principal and $88,687 in interest. Thus, the Initial Account understates the value of the note by $18,687. The correct value of the note appears in the IRS's May 2010 Audit Report, and was available to Norris, Furman and the Lamb firm years before the Initial Account was filed. Stipulation re: Revised Accounts at ¶¶ 14-17.

f. Merrill Lynch Account 649-74E07 Misvalued

442. Sir John's Initial Account similarly misstated the value of Merrill Lynch account 649-74E07. The account showed this accounts value as $1,756,384 (OBJ 6-231), but the IRS audit had valued the account at $1,762,459. Thus, the Initial Account understated the value by $6,075. The correct value appears in the IRS's May 2010 Audit Report and was available to Norris, Furman and the Lamb firm years before the Initial Account was filed. Stipulation re: Revised Accounts at ¶¶ 22-25.

g. Pennsylvania Personal Property Misvalued

443. Sir John's Initial Account showed the value of his Pennsylvania personal property as $1,451,490. OBJ 6-231. This value was understated by $246,688; the correct value of $1,698,178 was identified in the IRS's May 2010 Audit Report, which made a correction for items omitted from the Estate's tax return. The information needed to correctly state the value of Sir John's Pennsylvania personalty thus was available to Norris, Furman and the Lamb firm years before the Initial Account was filed. Stipulation re: Revised Accounts at ¶¶ 26-29.

h. Effect of the Above Misvaluations, Errors and Omissions

444. The parties have stipulated that the net effect of the above misvaluations, errors and omissions is that the total Principal Receipts reported in Sir John's Estate were overstated by $9,796,640. The original account reported Principal Receipts of

$50,087,109. The Revised Account for Sir John's Estate that the Executor filed pursuant to the court's Order on July 13, 2016, shows a corrected total of $40,290,470.

iii. Other Deficiencies in Sir John's Initial Account

a. Bancorp Loan Treated as Receipt

445. Norris authorized Sir John's Estate to borrow $3,900,000 from Bancorp Bank to provide liquidity to pay Sir John's federal estate tax obligations in 2010. N.T (12/4/2015) at 63:21-64:4 (Furman); N.T. (5/6/2016) at 110:5-8 (Donohue).

446. In the Initial Account, Furman treated this loan as an "Other Receipt" of Principal by the Estate, instead of income as would be customary with a post-death borrowing. *See* OBJ 6-230 ("Other Receipts"), 6-236 (Schedule).

447. Additionally, Furman failed to include an entry in the Initial Account to show the repayment of the Bancorp loan in December 2011. N.T. (12/4/2015) at 68:15-69:3 (Furman).

448. Furman admitted that the effect of this would be to inflate the value of Sir John's Estate by $3.9 million. He testified that the loan repayment might be figured in the unexplained $25.6 million disbursement in the Summary of Accounts (OBJ 6-230), but "I don't have the detail of that." N.T. (12/4/2015) at 69:22-70:5 (Furman).

b. Other Errors

449. The evidence also showed a number of other deficiencies attributable to a lack of due care or a misunderstanding of accounting principles. For example:

450. *"Other Receipts"*: Sir John's Initial Account included among its schedule of Other Receipts of Principal many items of income received years after Sir John's death. Furman testified he distinguished "receipts" from "income" based on the type of

revenue. N.T. (12/4/2015) at 62:18-24 (Furman). But this distinction led, for example, to rental income and refunds from operations of the Estate's properties in 2009, 2010 and 2011 being described as "Principal" and not income. *Id.* at 63:1-13 (Furman).

451. *Estate Tax Payments:* At OBJ 6-286, Sir John's Initial Account reports an estate tax payment made to the IRS on January 21, 2009. But, in fact there were two (2) different tax payments made, one in 2007 and another in 2009. Furman conceded the individual payments should have been listed. N.T. (12/4/2015) at 70:10-72:6 (Furman).

452. *Payments to the Beneficiaries' Counsel:* Sir John's Initial Account listed certain payments made by the Estate to the Beneficiaries' counsel as legal fees incurred by the Estate. OBJ 6-286 to 287. Furman conceded these should have been reported as distributions to the Beneficiaries. N.T. (12/4/2015) at 77:5-19 (Furman).

F. Deficiencies in Tiger's Initial Account

453. Tiger's Initial Account was also fraught with errors of omission and commission.

i. Not a Final Account

454. Tiger's Initial Account was titled a "First and Final Account." In McConnell's words, such an account "takes it to the end of estate administration and precedes distribution to the beneficiaries . . . [I]t's just a question of approving the account and having distribution of it." N.T. (12/1/2015) at 110:3-13 (McConnell).

455. Yet, on March 1, 2013, McConnell had signed a Pennsylvania Inheritance Tax return for Tiger's Estate (OBJ 132), which she filed on March 5, 2013, the day after Tiger's Initial Account was submitted. This was the original return (OBJ 132-1), and

came more than seven (7) years after Tiger's passing. It claimed a refund of over $384,000. OBJ 132-3.

456. McConnell herself had prepared the return, N.T. (12/1/2015) at 140:19-24, but its filing is nowhere referenced in McConnell's Petition for Adjudication or in Tiger's Initial Account. N.T. (12/1/2015) at 114:22-115:6 (McConnell).

457. In view of this filing, Norris and McConnell had no basis for presenting Tiger's Account as a "final" account: the Estate was not at the end of administration or ready for distribution, since a significant known but undisclosed receivable remained to be collected. The full claimed refund was received on August 13, 2013, *see* Tiger's Revised Account filed July 13, 2016 at p. 107, but was not accounted for to the court before the hearing. N.T. (12/1/2015) at 116:4-7 (McConnell).

ii. Loans to Tiger Not Referenced in the Account

458. The Pennsylvania Inheritance Tax return showed five (5) loans made to Tiger totaling $7.5 million. OBJ 132-10 (Schedule I). McConnell agreed it would be important for a person reviewing the Initial Account to know of these loans. N.T. (12/1/2015) at 144:14-145:145:2 (McConnell).

459. Yet, Tiger's Initial Account makes no mention anywhere of these debts. Furman agreed that as of March 2013, when the Initial Account was filed, it had been determined these were loans, and that they were so treated on the contemporaneous inheritance tax return. N.T. (12/4/2015) at 37:10-21 (Furman). He agreed that they should be reflected in the account for fiduciary accounting purposes as they then remained outstanding. *Id.* at 37:22-38:1 (Furman).

460. Further, Furman agreed that while Tiger's Initial Account represented a combined balance on hand of $5.9 million, this amount would be offset by the $7.5 million in loans and, with other needed adjustments, would result in a zero balance in the Estate – and "that would be a significant fact to anyone reviewing the account." *Id.* at 38:7-19 (Furman).

iii. Distribution of JJT Virginia Ventures Misrepresented

461. The Initial Account represented that the JJT Virginia Venture partnership held by Tiger had been distributed to the Beneficiaries on "various dates." OBJ 7-65. The Initial Account referred to many transactions as occurring on "various dates." McConnell agreed that this was "not customary." N.T. (12/1/2015) at 150:3-19 (McConnell).

462. More importantly, however, the report that this partnership had been distributed was incorrect. As Norris admitted, JJT Virginia Venture had not been distributed as of the date of the Initial Account and thus the assets in the Estate as of that date were understated by at least $1.3 million. N.T. (12/2/2015) at 16:11-17:18 (Norris). Neither he, Furman nor McConnell noted this or corrected it at any time prior to the hearing.

iv. Investments Inconsistently Reported

463. Another anomaly Tiger's Initial Account presents is that the investments listed in the Inheritance Tax Return do not square with those listed in the account. McConnell could not explain why the return she filed showed only one (1) Merrill Lynch investment account (OBJ 132-4), while the Initial Account listed six (6). *See* OBJ 7-36; N.T. (12/1/2015) at 143:13-144:23 (McConnell).

v. Gains and Losses on Sales and Dispositions of Investments Not Shown

464. Tiger's Initial Account contains a schedule of "Net Gains from Investment Activities." OBJ 7-41. As Furman admitted, this schedule does not identify the nature of any transactions in which the Executor engaged, by date, security, or amount of gain or loss. It is thus impossible to assess what the portfolio is and whether the Executor managed the portfolio responsibly. N.T. (12/4/2015) at 30:18-31:13 (Furman).

465. Likewise, Tiger's Initial Account contains a schedule of "Net Gain on Sales or Dispositions." OBJ 7-42. These are the result of trading in other securities (identities unknown) on some dates (also unknown) to particular outcomes (undisclosed). Furman said that information was available to assess the Executor's performance "[i]f the question was asked." N.T. (12/4/2015) at 31:14-32:10 (Furman). But nothing in the account allowed one to track individual components of any investment accounts. *Id.* at 23:20-24:5 (Furman).

466. The total of these entries understated actual gain on investment activity by $40,335. The total reported in the Initial Account was $144,426, when the actual total was $184,761, because an incorrect valuation date was used for Merrill Lynch account 649-14157 and because other items that constituted gains had been classified as fees or other receipts. This information was available to Furman, Norris and the Lamb firm in and after 2007. Stipulation re: Revised Accounts at ¶¶ 82-84.

vi. Dates of Transfers to Estate Not Reported

467. A schedule of "Net Transfers to John J. Thouron Account" shows an influx of nearly $800,000 into the Estate. OBJ 7-37. But nothing in the Initial Account

discloses the dates, sources or amounts of any of these transfers. Furman did not know if this was appropriate. N.T. (12/4/2015) at 26:16-27:10.

vii. Other Errors

468. The evidence again showed other deficiencies attributable to a lack of due care or a misunderstanding of accounting principles. For example:

469. *Principal Receipts Misvalued:* Tiger's Initial Account valued the Estate's Principal Receipts at $13,338,118. OBJ 7-36. This overstated the Principal Receipts by $16,945, because six (6) cash and investment accounts held by Tiger were carried at the wrong values. The information needed to correctly value these accounts was available from Merrill Lynch and Glenmede in 2007 and thereafter. Stipulation re: Revised Accounts at ¶¶ 78-81.

470. *Tax Payments Overstated:* The tax disbursements for Tiger's Estate were overstated by $322,945, because the Initial Account omitted a payment to the Bank of Scotland for United Kingdom taxes and misreported three other tax payments or refunds. This information was available to those preparing the Initial Account no later than October 2012. Stipulation re: Revised Accounts at ¶¶ 86-89.

471. *Legal Fees paid the Beneficiaries' Counsel:* As with Sir John's Initial Account, Furman identified legal fees paid to the Beneficiaries' counsel as legal expense of the Estate rather than distributions. OBJ 7-63; N.T. (12/4/2015) at 34:3-21 (Furman).

472. *Disbursements:* Disbursements were listed by account and not by payee, and thus failed to present clearly the actual activity. OBJ 7-43; N.T. (12/4/2015) at 32:15-33:19 (Furman).

473. *Income:* Receipts of income include "third-party checks" and "miscellaneous deposits" for which no payor is identified. OBJ 7-38 to 40. Furman agreed that if the payors were known the name should have been included. N.T. (12/4/2015) at 27:18-28:12 (Furman).

G. Hearing Time Devoted to Establishing Deficiencies in Initial Accounts

474. The Initial Accounts were pressed by the Executor's counsel upon the Beneficiaries and the court as reasonable and proper despite the Beneficiaries' objections and continuing through a lengthy period of discovery, trial preparation and days of testimony which demonstrated their impropriety and uselessness.

475. The taking of evidence concerning the deficient Initial Accounts comprised two (2) full days of the first eight (8) days of the hearing, and modest further time following the court's April 29, 2016 Order requiring amendment and restatement. *See* Testimony of McConnell (12/1/2015 at pp. 87-196 =1/2 day); Norris (12/2/2014 at pp. 5-36 and 12/3/2015 at pp. 170-172 = 1/4 day); Furman (12/4/2015 at pp. 16-85, 94-96, 139-169 and 4/29/2016 at pp. 159-163 = 1/2 day); Donohue (3/14/2016 at pp. 174-178, 189-191; 3/15/2016 at pp. 3-29, 31-36; and 5/4/2016 at pp. 175-180 = 1/4 day); Bullitt (3/15/2016 at pp. 140-202 and 3/16/2016 at pp. 3-26 = 1/2 day); Latourette (4/27/2016 at pp. 35-45, 63-64 = 1/8 day).

476. The time and expense the Estates (and the Beneficiaries) incurred preparing for and conducting a hearing regarding the Initial Accounts was necessary only because Norris and the Lamb firm insisted on defending those accounts even though they were obviously deficient. N.T. (4/29/2016) at 3:17-4:19 (court ruling); Orders dated April 29, 2016.

477. During the months of November 2015 through April 2016, the period of preparation for and conducting the first eight (8) days of the hearing, the Lamb firm invoiced the Estates the following legal fees:

	Hours	Fees	Source:
Nov. 2015	614.70	$181,554.75	Exec. 60 (LM0960-0980]
Dec. 2015-Feb. 2016	668.35	$218,578.50	Exec. 60 [LM0981-1005]
Feb.-March 2016	560.00	$173,338.75	Exec. 76 [LM1006-1021]
Apr. 2016	596.75	$190,638.75	Exec. 76 [LM1021-1036]
Total	2,432.05	$761,493.25	

478. One-quarter (1/4) of this total is a reasonable estimate of the unnecessary costs of the trial preparation and trial days devoted to the Initial Accounts that the Estates incurred. That amount is $190,373.31.

XVII. Sir John's and Tiger's Estate Administration: The Revised Accounts

479. Pursuant to this court's Orders dated April 29, 2016, the Executor filed Amended and Restated Accounts in each of Sir John's and Tiger's Estates on July 13, 2016 ("the Revised Accounts").

480. The parties thereafter discussed the Revised Accounts and stipulated to certain facts relating to them, subject to the approval of the court. *See* Stipulation re: Revised Accounts, dated September 29, 2016.

481. The parties further agreed that the court, subject to these facts, may accept the Revised Accounts as accurate and adequate for purposes of the ongoing proceedings before the court, without the need to litigate further objections to them.

482. This agreement does not affect the matters in dispute before the court, except that the court may adjudicate them with the understanding that, as of September 29, 2016, the Executor shall be deemed to have provided an accurate accounting of all material financial transactions relating to the Estates and the partnerships.

483. The court approved this Stipulation and is proceeding in accordance with its terms. Orders dated September 30, 2016.

484. The Revised Accounts differ from the Initial Accounts in many ways. Of most significance in considering the Objections to the Initial Accounts is that both Revised Accounts accept the Beneficiaries' criticisms of the Initial Accounts.

485. For example, the Revised Account for Sir John's Estate eliminates most inter-partnership transfers and accounts for most of the partnerships separately from the Estate.

486. Further, the Revised Account for Sir John's Estate presents an Estate with principal receipts of $40,290,070, as compared with $50,087,109 in the Initial Account; subsequent receipts, other receipts and net gains which bring the total to $44,651,929, as compared with $76,844,503; total disbursements of $31,303,110, as compared with $56,671,698; total distributions to the Beneficiaries of $8,432,211, as compared with $13,764,235; and a combined principal balance on hand of $4,916,607, as compared to $6,408,560. The Revised Account thus shows an Estate that, while still sizable, is significantly smaller than originally presented to the court.

487. The Revised Account for Tiger's Estate presents an Estate with principal receipts of $13,321,173, as compared with $13,338,117 in the Initial Account; subsequent receipts, other receipts and net gains which bring the total to $13,910,643, as

compared with $14,846,251; total disbursements of $6,084,842, as compared with $7,267,015; total distributions to the Beneficiaries of $2,009,637, as compared with $1,777,685; and a combined principal balance on hand of $5,911,104, as compared to $5,908,296. While these totals are more consistent than in Sir John's case, the components of Tiger's Revised Account, which now include, for instance, the inheritance tax refund and other items of revenue and expense, are not so.

XVIII. Sir John's and Tiger's Estate Administration: Latourette Expert Testimony

488. The Beneficiaries called John R. Latourette as an expert witness at the hearings. Latourette is a graduate of the Rutgers University School of Law and holds an LL.M. degree in taxation from the New York University School of Law. He is a partner in the law firm of Dilworth Paxson LLP where he has practiced for 42 years, the last 37 as a partner. He serves as chair of that firm's trusts and estates department. N.T. (4/27/2016) at 12:13-14:6 (Latourette).

A. Qualifications and Expertise

489. Latourette's practice focuses on trusts and estates work and philanthropic tax and administrative work. He was co-executor of the Walter Annenberg estate and has represented the Annenberg Foundation and other Annenberg entities over the years. He has handled several other large estates and is trustee of several large trusts as well. *Id.* at 14:7-20. Latourette's client focus is high net worth individuals, for whom he provides estate and gift tax planning services. *Id.* at 14:21-15:3. Latourette is also familiar with family limited partnerships and valuation issues they present. *Id.* at 15:4-16:4.

490. Latourette is familiar with federal estate tax laws and with state inheritance tax laws.

491. Latourette has provided expert opinions and reports on the reasonableness of executor and trustee fees in the past and has testified previously in one such matter. *Id.* at 17:4-18:9, 30:4-17.

492. Latourette was offered, and after voir dire by Executor's counsel, was qualified as an expert in Pennsylvania trusts and estates matters, federal tax and state inheritance tax law for Pennsylvania and Florida, and issues related to that with regard to the management of large estates and the reasonableness of fees in particularly large estates. *Id.* at 32:9-20.

493. Latourette was asked to evaluate and render an opinion on the reasonableness of the Executor's compensation in both Estates, as well as the reasonableness of the attorneys' fees charged to the Estates.

B. Tiger's Estate: Expert Testimony on Fees of Executor and Professionals

494. Latourette began his evaluation by first determining what assets Norris was responsible for and their values. For each Estate he prepared a table that compared the asset values stated in the Initial Accounts filed with the court in March 2013 with the final values determined in the IRS audit. N.T. (4/27/2016) at 35:20-36:10 (Latourette).

495. For Tiger's Estate, Latourette found the Initial Account valued the assets at $13,338,117, which the IRS audited value of the same assets was $12,002,979. Because the Initial Account was prepared and filed after the IRS audit concluded, the numbers should have been the same. *Id.* at 36:11-37:11.

496. Latourette then considered what the Executor and the attorneys had to do with respect to those assets, reviewing the history of each of them in the Executor's hands. *Id.* at 37:12-17.

497. *Glenroy LP*: This was Tiger's home and required some level of activity following his death. But soon after his death, responsibility for property maintenance shifted to Rachel and Rupert. *Id.* at 37:18-38:10.

498. *Knockiemill Cottage*: This was a cottage Tiger had in Scotland, and was distributed to Rachel and Rupert shortly after Tiger's death. *Id.* at 38:11-17.

499. *Glenknockie LP*: This partnership included several properties. Latham and Graybill were purchased initially, while Driftwood and Hollybrook were purchased later. After Tiger died in 2006, however, Norris sold Driftwood and Hollybrook to TFIP, even though TFIP was still owed money for the purchase of those two (2) properties. *Id.* at 38:18-40:22.

500. *JJT Virginia Ventures LP:* This partnership acquired Hale Tract and held that property at Tiger's death. *Id.* at 40:23-41:12.

501. Latourette next looked at how the Executor addressed other matters relevant to Tiger's Estate:

502. *Estate Tax Return*: Norris hired Smith to prepare and file the federal estate tax return and Gibbs to prepare valuations of the assets in connection with that filing. Norris also hired an accounting firm, Morison Cogen, to prepare an analysis of the various transactions involving the real estate. *Id.* at 41:13-42:7.

503. *Documentation*: While there were no loan documents prepared for various real estate transactions, there was also no evidence that Sir John intended to make gifts of the assets. Latourette testified one can have oral loans and "that's, in fact, what was ultimately agreed upon and approved in the federal estate tax audit." *Id.* at 42:8-17.

504. *State Inheritance Tax Return*: A draft return was prepared in 2006. However, the actual return was prepared by the Lamb firm and filed by the Executor in 2013, seven (7) years after Tiger died. *Id.* at 42:18-24.

505. Latourette then reviewed Tiger's Initial Account (OBJ 7) to assess the role of the Executor in Tiger's Estate. He concluded the account "was not prepared in a form, in a format that is customary to be filed in an orphans' court, and did not follow the Supreme Court Orphans' Court rules." Assets were not individually identified; principal receipts and income receipts were confused and difficult to follow; and some transactions did not seem to appear in the account. *Id.* at 43:1-44:16.

506. Finally, Latourette looked at the amounts charged for executor fees ($543,000), attorneys' fees ($568,000 of which $323,000 was charged by the Lamb firm) and accounting fees ($86,000). These three (3) fees totaled approximately $1.2 million, or 9.98% of the probate estate. *Id.* at 44:2-21.

i. Opinions on Reasonableness of Fees in Tiger's Estate

a. Norris's Executor Fee

507. Latourette concluded that Tiger' Estate was not a complex estate. Responsibility for the Glenroy property was transferred to Rachel and Rupert near the beginning of the administration, and the Latham and Graybill properties thereafter. The other real estate, Hollybrook and Driftwood, were sold to Sir John's partnership and then divested. N.T. (4/27/16) at 65:4-16 (Latourette).

508. There was nothing unusual about Tiger's Estate administration. There was a tax audit. But Smith and Gibbs had been paid to handle that as part of their

$200,000 fee. And, Maillie had been paid $86,000 to deal with the accounting. *Id.* at 65:17-66:1.

509. Latourette summed up: "So, Mr. Norris hired people. And to the extent there was any activity at Glenroy that he was involved in it was generally handled by people he hired to manage the Estate. So I did not view his role to be unusual or difficult." *Id.* at 66:2-6.

510. Since in Tiger's Estate Latourette did not find that Norris provided any services beyond what was normal as the executor of an estate, he turned to the *Johnson Estate* guidelines as a fair one to follow in calculating the fee. Under those guidelines, a reasonable executor's fee for Norris would not exceed $118,000, with some adjustment downward with respect to the accounting fee. *Id.* at 68:6-69:3.

511. The court will also reference additional authorities in arriving at its adjudication.

b. The Lamb Firm's Legal Fees

512. Latourette further concluded that the fees the Lamb firm charged Tiger's Estate were unreasonable. The Lamb firm's role was to prepare the inheritance tax return filed in 2013, and assist in the tax audit. The accounting, however, was to be prepared by Maillie; the federal estate tax returns and any audit work by Smith and Gibbs; and the income tax returns by Maillie. He opined that the Lamb firm's role should not have been unusual. *Id.* at 71:22-72:15.

513. The Lamb firm billed the Estate over $323,000. The *Johnson Estate* guidelines suggests a fee of $118,000, which Latourette would adjust downward, since that case assumes one lawyer is doing all the work and here Smith and Gibbs took on the

federal estate tax work. Latourette thus multiplied the guidelines by a percentage equal to the ratio between the Lamb firm's fees ($323,000) and the total of all legal fees ($543,000), to arrive an allowable fee of $67,000. *Id.* at 72:15-74:1.

514. The court will also reference additional authorities in arriving at its adjudication.

C. Sir John's Estate: Expert Testimony on Fees of Executor and Professionals

515. Latourette began his evaluation of the fees in Sir John' Estate in a like fashion, comparing the asset values set out in Sir John's Initial Account with those determined in the IRS audit. He found the value stated in the Initial Account was $50,087,109 while the IRS audited values totaled $46,775,500. N.T. (4/27/2016) at 44:22-45:19 (Latourette). Sir John's Revised Account, filed July 13, 2016, reflects a corrected total asset value for Sir John's Estate of $40,290,470. This information was not available to Latourette, but it does not appear to alter his overall conclusions based on the Initial Account.

516. He noted that the professionals hired for Sir John's Estate were the same engaged for Tiger's: The Lamb firm as counsel; Smith and Gibbs as special counsel to prepare federal estate tax returns and valuations at a flat fee of $450,000; and Maillie to prepare income tax returns and financial accountings for all of the entities and for the court. *Id.* at 46:12-47:6.

i. Review of Sir John's Assets and Executor Activity

517. Latourette opined similarly with respect to each of the assets identified in Sir John's Estate.

518. *TFIP*: This was the source of cash with which real estate in certain of Tiger's and Sir John's partnerships was purchased. It was controlled and owned at Sir John's death by Norris. *Id.* at 47:11-24.

519. *Doe Run LP*: This partnership held Sir John's real estate in Pennsylvania and had the same ownership and control. *Id.* at 48:1-3.

520. *Thouron Florida Real Estate, LP*: This partnership owned Sir John's home in Florida. *Id.* at 48:4-5.

521. There were various cash and brokerage accounts, fishing rights in Scotland, some tangible property and some notes receivable not in partnerships. *Id.* at 48:6-10.

522. There was a trust created by Sir John's wife, Esther duPont, of which he was the beneficiary. This was not part of the Estate and passed directly to Rachel and Rupert, Sir John's grandchildren. *Id.* at 48:11-18.

523. Latourette evaluated the activity required of the Executor with respect to each of these assets:

524. *Forglen Fishing Rights*: These were distributed to Rachel and Rupert with the help of a Scottish attorney. *Id.* at 48:23-49:4.

525. *TFIP*: Norris hired a custodian and an investment advisor for the assets in this partnership. TFIP also had some mineral rights, which Norris distributed to the Beneficiaries. *Id.* at 49: 5-13. Latourette would expect to have seen assets in TFIP liquidated to avoid any market risk and prepare for an estate tax payment. *Id.* at 49:16-50:10.

526. *Doe Run, LP*: This asset required some work to administer until it was sold approximately two (2) years after Sir John's death. *Id.* at 50:21-51:2.

527. *Florida Real Estate*: This consisted of a house and a property across the street, the Sutphin property, which was purchased just before Sir John died with a documented loan from TFIP. The two (2) parcels were sold by the Estate in 2011. *Id.* at 51:3-18.

ii. Sir John's Estate Tax Return, Audit, and Ensuing Litigation

528. Latourette also considered the federal estate tax return filed by the Estate and the ensuing audit and litigation:

529. As previously stated, Smith and Gibbs prepared the federal return. The return went to audit. Sir John's and Tiger's returns were audited together. After several meetings, the audit was settled with the IRS. *Id.* at 51:19-52:17, 55:8-56:1.

530. After the penalty was paid; the Executor appealed the decision to the district court and then to the Third Circuit, which remanded the case back to the district court. After attorneys' fees in the litigations were considered, there was a net loss to the Estate. *Id.* at 56:8-14.

iii. Sir John's Initial Account

531. Sir John's Initial Account had flaws as noted already. *Id.* at 63:6-20.

iv. Fees Paid by the Estate

532. The Initial Account and Petition supplement showed total fees paid to attorneys as of January 31, 2013 as $3,557,000. Of these $2,981,000 had been paid to the Lamb firm and $451,000 had been paid to Smith and Gibbs. *Id.* at 63:21-64:15.

533. The Initial Account showed the total fees paid to Maillie by Sir John's Estate as of December 31, 2012, were $1,013,000. *Id.* at 64:16-19.

534. The Initial Account showed total fees paid to Norris of slightly over $4,000,000. *Id.* at 64:20-22.

535. These fees totaled 18.32% of the probate estate reported in Sir John's Initial Account. *Id.* at 64:23-65:3.

v. Opinions on Reasonableness of Fees in Sir John's Estate

a. Norris's Executor Fees

536. Latourette concluded that the $4 million plus in fees that Norris charged Sir John's Estate were unreasonable. The fee calculated under the *Johnson Estate* guidelines would total $409,000. A reasonable fee would adjust this guidelines amount downward to account for some portion of the $1,013,000 in accounting fees Maillie charged. *Id.* at 69:4-16.

b. Legal Fees Charged by the Lamb Firm

537. In Latourette's view, the Lamb firm's fees charged to the Estate are unreasonable for other reasons as well. The Lamb firm's role was to prepare the Pennsylvania inheritance tax return and any Pennsylvania matters that might arise. *Id.* at 74:2-16. It was not engaged to prepare the federal estate tax return or an audit of that return. That was specifically Smith and Gibbs's engagement and the Estate should not be charged by the Lamb firm for work entrusted to other counsel. *Id.* at 79:10-16.

538. Nor should the Lamb firm be paid by the Estate for any work relating to Norris's failure to extend the federal estate tax payment date or ensuing litigation.

539. The guidelines legal fee calculated under *Johnson Estate* for Sir John's Estate is $303,000. Multiplying this figure by the fraction represented by the Lamb firm's total fees per the Initial Account of $2,981,000 over the total of all legal fees in that account of $3,557,000, yields a fee of $254,000. *Id.* at 75:9-22.

540. Lastly, Latourette felt that the fees charged to the Estate by the Lamb firm to defend the Executor's commissions and its fees should not be charged to the Estate. *Id.* at 75:20-76:22.

ADDITIONAL FINDINGS OF FACT

IX. Post-Objections Fees of Executor's Counsel and Accountants

541. After the Beneficiaries filed their Objections to Norris's Initial Accounts on April 3, 2013, the Lamb firm invoiced the Estates under the title "Estate of Sir John Thouron" matter a total of $2,489,728.39:

LAMB	Amount Invoiced
April-May 2013	$54,189.76
June-July 2013	$40,060.40
August 2013	$11,560.75
September 2013	$29,156.44
October 2013	$27,906.70
November 2013	$41,751.00
December 2013	$18,642.50
Jan. Feb. 2014	$90,943.66
March-June 2014	$253,143.29
July-Sept 2014	$128,724.03
Oct.-Dec. 2014	$97,479.70
Jan.-Feb. 2015	$189,254.31
March-May 2015	$234,952.12
June-Aug. 2015	$86,523.69
Sept.-Nov. 2015	$400,050.01

Dec. 2015-Jan. 2016	$221,173.48
Subtotal	*$1,925,511.84*
Feb. 2016-Aug. 2016	$564,216.55
Total Mar. 2013-Aug. 2016	**$2,489,728.39**

Exec. 61 (pages 526-744, 906-1005)
Exec. 76 (pages 1006-1063)

542. The above listed invoices relate entirely to the Lamb firm's defense of the Beneficiaries' Objections. In Tiger's Estate in April 2013, the only task remaining was the processing of a refund received on that Estate's belatedly filed Pennsylvania Inheritance Tax Return. This was accomplished by August 2013 – and was billed to Tiger's Estate's matter, and not the "Estate of Sir John Thouron" matter. *See* Exec. 61, at p. 0143 (McConnell 8/26/2013 time entry).

543. In Sir John's Estate, the Smith litigation continued after April 2013 (it concluded in October 2013), but this work was, again, billed to the Smith litigation matter and not the "Estate of Sir John Thouron" matter. *See* Exec. 61, at pp. 913-917. There were no significant matters in Sir John's Estate that required the Lamb firm's attention after April 2013 except the Objections and allied discovery and other court proceedings.

544. Since the Beneficiaries filed their Objections to Norris's Initial Accounts on April 2, 2013, Maillie has invoiced the Estates for accounting services a total of $233,710.

MAILLIE	Amount Invoiced
2013-4	$6,325.00
2013-5	$7,400.00
2013-6	$7,650.00
2013-7	$5,195.00
2013-8	$2,750.00
2013-9	$3,275.00
2013-10	$3,550.00
2013-11	$4,650.00
2013-12	$7,455.00
2014-1	$6,250.00
2014-2	$3,410.00
2014-3	$7,065.00
2014-4	$6,885.00
2014-5	$12,775.00
2014-6	$5,415.00
2014-7	$4,775.00
2014-8	$3,275.00
2014-9	$3,875.00
2014-10	$3,975.00
2014-11	$8,115.00
2014-12	$6,155.00
2015-1	$5,950.00
2015-2	$5,785.00
2015-3	$6,250.00
2015-4	$8,730.00
2015-5	$6,750.00
2015-6	$6,155.00
2015-7	$5,675.00
2015-8	$5,525.00
2015-9	$6,375.00
2015-10	$3,350.00
2015-11	**$6,750.00**
2015-12	**$18,920.00**
2016-1	**$10,350.00**
2016-2	$3,100.00
2016-3	$5,930.00

2016-4	**$9,225.00**
	$233,710.00

Exec. 60 Maillie Invoices pp.76-109
Sir John Revised Account, pp.33-34.

545. Maillie is not a party to these proceedings. The question of its charges will be visited upon the Executor who paid them.

546. Although the Lamb firm's invoices in the post-Objections period provide some descriptions of the work performed, particularly after October 2014 when bills were required to be submitted for the court's review, Maillie's invoices provide no description of the work Maillie performed.

547. The boldface entries on the list of Maillie invoices above correspond to months in which Furman was preparing to testify or providing testimony at the hearing. The total of these bold face entries is $45,245.00. Furman also prepared for and provided testimony in May 2016; his invoice for services during that month is not in the record.

XX. The Lamb Firm's Discovery Conduct

548. On November 13, 2015, the Beneficiaries filed a Motion for Sanctions directed to Norris and Lamb based upon claims of non-compliance with Pennsylvania law and this court's discovery orders.

549. The Motion for Sanctions followed a series of motions and court orders directed to Executor's production of documents and, particularly, to the withholding of thousands of documents on grounds of privilege.

550. On September 29 and 30, 2016, the court held two days of hearings on the issue of post-Objections fees. The parties agreed that those hearings would also serve to

establish the record for the related Motion for Sanctions filed by the Beneficiaries addressed below.

551. At the hearing, Norris and the Lamb firm designated a shareholder, John C. Cunningham, IV, Esq. ("Cunningham") as their witness "to testify to the nature of the production and what happened and how it was done." *See* N.T. (12/2/15) at 180:1-10. Donohue also testified primarily with respect to underlying facts relating to the amounts of the invoices for post-Objections fees, the fact that they reflected work authorized by Norris, and the like.

A. Inadequacy of Document Production

i. The First Production – The Lamb Firm's Historical Time Records

552. Prior to formally ordering the Executor to produce the administrative files to the Beneficiaries, the court had a discussion with the parties regarding the Lamb firm providing the Beneficiaries' counsel with the time records reflecting work charged to the Estates. The Lamb firm produced the records in July 2013.

553. The produced records (as reflected in OBJ 72) were heavily redacted.

554. By this time, Cunningham had become involved in the case; his significant work began when the Objections were filed. N.T. (9/29/2016) at 36:21-37:11 (Cunningham).

555. Cunningham testified that he and another shareholder in the Lamb firm, Joel Frank, Esq. ("Frank"), were in charge of the Objections litigation, and that, while they delegated specific tasks to others, ultimate responsibility with respect to both the Lamb firm's production of its time records and the subsequent production of administrative files resided with them. *Id.* at 56:5-9, 76:24-77:8.

556. Cunningham testified, as did Norris, that questions of what should be produced or withheld on grounds of privilege were decided by the Lamb firm and that Norris did not have any involvement in making such decisions. *Id.* at 170:7-20; *see also* N.T. (12/2/2015) at 182:10-183:2 *et seq*. (Norris).

557. Cunningham testified that these records were redacted in the initial production because "we believed there was some privileged communications in there." N.T. (9/29/2016) at 40:4-10. However, Cunningham could not recall if he had been involved in the initial production, could not say "who actually reviewed and made those redactions," *id.* at 45:14-20; *see also* 40:11-20, did not know whether any partner of the Lamb firm was involved either in making redactions, *id*. at 45:18-20, or in supervising the process, *id.* at 45:21-46:1, and was unaware of what instructions, if any, had been given to guide the persons charged with reviewing the time records for production. *Id*. at 46:2-5.

558. Cunningham was also unable to recall whether anyone reviewed the initial set of redactions after entry of this court's Order and Opinion of October 17, 2013 (herein the "October 17, 2013 Order") ordering production of the Estates' administrative files. *Id*. at 50:8-13. Nor could he recall whether any such review was undertaken after discussions with opposing counsel regarding the same. *Id*. at 50:14-51:5.

559. Cunningham acknowledged that un-redacted copies of these historical invoices were not produced until late October 2015, about five (5) weeks prior to the date set for the commencement of the hearing in this matter. *Id*. at 48:2-5.

560. The Lamb firm actively resisted the Beneficiaries' requests that it revisit its redactions throughout the pretrial phase of this matter, and did not voluntarily revisit these redactions even in response to this court's Order of August 11, 2015.

ii. The Second Production – Administrative Files

561. On October 17, 2013, the court instructed Norris to produce to Beneficiaries the administrative files of the Estates. However, because of the recognized distinction under the law between communications relating to "administration" and those relating to the "defensive" interests the court determined that a wholesale order granting access to Estates' documents was not appropriate. The court required Norris to provide an appropriate privilege log for any documents withheld on the basis of such a privilege. Both parties began using the shorthand "defensive issues" to refer to these assertions of privilege.

562. Cunningham could not recall any discussions with the persons charged with reviewing documents about "what the attorney/client privilege is or isn't, and what it protects or what it doesn't." *Id*. at 58:10-17. He also could not recall if there were any discussions with the persons charged with reviewing documents about what would be required in order for a document to be subject to work product protection under Pennsylvania law. *Id*. at 58:18-59:1, 59:23-60:4.

563. He could not identify any "specifics" of what might have been discussed about "what was a defensive issue or what wasn't," *id*. at 79:9-23, and he did not recall whether there was any discussion of what "potential adversity" might mean in the context of the document production and privilege analysis. *Id*. at 79:25-80:4.

B. The Redactions and Resulting Withholdings

i. The Initial Redactions of the Historical Time Records and the Lamb Firm's Ongoing Refusal to Re-evaluate Those Redactions

564. In a telephone conference with counsel on February 4, 2015, the court advised Executor's counsel that, to the extent it wished to continue to seek provisional approval of the fees it was billing to the Estates on an ongoing basis, it would be required to provide counsel for the Beneficiaries with un-redacted current time records.

565. As to the historical time records, Cunningham testified that "my recollection is that we told you that we were not going to remove the redactions and stand by them." *Id*. at 61:24-62:20.

566. Cunningham testified that, up until the point at which it produced un-redacted historical time records in late October 2015, the Lamb firm's justification for declining to remove any redactions remained that they were necessary to protect privileged material or work product: "We had made redactions on the basis of privilege." N.T. (9/29/2016) at 63:20-24 (Cunningham).

567. During his testimony, Cunningham was asked to compare the first three (3) redacted entries in the historical time records as originally produced, as they appear in OBJ 72, with the same time records as they appeared in un-redacted form in OBJ 12. *See generally id.* at 64:4 *et seq*.

568. The first redacted entry was an entry for William Lamb on the very day of Sir John's death, February 6, 2007, in which the word "agenda" had been redacted. The entry, un-redacted, read in its entirety: "preparation agenda." The second entry was one for Donohue, also for February 6, 2007, in which the words "Wednesday meeting and

other miscellaneous issues" had been redacted. The third entry was one for Kehner for February 7, 2007, in which the redacted words were "to discuss Sir John's death and related issues; probate will." *Id*. at 64:16-66:20; OBJ 72-1; OBJ 12-16.

569. Asked to explain what privileged information was contained or revealed by the word "agenda," Cunningham replied that he "did not perform the redactions on this." N.T. (9/29/2016) at 67:14-17. Asked again if he could identify any basis for a claim that the redacted material was privileged, *id*. 67:21- 68:2, Cunningham responded that he was being asked for legal conclusions. *Id*. at 68:3-4. After an objection and some colloquy, Cunningham testified: "I can't explain to you why that would be privileged." *Id*. at 69:8-13. Cunningham similarly testified with regard to the other two entries presented to him: "I can't explain the privilege." *Id*. at 70:18-71:1.

570. Cunningham testified that he could say what had been done, which he described as being the removal of "the detail of or the specifics of what was done" such that "the substance of what . . . [the entry] was about was redacted", but that he could not justify what had been done on the basis of privilege. *Id.* at 67:21-68:11; 71:1-11.

571. At one point, Cunningham volunteered that, while he could not justify the redactions on grounds of privilege, "I can also tell you that ultimately we are not attempting to justify that." *Id*. at 69:14-17.

572. OBJ 72 confirms that the redactions to the Lamb firm's time records were not carefully tailored to protect privileged matter

573. By way of illustration, set out immediately below are the un-redacted texts of the next ten (10) time entries that were redacted in the original production (OBJ 72)

following the entries that were discussed with Cunningham. The material that was redacted from these entries in OBJ 72 appears in bold type:

02/07/2007	PSK	0.50	Prepare **Probate documents**
02/08/2007	WHL	2.25	Numerous phone calls, emails regarding **Merrill Lynch transfer of funds**
02/08/2007	JTK	1.75	Correspondence to Carolyn Wright re **Hague Convention declaration**; review emails **re transfer of trust from Merrill to Citibank;** meeting with Vincent T. Donohue re **documents regarding change of trustee; follow up** re **probate documents, filing fee, death certificate and short certificate**
02/08/2007	VTD	4.50	Miscellaneous issues and correspondence among team about **Trust assets**; draft letter **to MLT Trust regarding assets**
02/09/2007	WHL	2.25	Various email regarding **Merrill Lynch issues**
02/09/2007	JTK	.50	Pay probate fee; arrangements re **lodging death certificate and obtaining short certificates;** review emails re sa**feguarding due run and trust transfer**
02/10/2007	WHL	1.00	Various emails regarding **Merrill Lynch**
02/11/2007	WHL	1.00	Continue emails regarding **Merrill Lyncbh** [sic]
02/12/2007	WHL	2.00	Various telephone calls, emails regarding **Merrill Lynch problem**
02/12/2007	VTD	5.25	Miscellaneous correspondence to Citi, Charles Norris, William Lamb, Esquire and E. Furman; review documents; review **Greycourt report**

574. The redacted time entries, as contained in OBJ 72, were essentially useless to the Beneficiaries as a tool to assist them in evaluating counsel's performance and charges.

575. Cunningham could not recall whether the Lamb firm re-evaluated its original time records in response to the court's October 17, 2013 Order to determine

whether they were in compliance with that Order. Nor did Cunningham recall doing this in response to requests from the Beneficiaries to do so. The Lamb firm did not revisit their redactions in response to this court's last order addressed to document production and privilege issues, the Order of August 11, 2015 (the "August 11, 2015 Order").

ii. The Withholding of Documents in the Administration File On the Basis of Claims of Privilege Or Work Product

576. Cunningham also was examined about the claims of privilege contained in and the content of the privilege logs that his firm constructed in the course of the Objections litigation. Cunningham was presented with OBJ 40 and OBJ 41 during his testimony and examined about the same. N.T. (12/2/2015) at 180:3-5; N.T. (9/29/2016) at 111:23-24 *et seq*.

577. Donohue, who was the "hub of the wheel" for the Lamb firm's activities as the Estates' counsel, and, as Cunningham testified, one of the Lamb firm's shareholders involved in supervising the document production, was also questioned about whether he could explain by reviewing the logs (OBJ 41 and OBJ 40) or by providing additional personal knowledge, the basis upon which certain documents had been withheld from production. N.T. (9/29/2016) at 77:17, 78:1-2. Donohue had been unable to do so, even with respect to documents of which he was himself the author.

578. The following testimony all relates to documents that were withheld and logged as privileged on OBJ 41:

a. Donohue identified Carolyn Wright and Robert Partridge as United Kingdom lawyers who assisted in tax reporting and transfers of United Kingdom property. They were not to Donohue's knowledge involved in any other matters for the Estates. Cunningham confirmed that he also had

no knowledge of their being involved in any "defensive issues" on Norris's behalf. N.T. (9/29/2016) at 114:25-117:8.

b. Donohue understood that Laura Koropey worked in an accounting firm that had been involved with Pennsylvania state inheritance tax issues only. Cunningham was not aware of Koropey being involved with any "defensive issue" on behalf of Norris. *Id.* at 117:24-118:3.

c. The same was true of John Stacey and John Ferretti, whom Donohue identified as individuals whose only involvement with the Estates was to represent Bancorp in connection with its loan to Sir John's Estate. Cunningham again was not aware of their having been involved in any defensive issue on Norris's behalf: "I have no knowledge one way or the other." *Id.* at 119:4-120:20.

d. Donohue did not know who Claudia Puiu was and neither did Cunningham. Cunningham did not know whether she had ever been involved in a defensive issue on Norris's behalf, *id.* at 123:2-3, and could not tell by reviewing the information on the log whether the relevant document had been properly withheld. *Id* at 123:5-8.

e. Donohue testified that Stephanie Kalogredis had worked on the Pennsylvania tax return, but nothing else to his knowledge. Cunningham was not aware that Ms. Kalogredis had any involvement with the Thouron matters, much less any defensive issues on behalf of Norris. *Id.* at 141:19-142:7.

f. Donohue identified Jim Foster and Gregory Curtis as employees of Greycourt, who did nothing other than provide Norris with advice about management of TFIP's assets. Neither he nor Cunningham had any knowledge of their being involved in any defensive issues. *Id.* at 142:20-143:8.

g. Donohue did not know who Alison Moscoffian was. Neither did Cunningham. *Id.* at 144:19-24.

h. Donohue testified that a [Ron] Goodwin was hired, he believed by Smith, to assist Smith in addressing his potential liability for the tax penalty incurred by Sir John's Estate. Donohue testified that Goodwin was never hired by Donohue or Norris or paid by the Estate so far as he knew. Cunningham was asked if he was aware of Goodwin having done anything on Norris's behalf that would justify withholding his communications as privileged, and testified that he had "no knowledge as to what he did or he didn't do for Mr. Norris" and that he was not aware of any basis upon which communications between Smith and Goodwin could have been withheld on the basis of privilege. *Id.* at 145:5-147:2.

i. Asked to address other withheld Smith-Goodwin correspondence, and asked whether he could even tell whether there was in fact a defensive issue to which these documents might relate, Cunningham testified: "Right. I don't know what that is, and I can't tell you what it will be." *Id.* at 148:4-149:3.

j. Donohue acknowledged that he could not, just by reviewing the log, determine the basis upon which certain documents had been withheld even though he was himself the author of those documents, such as communications between himself and someone named Toner. Donohue had testified that Toner had not been hired by the Lamb firm, Norris or anyone else that he knew of. Like Donohue, Cunningham had no idea why communications with him would be withheld as privileged. *Id.* at 150:14-151:21.

k. Donohue testified that he did not know who Gerald Grenon was, but that he was not aware of his being anyone who had ever represented the Estate. Cunningham had no contrary information and acknowledged that "I do not know on what basis that document was withheld other than it just being identified as for a defensive issue." *Id.* at 152:9-21.

l. Donohue testified that Edward Orazem worked at Citigroup and his only involvement was to act as custodial manager of TFIP's accounts and as the lender under the TFIP line of credit. Cunningham was unable to offer any further information about what Orazem did or the justification for claiming privilege with respect to documents involving him, testifying that "I don't have knowledge of his involvement at all." *Id.* at 154:7-9.

579. Cunningham confirmed that the approach to asserting privilege that was taken in the Amended Privilege Log OBJ 40, was precisely the same as that employed in the original log, OBJ 41. *Id.* at 154:15-155:9.

580. Cunningham was equally unable to defend, on the basis of what was contained in the log, even as supplemented by his personal knowledge, a variety of entries in OBJ 40. For example:

a. Cunningham did not know who Michael Sawyer or Barbara Mayor were and was not aware of any basis upon which communications involving them could have been withheld on grounds of privilege. *Id.* at 158:14-21.

b. He could not explain why the amended log still claimed privilege with respect to communications between Smith and Goodwin, but confirmed through his testimony that OBJ 40 suffered from precisely the same fundamental systemic defect as OBJ 41. Thus, Cunningham explained his inability to tell whether any basis existed for the withholding of the Smith-Goodwin communications by stating: "I cannot tell you anything that's not already set forth in this amended privilege log". *Id.* at 158:22-160:15.

c. Cunningham did not know why draft documents intended for Ollie Oliver (the IRS agent charged with evaluating Sir John's Estate's administrative appeal from the tax penalty it incurred) had been withheld as privileged. *Id.* at 160:16-162:6.

d. He was not aware whether Percic had been involved in any defensive issues on behalf of Norris. *Id.* at 162:9-20.

e. He acknowledged that the Lamb firm knew no later than the March 15, 2007 meeting in its offices that Walper was representing Rachel and Rupert, and agreed that a document sent to Walper among others after that date should not have been withheld. *Id.* at 162:21-164:4.

581. Cunningham acknowledged that none of those logs produced prior to September 2015 provided any information beyond the kind of information contained in OBJ 40 and OBJ 41, which as the record shows is merely a recitation of the "defensive issue" privilege being claimed. *Id.* at 167:4-169:9; *see* OBJ 77; OBJ 78; OBJ 79; OBJ 80.

582. Cunningham's testimony established that no one could determine from the face of the privilege logs whether there was arguably a factual basis for the assertion of privilege with respect to any document on the logs.

583. Cunningham could "justify" the assertion of "defensive issue" privilege only by going round in this circle; "I do not know on what basis that document was withheld other than it just being identified as for a defensive issue." N.T. (9/29/2016) at 152:20-21.

584. Cunningham claimed the logs contained "information…that is helpful to me and to you to determine what these things [the claims of privilege] *might* apply to . . . ." *Id.* at 131:9-10 (emphasis added).

585. However, the only "information" to which Cunningham could point as support for the claim of privilege is the fact that the document says it is privileged – "I cannot tell you anything that's not already set forth in this amended privilege log." *Id.* at 160:14-15.

iii. Additional Evidence of Over-Designation and Unreliability

586. A massive number of documents were withheld as privileged by the Lamb firm. Even after entry of the court's August 11, 2015 Order, the Lamb firm's privilege

logs run to 3,715 pages, consisting of OBJ 73 (141 pages), OBJ 74 (45 pages), OBJ 75 (1,181 pages) and OBJ 76 (2,348 pages).

587. A number of the entries demonstrate significant over-designation of documents for privilege by the Lamb firm. For example:

a. ten (10) allegedly privileged documents randomly selected at the court's urging and submitted to Judge Sommer *in camera* for consideration of whether they were subject to Norris's limited privilege, Judge Sommer concluded that none were. *See* N.T. (9/29/2016) at 166:21-167:18 (Cunningham) and Order of May 11, 2015;

b. after the court's August 11, 2015 Order, the Lamb firm produced a number of documents which, despite the lack of substantive significance, had been withheld for almost two (2) years as privileged without any colorable basis. *See* N.T. (9/30/2016) at 50:2-51:13 (Cunningham) (identifying documents that included a letter from William Lamb to counsel for the Beneficiaries; an email from Colleen Davis to counsel for the Beneficiaries; a note from McConnell to William Lamb reading in its entirety "We are the only matter on the list for tomorrow at 9:00 a.m.;" a letter from counsel for the Beneficiaries to William Lamb; and a note from Jennifer Wayne to William Lamb reading in its entirety "The only room open is the library. Would you rather use that or meet in your office?").

588. Cunningham admitted that significant over-designation for privilege significantly increases the amount of work necessary to prepare a privilege log. N.T. (9/29/2016) at 130:15-131:2.

iv. The August 11, 2015 Order and the Persistent Deficiencies in the Lamb Firm's Final Logs

589. Cunningham also testified about the Lamb firm's responses to the court's August 11, 2015 Order, which contained specific instructions regarding how various classes of documents within the production should be handled.

590. The August 11, 2015 Order required that pre-May 7, 2007 documents relating to the issue of Sir John's domicile be produced unless (1) they were identified as relating to Norris's defense of the Florida domicile litigation filed by the Beneficiaries or prosecution of the Pennsylvania domicile litigation, in which case (2) any privilege log was to provide a brief description of the document's subject matter sufficient to establish a basis for privilege.)

591. Cunningham was examined about certain documents that the Lamb firm identified in the privilege log submitted for such documents as required by the August 11, 2015 Order (OBJ 73). N.T. (9/30/2016) at 8:6 *et seq*.

592. Cunningham acknowledged that each of the documents identified as a pre-May 2007 document relating to domicile about which he was questioned had been withheld without any justification that Cunningham could identify.

593. Cunningham testified that a document dated March 5, 2007 had been properly withheld ("I do not believe it should have been produced," *id.* at 12:17), but Cunningham could provide no justification for its having been withheld. He could not explain how Norris could be anticipating a domicile dispute before the issue had ever been discussed with the Beneficiaries, and could only repeat what he had stated his examination on documents in OBJ 40 and OBJ 41: "I don't know what he [Norris] might have been anticipating in his own mind, but I can tell you that there is a piece of

correspondence that relates to that with that date that we withheld." *Id*. at 13:21-24; *see generally id*. at 12:15-13:24.

594. Cunningham could offer no explanation for the withholding of a document relating to domicile dated March 16, 2007 (Box 53-0389), but acknowledged that it predated any domicile litigation. *Id*. at 14:17-15:14. He offered no justification for the withholding of a domicile related document (Box 53-2785) dated March 26, 2007. *Id*. at 15:21-16:2.

595. He testified similarly with regard to a number of other pre-May 7, 2007 domicile related documents, including one dated April 1, 2007 (Box 56-0301), *id*. at 16:8-17:2); one dated April 22, 2007 (Box 53-0394-98) (*id*. at 17:14-18); another, also dated April 22, 2007 (Box 53-0403-8) (*Id*. at 17:19-18:2).

596. He acknowledged the "obvious" error in the description of these documents as relating to work done post-May 7, 2007, *id.* at 18:7, but insisted that the log entries relating to them otherwise comply with the requirements of the August 11, 2015 Order: "Well we believe it does." *Id*. at 18:18-20:2 (speaking about Box 53-0393, which was used as a point of reference).

597. Although claiming that the log entries complied with the August 11, 2015 Order, Cunningham was completely unable to provide any information about the subject matter of the document, Box 53-0393, repeating "I can only tell you what is set forth on the log, which is the subject matter is the defense or prosecution of the domicile litigation filed in Florida or in the Orphans' Court." *Id*. at 21:4-7.

598. A review of OBJ 73 confirms that none of the documents identified as pre-May 7, 2007 documents related to domicile contains any brief description of their subject

matter, much less one sufficient to support a claim of privilege as required by Paragraph 1(b) of the August 11, 2015 Order.

599. Cunningham sought to defend his firm's approach by testifying that "if I was telling you more information, I would be telling you what the – what it said, what it was about. And that was what, in our view, was privileged." *Id*. at 21:15-17.

600. When asked whether he was aware that, where privilege is concerned, there is a very significant difference between what a communication says and what it is about, *id*. at 21:18-21, Cunningham, after an objection and some colloquy, responded: "I'm not sure I can really answer your question." *Id.* at 24:22.

601. Cunningham was examined about another category of documents - - IRS "audit strategy" -- withheld and logged in part on OBJ 73 totaling almost 3,900 documents.

602. Cunningham agreed that Paragraph 5 of the August 11, 2015 Order established, as the default position with regard to documents relating to the IRS Audit, that they were to be produced if they predated the filing of the Beneficiaries' Objections on April 13, 2013.

603. The Order further required that if there were "sub-issues" within the audit as to which Norris claimed privilege applied, any privilege log was to identify the applicable documents and provide a brief description of their subject matter sufficient to support the claim of privilege. *Id*. at 27:20- 28:11.

604. Cunningham was then directed to OBJ 73 and questioned about two examples of documents (Box 80-1803-04 and 1805-07) that were withheld on the basis of

a description "IRS audit strategy between Norris and his representatives prior to beneficiaries' objections filed on April 13th, 2013." *Id*. at 28:12-29:4.

605. Asked if he saw any "sub-issue" with respect to which Norris claimed a privilege, *id*. at 29:9-10, Cunningham suggested that the documents do not really relate to the audit, *id*. at 30:5, and that, despite their description, he "believes" they actually relate to Norris or the Lamb firm being blamed for what occurred as a result of the tax penalty, and that the Lamb firm had "explained this" in its response to the Beneficiaries motion for sanctions. *Id*. at 30:23-31:4.

606. Asked if he was testifying under oath that all 3,900 documents that had been described as reflecting "audit strategy" in fact related to strategy as to how Norris or the Lamb firm might defend against claims that they were liable for the tax penalty, Cunningham acknowledged that he "ha[d] not gone back and reviewed the 3,900 documents that you are referring to." *Id*. at 35:2-10.

607. Cunningham then acknowledged that the documents were not limited to assessments of Norris's or his firm's potential liability for the tax penalty, but really covered three subjects: "we say as a general matter that this relates to documents in anticipation of the IRS litigation, the Cecil Smith litigation, and the fact that your clients ultimately blamed Mr. Norris and our firm for the tax penalty and all that arose from that." *Id*. at 35:12-16.

608. Asked if he could substantiate this claim, Cunningham admitted he did not know who looked into the question, what they looked at, or how they came to the conclusion that the withheld documents related to the matters Cunningham identified: "I

do not recall that. I know it was not me who looked at documents for that purpose". *Id*. at 36:5-9.

609. Cunningham believed that at least some of the documents described on the privilege log as relating to "audit strategy" in fact related to a "defensive issue" (an assessment by Norris and the Lamb firm of potential claims that they bore some responsibility for the tax penalty). He did not claim, however, that all of them did.

610. He did not contend that the withholding of documents logged as relating to "audit strategy" complied with the requirement of Paragraph 5(a) of the August 11, 2015 Order that Norris was to provide "a brief description of its subject matter sufficient to support a claim of privilege." Nor did Cunningham claim that the Lamb firm's explanation complied with the identical provision in the second Paragraph numbered 5(b)(ii) in the Order (which should have been numbered 5(b)(iii)), although he acknowledged that the basis upon which privilege might be claimed for some of the documents was that they might fall into that category. *Id*. at 39:7-24.

611. Cunningham was asked whether any of the withheld documents that he believed related to the Smith and tax penalty litigations were subject to the paragraph of the August 11, 2015 Order correctly numbered as 5(b)(ii) in the August 11, 2015 Order and agreed that many such documents (which the paragraph 5(b)(ii) requires be produced) had in fact been withheld without any explanation beyond the claim that the document "addresses/reflects an assessment of beneficiaries' claims in the IRS litigation" or "addresses/reflects an assessment of beneficiaries' claims in the Smith litigation." *Id*. at 41:11-42:14.

612. While Cunningham claimed that at least some of these documents relate to Norris seeking advice from Smith about Norris's potential liability for the tax penalty, after William Lamb had told Smith that Norris intended to hold Smith solely liable for that penalty, Cunningham did not identify any specific documents as falling into this category. *See generally id.* at 42:19-45:16.

613. Cunningham was examined about that part of Paragraph 7 of the August 11, 2015 Order that requires substantiation of claims that documents reflect protected non-lawyer work product through the provision of a description of the work the authoring or receiving non-lawyers were retained to perform. Cunningham could not identify any log entries containing any such description, *id*. at 52:25- 55:9. In fact, there are none.

614. Despite this, the logs produced in response to the court's August 11, 2015 Order withhold numerous documents involving individuals identified as non-lawyers.

615. Cunningham was directed to the example of Alan Denis, an accountant at the Morison Cogen firm and an email (OBJ 75-246, Estate Email 92911) withheld on the basis of a claim that it relates in some unspecified way to "complaints or issues . . . raised during course of administration." As Cunningham acknowledged, the log contains no information as to what Denis was purportedly retained to do. N.T. (9/30/2016) at 55:20-57:18.

616. Cunningham could not tell whether another example presented to him relating to a Mr. Ladd (OBJ 75-624, Estate Email 112591) should have contained such a description, because he did not know who Ladd was. N.T. (9/30/2016) at 57:19-58:8.

617. Finally, Cunningham was asked a few questions about the 2,300-plus page privilege log OBJ 76. Examples of his testimony with regard to that document follow:

a. Cunningham was shown a document (Box 75-1499-1500) logged as withheld pursuant to paragraph 1(c) and asked if he agrees it is not subject to 1(c), since it is not a pre-May 7, 2007 document. He testified "Well, it could be [subject to 1(c)] if the date is incorrect on the log." *Id*. at 59:13.

b. Shown a document said to be related to domicile and dated 11/12/06 (Box 55-0857-59), Cunningham again surmised that there may be a problem with the date of the document (*Id*. at 61:1-3), although he says "I was not involved so I can't say that for sure" and that he is "just testifying about what my belief is." *Id*. at 61:4-14.

c. Finally, Cunningham was presented with a sampling of log entries and questioned whether, even after the court's August 11, 2015 Order, the Lamb firm had prepared privilege logs with the requisite degree of care. The log entries and Cunningham's testimony confirmed that they had not. *See generally id.* at 62:3-63:12 (OBJ 76-1513 (Estate Emails 76238, 76239, 76240, 76267); OBJ 76-1514 (Estate Emails 76281, 76283, 76286, 76309).

618. Even after the court's Order of August 11, 2015, the Lamb firm continued to produce logs that withheld substantial numbers of documents and failed to substantiate claims of privilege.

619. The last series of logs was produced in late September, almost two (2) years after the court had first ordered the production of privilege logs on October 17, 2013, and just over two (2) months prior to trial. These logs totaled more than 3,500 pages in length.

620. Again, a significant number of documents were withheld without justification as required by the August 11, 2015 Order and, in some cases (as with documents subject to paragraph 5(b)(i) of the Order – *see, e.g.,* all of the documents listed at OBJ 73-97) despite the fact that the Order mandated that the documents be produced.

C. Conduct with Respect to Documents Actually Produced

621. Cunningham was examined with regard to a number of matters relating to those portions of the Administration file that were produced and originally maintained in hard copy. N.T. (9/29/2016) at 86:4-24.

622. Shortly after the entry of the October 17, 2013 Order, the Lamb firm proposed to the Beneficiaries' counsel that it first provide counsel with an "inventory" of the administrative files to help the parties focus on what information needed to be produced. The Beneficiaries, through counsel, agreed to this approach and an inventory of 81 boxes was provided to the Beneficiaries' counsel in November 2013. OBJ 20 (also admitted as Exec. 44); *id.* at 14:23-15:10, 51:20-52:6; *see also id.* at 7:8 (Frank statement to court).

623. The parties engaged in further communications aimed at identifying the files most likely to contain relevant information. They narrowed the initial production down to 39 of the 81 boxes. The Lamb firm concluded it was most efficient to convert these 39 boxes into electronic format before producing them. *Id.* at 87.

624. The Beneficiaries objected strongly to this approach. Cunningham represented that the proposed conversion was aimed at making document review easier and less expensive.

625. Cunningham testified that when the Lamb firm produced the electronic versions of the hard copy files, they did not contain any demarcation to identify where one document began or another ended, *id.* at 100:7-14, but were, rather, produced simply as a series of pages. *Id.* at 103:20-23.

626. Cunningham acknowledged that, upon this production, opposing counsel objected on the basis that simply producing an undifferentiated series of pages degraded rather than enhanced the reviewability of the original documents. *See* OBJ 197.

627. The Beneficiaries first raised the issue of the "quality" of the Executor's electronic production of the 81 boxes of administrative files in October, 2014 when the Beneficiaries filed a motion to compel.

628. The Beneficiaries sought an order compelling Executor to reproduce the electronically produced files in the format they requested.

629. The court denied the motion without explanation.

630. The Beneficiaries later filed a motion seeking reconsideration of the court's October, 2014 Order, but represented to the court that they were not requesting reconsideration of the electronic data issues.

DISCUSSION

I. Issues for Disposition

A. Remaining Objections to Initial Accounts

Certain of the Beneficiaries' Objections were overruled on a motion for a partial nonsuit at the close of the Beneficiaries' case. *See* Order, Estate of John J. Thouron, No. 1506-0305, dated May 2, 2016 (overruling Objections Nos. 3, 5, 8 and 10); Order, Estate

of Sir John R.H. Thouron, No. 1507-0230, dated May 2, 2016 (overruling Objections Nos. 3, 5, 9 and 13).

The remaining Objections before the court may fairly be summarized as:

(a) Objections directed to the form, content, accuracy, adequacy and propriety of each of the Initial Accounts and to payment of legal and accounting fees and other costs related to these accounts (Tiger's Estate, Objection Nos. 1, 4, 5); Sir John's Estate, Objections Nos. 1, 4, 6, 7, 10, 16);

(b) An Objection to legal fees charged to and tax payments incurred by Sir John's Estate as a result of Norris's decision to probate Sir John's will in Pennsylvania as the estate of a Pennsylvania domiciliary and the related litigation over Sir John's domicile. According to the Beneficiaries, Norris and the Lamb firm breached their fiduciary duties to the Estate and the Beneficiaries by treating Sir John as a Pennsylvania domiciliary and needlessly paying the resulting Pennsylvania inheritance tax, and by affirmatively seeking a declaration that Sir John was a Pennsylvania domiciliary. They claim (1) Norris should be surcharged for the net cost to the Estate of the Pennsylvania taxes that could have been avoided and (2) the Lamb firm fees incurred and charged to the Estate for conducting the domicile litigation should be disallowed (Sir John's Estate, Objection No. 8);

(c) An Objection to legal fees incurred in connection with efforts to abate or otherwise remedy a tax penalty charged to Sir John's Estate as a result of Norris's failure to request timely an extension of the deadline to pay estate taxes. The Beneficiaries contend that the penalty was incurred as a result of Norris's and his counsel's breaches of their fiduciary duties to the Estate and the Beneficiaries and that (1) Norris should be

surcharged as necessary to make the Estate whole and (2) the Lamb firm fees incurred in an effort to remedy the effects of the penalty (i) are not properly chargeable to the Estate, or, (ii), in the alternative, should be limited to that amount of fees that will allow the Estate to be made whole, without allowing the Beneficiaries to enjoy a windfall recovery (Sir John's Estate Objection No. 15);

(d) An Objection to the borrowing costs Sir John's Estate incurred in connection with a loan from Bancorp that was taken out in 2010 to pay estate taxes. The Beneficiaries claim that this loan was necessary only because Norris failed to manage the Estate's assets in accordance with his fiduciary duties to the Estate and the Beneficiaries, and that Norris should be surcharged in the amount of interest the Estate paid on the loan (Sir John's Estate, Objection No. 14);

(e) Objections to the executor fees charged by Norris to each Estate as grossly excessive and unreasonable. The Beneficiaries contend that these fees should be disallowed. (Tiger's Estate, Objection No. 7; Sir John's Estate, Objection No. 12).

(f) Objections to the legal fees paid to the Estates' counsel, the Lamb firm and Smith, in Sir John's Estate as grossly excessive and unreasonable. The Beneficiaries contend that these fees should be disallowed. (Tiger's Estate, Objection No. 6; Sir John's Estate, Objection No. 11); and,

(g) Objections to the accounting fees paid to Maillie and to other accountants as grossly excessive and unreasonable. The Beneficiaries contend that these fees must be considered part of the compensation paid to the Executor, and that they should be disallowed to the extent excessive and unreasonable. (Tiger's Estate, Objection No. 9; Sir John's Estate, Objection No. 14.)

B. Post-Objections Fees

After the Objections were filed, the Lamb firm was instructed to produce its time records for work that had been charged to the Estates, Norris was ordered to produce non-privileged documents in his administrative files to the Beneficiaries, and the parties began to engage in discovery. Norris caused Sir John's Estate to pay the Lamb firm's legal bills for its work in defending against the Objections. The Beneficiaries moved to stop these payments. The court, on October 7, 2014, entered an Order requiring court approval prior to payment, with any payment being expressly "without prejudice to the Beneficiaries' right to challenge the award of these fees in connection with the adjudication of the Beneficiaries' Objections to the Executor's First Account in this matter." *See* Order, dated October 7, 2014. Subsequently, beginning with an Order dated April 2, 2015, the court required the Lamb firm to place all fees it received in "a segregated client account" where they "shall remain . . . until final disposition of this matter by the court or further order of the court." *See* Order dated April 2, 2015 at ¶¶ 3-4.

Pursuant to these Orders, and to the court's obligation to approve or disapprove executor and counsel fees, post-Objections fees paid to the Lamb firm from the Estates are, like the Lamb firm's pre-Objections fees, a subject of this Adjudication.

C. Motion for Sanctions

On November 13, 2015, the Beneficiaries filed a Motion for Sanctions directed to Norris and Lamb based upon claims of non-compliance with Pennsylvania law and this court's discovery orders. The Motion for Sanctions followed a series of motions and court orders directed to Executor's production of documents and, particularly, to the

withholding of documents on grounds of privilege. The Beneficiaries contend that Norris and the Lamb firm failed to comply with these orders, and their motion requests a decree deeming certain matters to be established for purposes of this adjudication, barring Norris and the Lamb firm from offering evidence on such matters, and awarding fees and costs. In addition, or in the alternative, the Beneficiaries request an order disallowing some or all of any post-Objection fees paid to or claimed by the Lamb firm that are not otherwise subject to disallowance.

D. Revised Accounts and Parties' Stipulation

After hearing eight (8) days of testimony, the court ruled, *sua sponte*, that the Initial Accounts were "not useful" and "cannot possibly be audited because of [their] form and content." It directed the Executor to file Amended and Restated Accounts. N.T. (4/29/2016) at 3:9-4:16; Orders, dated April 29, 2016. The Executor filed his Amended and Restated Accounts (the "Revised Accounts") on July 13, 2016. The Beneficiaries and the Executor, on September 29, 2016, entered into a "Stipulation and Order Regarding Revised Accounts filed July 13, 2016 and Hearing and Adjudication of Objections" (the "Stipulation re: Revised Accounts"), which was approved and entered as an Order of the court.

In the Stipulation re: Revised Accounts, the parties agreed that the court may, subject to certain facts stipulated to by the parties, accept the Revised Accounts "as accurate and adequate for purposes of the ongoing proceedings before the court and the Beneficiaries need not file additional objections to those accounts, nor with the parties have to litigate any such objections." The Stipulation re: Revised Accounts provides, however, that it "shall not affect the matters in dispute between the parties, and under

consideration by the court, except that the court may adjudicate such matters with the understanding that, as of the date of this Stipulation, the Executor shall be deemed to have provided an accurate accounting of all material financial transactions relating to the estates and partnerships." Stipulation re: Revised Accounts, § I, A-B

II. Norris's Duties

A. Norris's Duties as Executor

As executor of Tiger's and Sir John's Estates, Norris is a fiduciary who "owes a duty of loyalty to [the] beneficiar[ies] of his trust." *In re Noonan's Estate.*, 361 Pa. 26, 30, 63 A.2d 80, 83 (1949); s*ee also* 20 Pa. C.S.A. §7772(a) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). As a fiduciary, Norris must prefer the interests of the Beneficiaries to his own and is "'held to the highest degree of good faith'" in fulfilling his duties. *Estate of Campbell*, 692 A.2d 1098, 1101 (Pa. Super. Ct. 1997) (citation omitted). He has the absolute duty to administer fiduciary assets solely in the interest of the beneficiaries. *In Re Flagg's Estate*, 365 Pa. 82, 87, 73 A.2d 411, 414 (1950). He is obligated to preserve and protect the property for distribution, *In Re Estate of Kurkowski*, 487 Pa. 295, 301, 409 A.2d 357, 360-61 (1979), and to distribute the estate promptly. *McCrea's Estate*, 475 Pa. 383, 387, 380 A.2d 773, 776 (1977).

In addition to owing fiduciary duties, Norris, as executor, also owes a duty of care to the Beneficiaries, and is required "to exercise the same degree of judgment, skill, care and diligence that a reasonable or prudent person would ordinarily exercise in the management of his or her own affairs." *Estate of Campbell*, 692 A.2d at 1101-02.

Absent a receipt and release, an executor must account for his administration of a Pennsylvania estate to the beneficiaries and the court in accordance with statute and the

rules of the Orphans' Court. *See, e.g.*, 20 Pa. C.S.A. § 3501.1; Pa. O.Ct. Rule 6.1 *et seq.*; *In re Malvestuto's Estate*, 25 Pa. D. & C. 2d 686, 689 (Orphans' Ct., Phila. Cty. 1962) ("There can be no question that in Pennsylvania a personal representative is ordinarily under a duty to file an account of his administration, and he can be cited to file an account by any party in interest if he fails to do so."); *In re Bennicas Estate*, 79 Pa. D. & C. 299, 301 (Orphans' Ct., Lehigh Cty. 1951) ("[T]he chief duties of an executor and administrator are to collect and take charge of the assets of decedent, to file an inventory, and to file a true account of his administration at the expiration of six months from the grant of letters; and for a fiduciary to be excused from filing an account requires that he submit an unusual set of facts showing clearly that no useful purpose could be served in filing an account."). Finally, the executor, as a fiduciary, must keep adequate records of his administration. 20 Pa.C.S.A. § 7780.

B. Norris's Duties as Sole General Partner

Since September 2005, Norris has been the sole member of the LLCs that are the general partners of the Thouron family limited partnerships. As such he owed fiduciary duties to the Beneficiaries and limited partners in those partnerships. Among these duties is a duty of loyalty and the corresponding obligation to act for the benefit of the other members of the partnership. *See Clement v. Clement*, 436 Pa. 466, 260 A.2d 728, 729 (1970); *see also Hamberg v. Barsky*, 355 Pa. 462, 465, 50 A.2d 345 (1947). "Partners owe a fiduciary duty to one another . . . One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes." *Id.*

C. Norris's Duties as Co-General Partner

Norris has described himself as a "co-general partner" with Tiger of the family limited partnerships during the period prior to September 2005. Technically, however, a limited liability company (LLC) was the general partner; Norris and Tiger were 50-50 owners of each LLC until September 2005, when Tiger assigned and transferred all of his interests to Norris in view of Tiger's illness and impending death.

Before becoming the sole owner of the general partner LLCs, Norris deferred to Tiger on all matters relating to the management of the partnerships. During this period, he abdicated, and made no substantial effort to fulfill, any of his duties as *de facto* co-general partner. Norris's abdication of his duties does not, however, protect him from responsibility for the acts or omissions of the LLC as general partner of the partnerships, or from responsibility for any defects in the various transactions into which the partnerships entered prior to September 2005.

The agreement that Norris signed governing the LLC general partner of TFIP (the partnership that held the Thourons' investment and liquid assets), stipulated that the LLC could act only "by the affirmative vote of *a majority* of the Members." Limited Liability Operating Agreement of Thouron Family Investment, LLC dated Jan. 30, 2003 ("TFI, LLC Agreement") at §5.0(a) (Exec. 59 at 0265) (emphasis added). As Norris and Tiger were 50-50 owners and the only members of TFI, LLC until September 2005, the general partner could act lawfully only with Norris's vote. *Id.*

Norris's testimony was, in effect, that he gave Tiger his proxy, since he insisted that Tiger was authorized to cause the partnerships to enter into the transactions they did prior to Norris's becoming sole general partner. As a result of his abdication of the duties

he expressly undertook with regard to each of the general partner LLCs, for the benefit of the FLPs, Norris is responsible at law for all irregularities, improprieties, or inadequacies of documentation that existed as a result of the pre-death partnership transactions of which he now complains as Executor.

This follows from the plain language of the LLC agreements. The TFI, LLC Agreement, for instance, provides with respect to a member's liability:

> (b) Liability for Acts or Omissions. To the extent not inconsistent with applicable law, no Member … shall be liable, responsible or accountable in damages or otherwise to the Company or any Member for any action taken or failure to act on behalf of the Company within the scope of authority conferred upon the Member by this Agreement, *so long as the Member has acted in furtherance of a good faith belief that such course of conduct was in the best interest of the Company and said conduct did not constitute gross negligence, gross misconduct, fraud, breach of fiduciary duty, or a breach of this Agreement.*

TFI, LLC Agreement at §5.8(b) (Exec. 59 at 0268) (emphasis added).

The other LLC agreements signed by Norris contain substantially similar provisions. Exec. 59 at 0340-41 (TFRE, LLC §§ 7.1, 8.1-8.2), 10013, 1019 (Glenknockie, LLC §§ 5.01, 11.02(b)). Norris was legally and contractually bound to act, along with Tiger, as a *de facto* "co-general partner" of the family limited partnerships by directing the actions of its general partner, the LLC.

III. The Lamb Firm's Duties as the Executor's Counsel

As counsel to Norris in his capacity as executor, the Lamb firm also owed fiduciary duties to the Beneficiaries, even though they were not that firm's clients. This court has previously so held. *Estate of Thouron*, 61 Chester Co. L.R. 422, 3 Fid. Rep. 3d 435, 2013 WL 10573657, at *4 & n.1 (Orphans' Ct., Chester Cty. Dec. 13, 2013).

The duties counsel for the fiduciary owes to non-client beneficiaries are characterized as "joint," "derivative," or "secondary" duties. They are prohibitive or restrictive, and bar counsel from "taking advantage of his or her position to the detriment of the fiduciary estate of the beneficiaries." *Pew Trust (No.2)*, 16 Fiduc. Rep. 2d 80, 85 (Orphans' Ct., Mont. Cty. 1995). The duties arise primarily because of the nature of the representation and the relative positions of the lawyer, fiduciary and beneficiaries, that is, because the lawyer stands in a fiduciary relationship as to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries. . . . Support for these 'derivative' duties rests in the fact that the fiduciary estate has been created by the settlor for the exclusive benefit of the beneficiaries, the fiduciary and the lawyer for the fiduciary are compensated by the fiduciary estate, and the fiduciary traditionally stands in a superior position relative to the beneficiaries, who, in turn, "repose trust and confidence in the lawyer.'"
Id. (citing "ACTEC Commentaries on the Model Rules of Professional Conduct," 28 REAL PROPERTY, PROBATE AND TRUST JOURNAL 865, 871 (Winter 1994)). As the Superior Court has held, "the standard of care for counsel to an estate is at least equivalent to that of the executor." *In re Estate of Westin*, 874 A.2d 139, 147 (Pa. Super. Ct. 2005).

Accordingly, just as Norris was obligated to prefer the interests of the Beneficiaries to his own, so was the Lamb firm. The Lamb firm, as Norris's counsel, was subject to the same restrictions as Norris and could not assist, aid or abet Norris in breaching his obligations to the Beneficiaries without exposing itself to liability.

Counsel for an estate also bears responsibility for the accounts the estate provides to the court. *Marcella Estate*, 12 Fiduc. Rep. 2d 224, 228 (Orphans' Ct., Phila. Cty.

1992) ("[T]he preparation of the account is the responsibility of the lawyer and his client, the executor . . . .") (quoting the hearing judge); *see also Feise Estate*, 21 Fiduc. Rep. 2d 317, 321 (Orphans' Ct., Mont. Cty. 2001) ("While there is some authority that the tax work is the responsibility of the executor . . . in today's world these tax services are normally performed by the attorney representing the estate in such matters.").

IV. Standards and Burden of Proof Applicable to Executor Fees

A. Basic Standards for Executor Fees

Executors are entitled to reasonable compensation for services provided, which may be based on a graduated scale. The Probate, Estates and Fiduciaries Code provides as follows:

> §3537. Compensation
>
> The court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage.

20 Pa. C.S.A. §3537.

The basis for determining whether compensation is reasonable under Section 3537 depends upon the value of the services actually rendered. *In Re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 312-13 (1996) (citing *In Re Estate of Rees*, 425 Pa. Super. 490, 625 A.2d 1203 (1993)). Although in *In Re Reed's Estate*, 462 Pa. 336, 340, 341 A.2d 108 (1975), the Supreme Court stated that "as a matter of convenience, the compensation of a fiduciary may be arrived at by way of percentage . . ." [citations omitted] it concluded that "this test, however, is merely a 'rule of thumb', the true test being what the services were worth." An executor's compensation should be based on actual services provided and not an arbitrary formula. *Estate of Sonovick*, 373 Pa. Super.

396, 399, 541 A.2d 374, 376 (1988). Similarly, the Superior Court in *In Re Estate of Preston*, 385 Pa. Super. 48, 560 A.2d 160 (1989), called into question the use of a percentage based fee schedule. Therefore, it follows that where there is evidence that the services were actually worth more or less than what is *prima facie* reasonable as, for example, "where the fiduciary performed extraordinary duties . . . or where the performance falls below accepted norms", the amount of compensation may be increased or decreased accordingly. *In Re Reed's Estate, supra.*

In this court, *Johnson Estate,* 4 Fiduc. Rep. 2d 6, 7-8 (Orphans' Ct., Chester Cty. 1983), and the schedule of percentages provided there, continue to provide a useful starting point, a rule of thumb, from which one can "focus ultimately on what is fair and reasonable under the circumstances." *Bailey Estate*, 10 Fiduc. Rep. 2d 55, 57 (Orphans' Ct., Chester Cty. 1990). To justify payments of commissions or fees greater than the rule of thumb, an executor "must present evidence that the administration of the estate was in some way extraordinary." *Feise Estate,* 21 Fiduc. Rep. 2d at 320. On the other hand, where the executor shows he provided only limited services, requested commissions and fees are often reduced. *Fanning Estate,* 26 Fiduc. Rep. 2d 1, 9-11 (Orphans' Ct., Chester Cty. 2005) (reduced claim on $27 million estate because executor only searched house and organized items); *Polischeck Estate,* 24 Fiduc. Rep. 2d 465, 468 (Orphans' Ct., Chester Cty. 2004) (reduced request from approximately $9000 to $5000); *Thomas Estate,* 24 Fiduc. Rep. 2d 235, 237-38 (Orphans' Ct., Chester Cty. 2004) (reduced request from $3600 to $2000); *Fitch Estate,* 8 Fiduc. Rep. 2d 251, 253-55 (Orphans' Ct., Chester Cty. 1988) (reduced to *Johnson* level but no lower); *Estate of Perry,* 27 Ches. Co. Rep. 379, 384 (Orphans' Ct., Chester Cty. 1979) (reducing requested commissions from 6% to

3% of approximately $124,000 estate); *Frame Estate*, 62 Pa. D. & C.2d 46, 52-53 (Orphans' Ct., Chester Cty. 1973) (affirmed reduction to 5% on personalty and 3% on real estate).

Consistent with *Reed* and *Preston*, a court may take a percentage-based fee schedule into account when evaluating the reasonableness of a requested fee. It is permissible to use such formulas as one factor among others in determining whether requested fees are reasonable. *See, e.g.*, *Shilling Estate*, 4 Fiduc. Rep. 3d. 8 (2013). The true test is always what the services were actually worth. *Estate of Reed, supra*.

B. Executor Responsible for Accountant's Fees and Account Preparation

Where an accountant is engaged by the estate, his fee should be paid out of the executor's commission. *Bailey Estate,* 10 Fiduc. Rep. 2d at 58; *see also Donofrio Estate*, 5 Fiduc. Rep. 3d 384, 388 (Orphans' Ct., Wash. Cty. 2015). There is substantial authority which holds that preparing and filing tax returns are part of the duties of an executor. If the personal representative cannot handle the matter, he pays others from his commission, not in addition to his commission. *Grimble Estate,* 3 Fiduc. Rep. 3d. 224 (2013). Other courts in recognition of the reality of today's practices have deducted the amount of accountants' fees to prepare tax returns against the amount of attorneys' fees, not the executor's commission. *See Feise Estate,* 25 Fiduc. Rep. 2d. 317 (Mont. Co. 2001), *affirmed*, 421 Pa. Super. 653, 613 A.2d 32, *app. den.*, 533 Pa. 634, 621 A.2d 580; *Polischeck Estate,* 24 Fiduc. Rep. 2d at 468 ("Since the executrix hired the accountant to assist her with the estate, she will bear the cost of the accountant's fee out of her commission.")

In a recent decision the orphans' court in *Blackmore Estate*, 606 Fiduc. Rep. 3d. 170 (Lackawanna Co. 2016), stated that it would be "somewhat exploitive for a well-compensated estate fiduciary to demand that heirs, who have already absorbed well over $100,000 in Administration costs in an estate that has yet to be finalized and distributed, pay again for the services of an accountant. It is realistic to expect attorneys to use the services of outside professionals like accountants and real estate agents, who are adept in their fields of expertise, but we do not expect heirs to be charged additionally and separately for costs that should be included under the general task of administration." The court rejected additional accounting fees accordingly.

However, in *Naugle Estate*, 6 Fiduc. Rep. 3d. 149, 157 (Franklin Co. 2016), due to the complexities of the estate, which included multiple investment accounts and issues that had to be addressed, the court determined that the hiring of accountants and the payment of fees to them were justified and approved them in addition to payment of the executor's fee.

Yet, the preparation of the account is the responsibility of the executor, and is included in the fee. No additional compensation is allowed unless the executor can justify its propriety. *Marcella Estate*, 12 Fiduc. Rep. 2d at 228.

Accordingly, the fees paid to Maillie by the Estates should be Norris's responsibility, and paid out of any commission he may be allowed. This does not mean that Maillie's fees are not independently subject to evaluation and, if appropriate, to disallowance (albeit by way of reduction of any amounts otherwise payable to the Executor) to the extent excessive or unreasonable in light of the services rendered.

C. Executor Not Entitled to Fees If He Is Negligent and Causes Loss.

An executor's fee or commission may be reduced or eliminated "if the fiduciary was negligent and caused loss to the estate. . . . The court may disallow any commission for a fiduciary guilty of supine negligence, of faithlessness and mismanagement, of repeated failures to perform fiduciary duties and of negligence." *Brennan Estate*, 15 Fiduc. Rep. 2d 425, 431 (Orphans' Ct., Bucks Cty. 1995).

For example, in *Prosock Estate*, 5 Fiduc. Rep. 2d. 308 (1985), Judge Tredinnick levied a surcharge against executors after determining that the interest the estate had to pay the IRS was a direct result of the executor's using the available cash to pay themselves other than paying the federal tax.

In *Lohm Estate*, 440 Pa. 268, 269 A.2d 451 (1970), the executors hired an attorney specifically for his tax expertise. To take advantage of the alternative valuation date for federal tax purposes it was critical that the federal tax return be filed by a specific date. The tax attorney, however, failed to do so, resulting in significantly higher taxes for the estate. On these facts, the Pennsylvania Supreme Court concluded that the executors were guilty of supine negligence in failing to ascertain the legal deadline for filing the tax return and their negligence could not be excused by claiming that they had relied on counsel hired for tax expertise. 440 Pa. at 276-77, 269 A.2d at 457-58.

D. Executor Not Entitled to Fees to Protect or Advance His Own Interest

A fiduciary who engages counsel to protect or advance his personal interest, including substantiating his right to keep or receive a commission or fee, is responsible for counsel fees incurred in that effort. *McCann Trust (No. 3)*, 10 Fiduc. Rep. 2d 53, 54, (Orphans' Ct., Chester Cty. 1990) (where a "trustee employs an attorney for his

individual benefit and not for the estate he must pay the attorney out of his own pocket and is not entitled to reimbursement from the estate") (quoting Fratchee, Scott on Trusts, Vol. III (1967)); *see also Nicely Estate*, 18 Fiduc. Rep. 2d 397, 415 (Orphans' Ct., Phila. Cty. 1998); *Broadwater Estate (No. 2)*, 12 Fiduc. Rep. 2d 287, 296-97 (Orphans' Ct., Bucks Cty. 1992).

E. Burden of Proof on Executor Compensation

The burden is on Norris, as executor, to establish the reasonableness of his fees. *Estate of Harper*, 975 A.2d 1155, 1162 (Pa. Super. Ct. 2009); *In re Padezanin*, 937 A.2d 475, 485 (Pa. Super. Ct. 2007). Norris must establish facts that show he is entitled to the requested compensation. *Estate of Phillips*, 420 Pa. Super. 228, 231, 616 A.2d 667, 668 (1992) ("This court cannot fix compensation as a percentage of the assets of the estate without some knowledge of the work actually done. The fiduciary and his attorney have the burden of proving facts which will enable the court to make an informed judgment as to the work actually done by each and the reasonableness of the requested commissions and fees." (quoting trial court opinion)); *see also Estate of Sonovick*, 373 Pa. Super. at 400, 541 A.2d at 376. In this regard, courts give significant weight to contemporaneous time records. *Estate of Phillips*, 420 Pa. Super. at 232, 616 A.2d at 669 (finding that "appellant failed to provide this court with the specifics of the work performed and relied, instead, on the reconstructed time sheets he assembled without benefit of time records").

This rule applies regardless of whether the executor seeks approval of payments he wishes to make or of amounts he has already paid himself. A contrary rule – one that would allow the executor to transfer the burden of proof to the beneficiaries to establish the unreasonableness of fees that had been already taken – would create an unacceptable

moral hazard by encouraging executors to take fees in excessive amounts, without court approval, and to take fees sooner rather than later.

Thus, where an executor pays himself a fee without prior court approval, as happened here, he does so at risk the fees will be disallowed and that he will be personally liable to repay to the estate the amounts disallowed. To approve or disapprove such fees, is, indeed, one of the purposes for which an accounting is required. The legal principle is the same as that establishing that even distributions to beneficiaries made by an executor are considered to be at risk. *Susick Estate*, 6 Fiduc. Rep. 3d 209, 213 (Orphans' Ct. Phila. Cty. 2015) ("[I]t is well established that any distribution by a personal representative without court approval and/or the consent of all of the beneficiaries is considered an at risk jeopardy distribution: 20 Pa. C.S. § 3532.").

V. Standards and Burden of Proof Applicable to Counsel Fees

A. Basic Standards for Counsel Fees

The attorney for the executor of an estate is entitled to reasonable and just compensation for his services to the estate. Any analysis of the reasonableness of counsel fees must begin with a consideration of the landmark case of *In re LaRocca Estate*, 431 Pa. 542, 246 A.2d 337 (1968). In *LaRocca*, the court explained:

> What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty 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.

Id. 431 Pa. at 546, 246 A.2d at 339. These are the *LaRocca* factors.

Not every factor will be germane in every case. The court must exercise discretion. *Id.*

B. Counsel Fees Allowed Only for Work Done for Estate's Benefit.

An attorney is entitled to reasonable compensation from the estate only for work done for the estate's benefit. This has three important implications.

First, as noted above, fees for legal work performed to advance the personal interest of the executor, including his right to fees or a commission, is not payable by the estate, and must be borne by the executor. *McCann Trust (No. 3),* 10 Fiduc. Rep. 2d at 54; *Nicely Estate,* 18 Fiduc. Rep. 2d at 415; *Broadwater Estate (No. 2),* 12 Fiduc. Rep. 2d at 296-97. The executor and legal counsel cannot seek compensation from the estate for any time and expense spent pursuing their claim for compensation. That time did not benefit the estate. Only the executor and legal counsel stand to benefit from this effort. *Geary Estate,* 26 Fiduc. Rep. 477 (1976); *Detinger Estate,* 27 Fiduc. Rep. 300 (1976), *affirmed* 487 Pa. 40 (1979).

Second, fees for legal work performed to defend the executor's performance of his duties to the estate where charges of negligence or wrongdoing are proven are not payable by the estate. *In re Estate of Geniviva,* 450 Pa. Super. 54, 69, 675 A.2d 306, 313 (1996) (finding that an executor is not entitled to be reimbursed for attorneys' fees incurred as "a direct result of the executor's negligence in the administration of the estate . . ."); *see also Lessig v. Nat'l Iron Bank of Pottstown,* 342 Pa. 209, 211, 20 A.2d 206, 207 (1941) (finding that trustees were not entitled to recover attorneys' fees incurred defending litigation caused by their wrongful acts). The operating principle is that where

a beneficiary seeks to surcharge a trustee, and is successful, the trustee will be personally liable in damages and must pay its own costs and counsel fees; if on the other hand the beneficiary is unsuccessful, the trustee will be entitled to reimbursement out of the trust estate. *In Re Wormley's Estate*, 359 Pa. 295, 301, 59 A.2d 96 (1948).

Third, fees incurred by counsel in defending his own charges are not for the benefit of the estate and are not payable by the estate. *See* COL 67-68.

C. Counsel Fees Not Allowed for Work That Is Deficient

Fees for legal work that is deficient or useless are not payable by the estate and may be disallowed. *Estate of Lohm*, 440 Pa. 268, 269 A.2d 451 (1970) (surcharging counsel to the estate for negligence in filing tax returns that led to a loss of estate assets); *Estate of Westin*, 874 A.2d at 146-47 ("[W]here such counsel 'fails to exercise the required degree of skill, knowledge and diligence, and such negligence results in loss or waste to the estate, the court may impose a surcharge by way of awarding reduced compensation or no compensation at all.'") (citation omitted); *Susick Estate*, 6 Fiduc. Rep. 3d at 217-18 (surcharging an executor for unreasonable attorney's fees, but requiring that the attorney disgorge those fees to the estate); *Milavitch Estate*, 30 Fiduc. Rep. 2d 328, 332-33 (Orphans' Ct., Phila. Cty. 2010) (fees for deficient accounts prepared by attorney disallowed); *Wicker Estate*, 29 Fiduc. Rep. 2d 44 (Orphans' Ct., Phila. Cty. 2007) (disallowing fees and imposing surcharge for interest and penalties for botched tax filing). An attorney who is not able to discharge all of the tasks required of counsel for a personal representative is not entitled to a full attorney fee. Tax returns are an essential part of an estate administration. Generally, then, an attorney's fee should be

reduced by the amount of a reasonable fee paid to the accountant. *Donofrio Estate*, 5 Fiduc. Rep. 3d. 384, 390 (Wash. Co. 2015).

On the other hand, the valuation of a close corporation would not, for example, be within an attorney's ordinary expertise and would require special service. For this reason, the Orphans' Court in *Donofrio Estate* allowed payment to the valuation expert in addition to a reasonable attorney's fee.

D. Burden of Proof on Counsel Fees

"[A]n attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation." *Estate of Wanamaker*, 314 Pa. Super. 177, 180, 460 A.2d 824, 825 (1983) (citing *Hempstead v. Meadville Theological Sch.*, 286 Pa. 493, 134 A. 103 (1926)). The attorney also bears the burden of proving that the compensation he seeks is just and reasonable. *Estate of Sonovick*, 373 Pa. Super. at 400, 541 A.2d at 376. In this connection, the attorney must provide adequate records of the work he performs to allow a fair assessment of his charges. *Milavitch Estate*, 30 Fiduc. Rep. 2d at 332-33 (parsing time records); *Estate of Perry*, 27 Chester Co. Rep. at 383-384 (finding counsel caused complexity in otherwise simple estate and provided inadequate records).

Where an attorney for an estate is paid without prior court approval, as happened here, the attorney takes such payment at the risk the fees will be found unjustified and disallowed upon an adjudication of the estate. *Susick Estate*, 6 Fiduc. Rep. 3d at 216 (finding that the attorney knew and the executor "should have known they were assuming the risk they would have to return any amount found excessive"); OBJ 128-2 (William Lamb opines to Rachel and Rupert that "All professional fees – executors fees, lawyer

fees accounting fees and the like . . . are never really set until close to the end of the estate administration. Rest assured, however, that they are very carefully and seriously considered AND ultimately approved (or disapproved) by the court.")(FOF 83-84, 90).

A contrary rule – one that would place the burden of proof on objectors to show that fees already paid to counsel were unjustified – would again create an unacceptable moral hazard by encouraging attorneys to demand immediate payment of fees in excessive amounts in the hope of shifting the burden and, thus, diminishing the likelihood of a future requirement to disgorge excessive fees. An estate's attorney concerned to avoid the risk that fees he has received from the estate will be disallowed has a ready remedy: He may seek an interim accounting to confirm fee payments and avoid doubt. That was not done here.

VI. Standards and Burden on Proof for Surcharge Claims

A. General Standards for Surcharge Claims

A surcharge may be imposed on an executor for breach of his fiduciary duties. *Estate of Dobson,* 490 Pa. 476, 484, 417 A.2d 138, 142 (1980); *Estate of Geniviva*, 450 Pa. Super. at 64, 675 A.2d at 311. If the breach arises from a conflict of interest or self-dealing, then a loss to the estate is not required to give the beneficiaries a remedy. *Noonan's Estate*, 361 Pa. at 32-33, 63 A.2d at 84. If the breach involves other fiduciary duties, a loss to the estate must be shown. *In re Mendenhall*, 484 Pa. 77, 82, 398 A.2d. 951, 954 n.3 (1979); *Estate of Pew*, 440 Pa. Super 195, 237-38, 655 A.2d 521, 542 (1994).

B. Liability for Breach of Duty of Loyalty

An executor is under a duty to administer the estate assets solely in the interests of the beneficiaries. *Flagg's Estate*, 365 Pa. at 87, 73 A.2d at 414; *see also* 22 Pa. C.S.A. §7772(a). If self-dealing or conflict of interest is proved, a surcharge will follow without regard to whether the fiduciary's decision was fair or resulted in loss to the estate. *Caitlin Memorial Trust*, 221 Fiduc. Rep. 2d (Orphans' Ct., Lack. Cty. 2001)

C. Liability for Mismanagement of the Estate

In managing the estate, the executor is required "to exercise the same degree of judgment, skill, care and diligence that a reasonable or prudent person would ordinarily exercise in the management of his or her own affairs." *Estate of Campbell*, 692 A.2d at 1101.

D. Liability for Tax-Related Claims

Ordinarily, a surcharge will be imposed where the fiduciary's error with respect to taxes is absolute and not simply of judgment. *Id.* at 1104 (finding that failure timely to file inheritance tax return is patent error); *Estate of Geniviva*, 450 Pa. Super. at 64-66, 675 A.2d at 311 (failure timely to file tax returns is patent error); Comment, 45 TEMPLE L.Q. 42, 60 (1971) (concluding "in tax matters more is required of an executor than is required of the ordinary prudent man").

Reliance on advice of counsel is a factor to be considered in assessing liability, but "is not a blanket of immunity in all circumstances." *Estate of Lohm*, 440 Pa. at 275, 269 A.2d at 455. Where the matter is a tax filing or payment deadline a defense of advice of counsel is not availing. *Id.* at 276, 269 A.2d at 455-56; *Estate of Geniviva*, 450 Pa. Super. at 66, 675 A.2d at 311 (finding that executor's reliance on tax expert does not

establish he acted with requisite skill and caution, and will not avoid liability for late filing of estate and inheritance taxes); *Birely Estate*, 30 Fiduc. Rep. 522, 527 (Orphans' Ct., Chester Cty. 1980) (Gawthrop, J.) (finding that both choice of counsel and decision to rely on the advice must be "reasonable and prudent").

E. Burden of Proof on Surcharge Claims

Generally, a party seeking a surcharge has the burden of proving, by a preponderance of the evidence, the breach and, if required, the loss to the estate. *Estate of Pew*, 440 Pa. Super at 240; 655 A.2d at 543.

However, where the fiduciary has committed a patent or absolute error, the burden shifts to the fiduciary to demonstrate that he exercised due prudence and if that burden is not met, a breach may be found. *Estate of Campbell*, 692 A.2d at 1104 (finding that failure timely to file inheritance tax return is patent error, executor liable); *Estate of Geniviva*, 450 Pa. Super. at 64-66, 675 A.2d at 311 (finding that failure timely to file tax returns is patent error, executor liable).

VII. Breaches of Fiduciary Duty by Executor and The Lamb Firm

A. Breaches of Fiduciary Duty in Filing and Defending Initial Accounts (Tiger's Estate, Objection Nos. 1, 4, 5; Sir John's Estate, Objection Nos. 1, 4, 6, 7, 10, 16)

The court concludes that Norris could not reasonably have determined, consistent with his fiduciary obligations and his duty of care, that either of the Initial Accounts was proper in content or form or useful to the court. Nor could Norris, consistent with such obligations and duty, have sworn to the accuracy or completeness of either of those Accounts. Norris also unreasonably relied on Furman having had substantial reasons to

question his competence to handle an estate accounting of this dimension and given his past performance for the decedents and the Estates.

The court concludes that the Lamb firm failed to exercise due care in reviewing the accounts and in counseling Norris on them. The Lamb firm had responsibility for the Initial Accounts in fact, having taken charge of coordinating with Furman on the preparation and filing of them for the Executor. It also had, as the Estates' counsel, responsibility for them as a matter of law. *Marcella Estate*, 12 Fiduc. Rep. 2d at 228 ("[T]he preparation of the account is the responsibility of the lawyer and his client, the executor . . . ."). The facial flaws in the Initial Accounts should have been obvious to the Lamb firm. Indeed, Donohue, the Lamb firm lawyer with an accounting background, saw some of those flaws, but with his colleagues proceeded to file the accounts anyway. McConnell certainly knew better.

As counsel to the Executor of the Estates, the Lamb firm had a duty of care "at least equivalent" to the Executor. Like Norris, it breached that duty in filing the Initial Accounts. Neither Norris nor the Lamb firm can avoid responsibility for their failures by blaming Maillie or the Beneficiaries' counsel.

Norris is responsible in law and in fact for hiring Maillie and the Lamb firm; if either caused him to fail in his responsibilities to the Beneficiaries and the court with respect to accounting for his administration, he is answerable. The Lamb firm is responsible to the Beneficiaries for its breaches of duty with respect to the Initial Accounts, and where both it and Norris have acted improperly, may be held jointly and severally liable with Norris. *Smyrl Estate*, 23 Fiduc. Rep. 2d at 89-90 (disallowing fees

and imposing surcharges where neither executor nor counsel acted appropriately and were "jointly and severally liable for the damages sustained by the estate").

Further, there is no credible factual basis for Norris's or the Lamb firm's efforts to blame the Beneficiaries' counsel for the faulty accounts they filed. Moreover, Norris's and his counsel's duty under the law is to file correct accounts *for the court*, and not only the Beneficiaries, to consider. This they did not do.

Norris and the Lamb firm further breached their fiduciary duties of loyalty and care by pressing and defending the Initial Accounts vigorously throughout an extended pre-trial period and through eight days of hearings, when the accounts were, on their face, indefensible and, indeed a travesty.

i. Remedies for Breaches of Fiduciary Duty with Respect to the Initial Accounts

The Estates should not be required to bear the costs of the Initial Accounts and fees charged for those accounts will be disallowed. *Milavitch Estate*, 30 Fiduc. Rep. 2d at 332-33 (disallowing fees in part because "the account that was filed was deficient in various aspects" and hence "the fee charged for preparing the account . . . cannot be charged to the estate").

Furman provided no detailed time records, but testified at the hearing at the end of April 2016 that his charges to prepare the Initial Accounts were approximately 10% of Maillie's total charges to the Estates. That 10% amount, based on total fee charges through February 2016 (and thus omitting at least one month included in Furman's April 2016 estimate), is $115,360. FOF 364. Norris, as Executor, is responsible for these charges and his fees will be disallowed in the amount of $115,360.

The time records for the Lamb firm attorneys William Lamb, McConnell, and Donohue show that they billed a total of $41,368.00 in connection with preparation of the Initial Accounts. FOF 365-391. The fees charged by the Lamb firm will be disallowed in the amount of $41,368.00

The total disallowance of pre-Objections fees charged for the Initial Accounts is $156,728. The court will address post-Objections fees related to those accounts hereafter.

B. Domicile Dispute

The court has determined from the credible evidence that Norris acted within reason on the issue of domicile and will not disturb the fees and commissions charged against the Estate of Sir John.

C. Breach of Fiduciary Duty in Incurring Tax Penalty and Charging the Estate for Ensuing Litigation (Sir John's Estate Objection No. 15)

Norris and the Lamb firm have disclaimed responsibility for Sir John's Estate's botched extension request in November 2007, as a result of which the Estate incurred a $1 million penalty as well as substantial costs of further litigation with the IRS and Cecil Smith. *See* FOF 277-281.

The court concludes that Norris and his counsel are responsible for this mistake and these costs.

i. Norris's Breach of Duty as to Tax Penalty

Norris, as executor, is responsible for timely filing of tax returns and extension requests and his failure to do so is a breach of his duty of care to the Estate and its Beneficiaries. *Estate of Lohm*, 440 Pa. at 275, 269 A.2d at 455-56; *Estate of Campbell*, 692 A.2d at 1104 (finding that failure timely to file inheritance tax return is patent error);

Estate of Geniviva, 450 Pa. Super. at 64-66, 675 A.2d at 311 (finding failure to file tax returns timely is patent error).

Here, Norris's failure was a "failure to check the box" in Part III of the Form 4768 presented to him for signature on November 6, 2007. Norris testified that he signed the form provided to him by his tax lawyer, Smith, and he and Donohue testified that Smith had assured all assembled that day that this was all Norris needed to do not only to extend the time to file but to extend the time to pay. FOF 290-292. The form itself, in Part III, is clear that extending the time to file does *not* extend the time to pay. OBJ 43; *See* FOF 296-299. But Norris did not attend to the form, and just signed what he was provided.

The court credits Norris's testimony. But under the law this does not excuse him, as executor, from responsibility for the tax penalty that resulted from his error.

Lohm is squarely on point. There, the two executors, Adair (a lawyer) and Kunst, had engaged an attorney who they believed a tax expert. But all three missed the due date for paying taxes. Our Supreme Court observed:

> Our examination of the instant record convinces us that both Adair and Kunst, acting in their fiduciary capacity, were guilty of supine negligence which contributed to the tax loss suffered by the estate. Both men should have been aware of, or, at least, should have taken steps toward ascertaining *when* the federal estate tax was due. Even though Adair was inexperienced in fiduciary estate tax matters and Kunst was a layman unversed in the law, it was their duty as executors of the estate to ascertain the crucial date when the return should have been filed. The record shows that neither Adair nor Kunst made any effort to ascertain such date. A prudent man may not have the technical knowledge or skill to prepare an estate tax return or even an income tax return, and so would properly rely on one more knowledgeable. But a prudent man in the conduct of his own affairs would certainly know that there is *a time when a tax return must be made and a time when a tax is due and payable***,** and, if he did not know what those times were, he

> would find out. No one files his own death tax returns, but the majority of us file other tax returns of one sort or another. What "prudent man" is there who does not know that April 15 is the normal date by which individual federal income tax returns must be filed and the tax paid? We have difficulty in comprehending how, in this tax conscious age, an executor of an estate can with impunity be or remain ignorant of the *time* for filing tax returns or paying the taxes in the estate he is managing.

Id. at 276, 269 A.2d at 455-56 (emphasis in original). The Supreme Court concluded:

> The matter of missing a tax return due date, a pivotal factor in connection with the administration of the entire estate, is not an error of law or of judgment for which the entire blame can be shifted to the expert. This was not a matter of acting on advice of counsel; it was a matter of neither knowing nor seeking to ascertain a key fact in the proper performance of a fiduciary function voluntarily undertaken. *Id.*at 277, 269 A.2d at 456.

To the same effect is the Superior Court's decision in *Estate of Geniviva,* 450 Pa. Super. at 64-66, 675 A.2d at 311. There the executor claimed his reliance on a tax expert should excuse his failure timely to file estate and inheritance taxes. The court rejected the contention, because an executor's reliance on a tax expert to determine a basic filing deadline does not establish that the executor has acted with requisite skill and caution. The court further noted that, in view of the $40,000 commission taken by the executor "'[i]it is only reasonable and logical to expect that services so well compensated for should have been performed in a careful and skillful manner.'" *Id.* at 66, 675 A.2d 311 (citation omitted).

Norris's $4,000,000 in fees charged the Estates is 100 times this amount; it is more than reasonable to have expected him to read what he was signing. *See also Birely Estate,* 30 Fiduc. Rep. at 527.

Norris has suggested that because it was not clear what *amount* of taxes needed to be paid on November 6, 2007, he was justified in relying on Smith's advice. But

uncertainty over the amount to be paid does not excuse a failure to request an extension at all. If it proved that Norris had underpaid, he might have faced a penalty, but it would not have been a $1 million late payment penalty for failing to check a box. Norris relied on expert advice, but that advice was clearly incorrect, as a review of the Form 4768 itself and applicable tax regulations would and should have disclosed. As in *Lohm*, *Geniviva*, and *Birely*, Norris cannot rely on Smith's advice to excuse his own failure independently to address the due date, and he is liable for his breach of his fiduciary duties to the Estate and the Beneficiaries.

ii. The Lamb Firm's Breach of Duty as to the Tax Penalty

The Lamb firm, according to Donohue's testimony, made the same mistake that Norris made in not reading the Form 4768 and relying on Smith's advice. Donohue acknowledged that when he reviewed the form and read the pertinent regulations after receiving the deficiency notice, it was clear Smith was wrong. But Donohue did not take these steps at the time.

There is some evidence that John Kehner, head of the Lamb firm's trusts and estates practice, at the very least took Form 4768 that Norris had signed and sent it to the IRS. The time entries suggest that Kehner drafted the form. In any event, what the Beneficiaries demonstrated is that an experienced estates attorney at the Lamb firm, who was in the meeting on November 6, 2007 and knew the concerns that had been voiced, saw the flawed Form 4768 and dispatched it. Donohue admitted it was not the Lamb firm's practice to ignore documents that it received that were of importance to its clients. N.T. (3/14/2016) at 204:14-205:8.

Moreover, the Lamb firm billed the Estate for Kehner's time, and so cannot be heard to say that it cannot be responsible because it was not engaged as tax counsel. It was counsel for the Estate and it purported to oversee in the exercise of that capacity the tax filing in question. As counsel for the Estate, the Lamb firm is subject to "a standard of care … at least equivalent to that of the executor." *Estate of Westin*, 874 A.2d at 147. The Lamb firm, given it superior expertise, may be held to an even higher standard of care than Norris. If Norris did not meet the standard of care under the law by failing to review further the question of extending the deadline to pay, the Lamb firm most certainly did not. It too breached its obligations to the Estate and the Beneficiaries in failing to investigate and "check the proper box." The act here remains negligent and the court can conceive of no circumstances why the resultant loss is properly assigned to the Beneficiaries to bear.

iii. Breach of Duty as to Costs of Ensuing Litigation

The Executor and the Lamb firm made a mistake for which the court concludes they are responsible. The costs of suing the IRS to abate the penalty and Smith for malpractice do not fall on the Estate and the Beneficiaries.

Indeed, Norris's and his counsel's contrary proposition is itself a breach of their fiduciary obligations. Both Norris and the Lamb firm have an absolute duty to prefer the interests of the Beneficiaries to their own. This precludes them from taking the Beneficiaries' property to fund litigation to mitigate the consequences of their own error. *See Pew Trust (No.2),* 16 Fiduc. Rep. 2d at 85 (fiduciary is prohibited from "taking advantage of his or her position to the detriment of the fiduciary estate of the beneficiaries").

Even if Norris and the Lamb firm were not responsible for the tax filing mistake, and only Smith was, the fees for correcting that mistake really ought not to be charged to the Estate and the Beneficiaries. As the Superior Court stated in *Artkraft Strauss Sign Corp. v. Dimeling*, 429 Pa. Super. 65, 70-71, 631 A.2d 1058, 1061 (1993):

> In *Rothman v. Fillette,* 503 Pa. 259, 265, 469 A.2d 543, 545 (1983), our Supreme Court quoted *Rykaczewski v. Kerry Home, Inc.* 192 Pa. Super. 461, 161 A.2d 924, 926 (1960), for the proposition that '[w]here one of two innocent persons must suffer, the loss should be borne by him who put the wrongdoer in a position of trust and confidence and thus enabled him to perpetuate the wrong.' *Artkraft Strauss Sign Corp. v. Dimeling*, 429 Pa. Super. 65, 70-71, 631 A.2d 1058, 1061 (1993).

Further, in *Davis v. SEPTA,* 680 A.2d 1223, 1226-27 (Pa. Commw. Ct. 1996), the Commonwealth Court held:

> It is well-established that the courts possess the inherent power to enforce their order and decrees by imposing penalties and sanctions for failure to comply. . . . Such penalties and sanctions, including attorneys' fees, may be imposed against either an attorney or an individual party who has been guilty of misconduct during the pendency of any litigation. Even where an attorney alone engages in misconduct, a client may be held liable for the resulting penalties and sanctions because a client is generally liable to a third person injured by an act which the attorney does in execution of matters within the attorney's authority . . . .

(citations omitted).

iv. Remedy for Breach of Duty with Respect to the Tax Penalty and Ensuing Litigation

The Beneficiaries have met their burden of proving a breach of duty and a loss as against Norris and the Lamb firm with regard to the IRS tax penalty and the tax penalty and Smith litigations.

The ultimate net loss to Sir John's Estate, after netting recoveries against the $1 million penalty and the at least $1,032,000 in legal fees the Lamb firm billed to sue the

IRS and Smith, is $557,001. Accordingly, Norris and the Lamb firm are surcharged $557,001, for which they shall be jointly and severally liable.

D. Breach of Fiduciary Duty with Respect to Management of the Estates: Bancorp Borrowing Expense (Sir John's Estate Objection No. 14.)

The $3.9 million that the Estate borrowed from Bancorp Bank in 2010 to pay its tax liabilities following the audit was necessary only because Norris mismanaged the Estate's assets in the preceding four years of his administration. The Executor contended the Estate faced numerous liquidity problems during his administration, requiring the borrowing.

The first and foremost duty of an executor is "to take custody of the estate and to administer it so as to preserve and protect the property for distribution to the proper persons within a reasonable time." *Estate of Campbell*, 692 A.2d at 1101.

When Norris took charge of the partnerships in September 2005, by his own account TFIP had an investment portfolio of $34 million, burdened by a line of credit on which $4.5 million had been drawn. When Sir John died, in February 2007, even after Norris had bought the Sutphin tract and had paid $1.64 million in salaries and made a further $1.5 million in distributions to Rachel and Rupert, Sir John's Revised Account shows that Norris still had over $24.7 million in investment securities at his disposal using Gibbs's *discounted* date of death valuation of TFIP.

Norris claims that he nevertheless faced substantial liquidity issues nine (9) months later at the November 6, 2007 estate tax due date and thereafter, issues that ultimately forced a borrowing from Bancorp in 2010. But, as the court has found, this claim does not withstand scrutiny.

Norris made discretionary expenditures of nearly $10 million after taking charge in 2005 through the tax due date, but even these did not suggest a liquidity crisis as of November 6, 2007. If there was a potential need for liquidity, and with Sir John in decline, that would have been a reasonable expectation, Norris might have considered more carefully whether to make all of these $10 million in discretionary expenditures after September 2005 in the exercise of the fiduciary care and diligence required of him first as sole general partner of TFIP and thereafter as Sir John's executor.

The evidence put forward by the Beneficiaries showed there was either no liquidity crisis at November 6, 2007 or, if there was, it was of Norris's making. In response to this evidence, Norris and his counsel offered nothing persuasive. They did not come forward with financial studies to show a liquidity issue; they did not call a single witness, lay or expert, who could testify in concrete terms to the nature or extent of illiquidity the Estate faced at any time before the Bancorp borrowing.

By 2010, however, there was a need to borrow $3.9 million. It is clear why. Despite his claims that the Estate had severe liquidity problems, Norris had managed by September 2010 to pay himself $3.9 million in executor and management fees from the Estates.

The court will separately address whether these fees were unreasonable or excessive. It concludes here only that the payment of fees of this dimension, by an Estate allegedly facing a large liquidity problem, breached the Executor's fiduciary duty to prefer the interests of the Estate and its Beneficiaries over his own and his duty of care in the management of the Estate's assets. The Beneficiaries have carried their burden on the claim for a surcharge due to a breach of duty and a loss.

Norris is surcharged in the amount of $263,947.25, the amount of interest charges the Estate paid for the Bancorp loan. Sir John Revised Account, at p. 39.

VIII. Excessive and Unreasonable Fees (Tiger's Estate, Objection Nos. 6, 7, and 8; Sir John's Estate, Objection Nos. 11, 12, 14)

Norris has the burden of proving that the fees he, his accountants and his counsel charged each of the estates are reasonable and just. He did not do so. These fees will be substantially disallowed and surcharged.

A. Tiger's Estate: Executor, Accounting and Legal Fees

i. Executor Fees in Tiger's Estate

The court considers, as many courts in the Commonwealth do, the decision in *Johnson Estate* and its guidelines, as one aspect of its analysis. Tiger's Estate was valued at death in at $13,338,117 in Tiger's Initial Account, OBJ 7-35, and at $13,321,173 in Tiger's Revised Account. Tiger's Revised Account (on file with the court) at p. 2. Expert witness John Latourette, using audited tax values of the estate of $12,002,979, determined that under the *Johnson Estate* guidelines, an executor's fee would not exceed $118,000. He saw no basis for increasing Norris's fees above the guidelines level and suggested it should be reduced to account for Furman's fees charged the Estate, totaling $86,000, which under Pennsylvania law can be adjudged to be the Executor's responsibility.

Norris actually paid himself from Tiger's Estate, without prior court approval, $543,000 in executor fees, more than four times this guidelines figure. The Estate also paid Maillie $86,000 for accounting services, which should be paid out of Norris's allowable fee and is considered part of that fee under Pennsylvania law. Thus, Norris's total executor fees are $629,000, more than five times the *Johnson Estate* guidelines.

Norris had originally agreed with the Beneficiaries to charge $250,000 as an executor's fee. However, he subsequently elected to pay himself and Maillie more than two and one-half times that.

After Tiger died, Norris paid himself from the partnerships a "management fee" of $30,000 per month for managing the partnerships, including Tiger's. None of these fees are reflected in Tiger's Estate's accountings, but they are additional amounts that Norris took essentially from the assets of Tiger's estate, since the estate, as limited partner, owned more than 99% of the relevant FLPs. While Norris, as reflected in his resistance to the distribution of Glenroy Farm, LP, has sought to use his position as general partner to justify charges in excess of a reasonable executor's fee, the evidence established that the FLPs were created as estate planning vehicles, as a tax efficient mechanism for transferring the Thouron family's wealth to subsequent generations, and not as entities that it was intended Norris would profit from controlling and managing indefinitely. His duties as the general partner of entities created for that purpose was essentially the same as his duty as executor – to protect and manage the assets until they were ready for distribution to Tiger's and Sir John's heirs.

ii. Assessment of Executor Fee Against Guidelines

Measured against the *Johnson Estate* guidelines, Norris's fee in Tiger's Estate appears excessive. The question before the court is whether Norris carried his burden to justify these charges. The court concludes he did not.

This conclusion is supported by a number of considerations based upon the facts developed above. The court has considered all of these facts in arriving at its conclusion. The most significant considerations, but not the only ones, are outlined below:

First, Norris kept no records of the time he devoted to Tiger's (or Sir John's) Estate. Although he holds himself out as an experienced lawyer, businessman, executor and trustee, and despite being advised by his counsel William Lamb at the outset of his executorship to keep detailed records, Norris did nothing to document the work he did on Tiger's Estate. Hence, he has nothing to show the court with any degree of precision or certainty what he did for the Estate or for the partnerships to support the fees he charged.

Second, Norris's account of the work he did on Tiger's Estate was general, vague and unspecific. Indeed, the detailed evidence concerning the principal events in the administration of both Tiger's Estate and Sir John's Estate came from Vince Donohue, who effectively took on day to day responsibility for coordinating activities relating to the Estate for Norris. Donohue did not become involved in this role until late 2006 and early 2007. Prior to that time, the record suggests that Norris did very little, because he claimed to remain unaware of the details of many of the transactions the partnerships had entered into until the time by which Donohue had become involved. Before then, the Lamb firm time billings were modest and apart from a November 2006 meeting with the Beneficiaries, there does not appear to have been much done. Smith and Gibbs signed on to do tax work early in 2007 and it was at that time more activity began. Norris had by 2007 formed a team consisting of the Lamb firm, Furman and Smith and Gibbs, and it appears that virtually all work on the Estate was handled through them. What Norris actually did for the Estate or partnerships, beyond hiring these professionals and making decisions based upon their advice was never clearly or convincingly explained.

Third, Norris failed to demonstrate that there was anything extraordinarily complicated about the administration of Tiger's Estate. Norris did not actually manage

Glenroy, offloading that responsibility to Rachel and Rupert. He distributed Knockiemill Cottage, sold off part of Glenknockie's property holdings to TFIP to obtain liquidity (creating other potential problems for both Estates), maintained the balance of Glenknockie with Rachel and Rupert's assistance, and held and ultimately distributed JJT Virginia Ventures. None of these activities involved any extraordinary efforts.

Norris did go through a tax audit of Tiger's Estate, which was consolidated with Sir John's, and here the lack of documentation of several transactions involving partnerships of Tiger's and partnerships of Sir John was an issue. That audit turned out well for both Estates, although, as Gibbs testified, that was in part attributable to the fact that he had already factored into his valuations somewhat lower discounts than he had originally anticipated. *See* N.T. (4/29/2016) at 88:5-15 (Gibbs).

To the extent there were challenges in dealing with the tax authorities concerning Tiger's partnerships, Norris must bear a significant amount of the responsibility. He abandoned his post, failing to play the role of independent co-general partner he signed on to perform at the outset of the Thouron family partnerships. It would be neither reasonable nor just to reward Norris with a substantial premium above the *Johnson Estate* guidelines merely because, in the tax audit, he and his team reached a reasonable compromise of problems that his complete abdication of his legal duties had allowed to exist in the first place.

Finally, the court cannot ignore that when Norris took charge of the partnerships and became Tiger's Executor, he began looking out for himself at the expense of the Estate and the Beneficiaries. He advanced himself the outrageous amount of $30,000 per month as "management fees" that had no warrant in the history of the partnerships.

Tiger's fees never approached what Norris began charging, despite the fact that Tiger *did* manage Glenroy and the other partnerships, and did so without the armada of professionals that Norris enlisted to do most of the required work. Moreover, after Tiger died, Norris advanced himself, without check or inquiry, executor fees far in excess of any guidelines, as well as far in excess of the $250,000 fee to which he had Furman secure the Beneficiaries' agreement early in the administration.

iii. Maillie's Fees in Tiger's Estate

Maillie's $86,000 in charges to Tiger's Estate included work on Tiger's Initial Account, which the court has found to be worthless. The Executor offered no evidence to support the reasonableness of or justification for the other fees that Maillie charged Tiger's Estate.

Maillie appears to have provided some accounting and payment services for Tiger's partnerships and the Estate, but there was no evidence introduced by Furman, Norris or others showing precisely what those were or why they cost what they did. This was for Norris to prove, and he failed to do so. Notably, Maillie never provided, and it appears Norris never required, time records or detailed invoices itemizing the services for which charges were made. Rather, Maillie merely provided brief summary statement with monthly invoice totals. In the absence of any clear evidence to support or justify Maillie's charges, the court will disallow one-half of those charges, or $43,000. The balance of $43,000 is surcharged against Norris.

iv. Legal Fees in Tiger's Estate

The Lamb firm billed Tiger's Estate fees totaling $335,882. This is, as Latourette noted, roughly three times the *Johnson Estate* guidelines of $118,000, and in his opinion

those guidelines amount should be adjusted downward for the Lamb firm since it assumes one estate counsel will be doing all the work, while in fact Norris had hired Smith and Gibbs, at a price of $200,000, to do all federal estate tax and valuation work. The Lamb firm's role was to prepare the Pennsylvania Inheritance Tax Return. Latourette computed the Lamb firm's proper fee under the guidelines as $67,000.

The Lamb firm, in fact, did relatively little in Tiger's Estate as compared to Sir John's. Tiger's Estate was relatively straightforward, save with respect to federal estate taxes which, with Sir John's Estate, became the subject of an audit. But the estates had hired Smith and Gibbs, not the Lamb firm, to deal with this eventuality, at a set fee. There is no reason why the estate should have needed to pay the Lamb firm for that service. To the extent Donohue's role was to serve as a "point person" or informational "hub" to ensure that information got to where it needed to be, which he testified was in fact a substantial part of his role, he was filling a role for which Norris was already being paid as executor. The Lamb firm's other significant role was in assisting with preparation of the unusable Initial Account, and it did not distinguish itself in that effort. Norris and the Lamb firm did not offer evidence sufficient to justify a $335,882 fee.

For the foregoing reasons, applying the *LaRocca* factors, *supra*, yields no different result.

v. Conclusion Regarding Executor and Legal Fees in Tiger's Estate

Executor, accountant and legal fees charged to Tiger's Estate totaled $1,230,006. Stipulation re: Revised Accounts, ¶¶ 90-91, 96. This amounts to 9.23% of the gross value of Tiger's Estate. For all of the reasons outlined above, the fees charged by the

Executor and these professionals are excessive and unreasonable. The court will approve a guidelines executor fee for Norris in Tiger's Estate of $118,000.

The balance of the executor fees Norris paid himself from Tiger's Estate, $425,000, is disallowed. With the $43,000 in fees the Estate paid to Maillie that has been disallowed, a total of $468,000 in fees attributable to the Executor is disallowed and surcharged to the Executor. As noted above, a surcharge is proper in these circumstances, where the Executor has advanced fees without prior court approval and fails to prove they are reasonable and justified.

The court will approve a legal fee for the Lamb firm in Tiger's Estate of $200,000, sixty percent (60%) of its charges. This recognizes that the Lamb firm did assist in the management of the Estate, playing part of the role Norris ought to have played but did not, but also recognizes that much of the important and complex work relating to valuation and federal taxes was performed separately by Smith and Gibbs, and involved additional charges to the estate of $200,000. The balance of the Lamb firm's fees for Tiger's Estate, $135,882, is disallowed and the Lamb firm is directed to pay that amount to the Estate.

B. Sir John's Estate: Executor, Accounting and Legal Fees

i. Executor and Management Fees in Sir John's Estate

Where the fee claimed is for services rendered in settlement of an estate, the Orphans' Court itself is amply able to appraise the reasonableness of the fee upon a mere recital of the services rendered. *In Re Lare's Estate*, 368 Pa. 570, 576, 84 A.2d 334, 338 (1951).

The amount of fees to be allowed to counsel is one peculiarly within the discretion of the court of first instance. Its opportunities of judging the exact amount of labor, skill and responsibility involved as well as its knowledge of the scale of professional compensation usual at the time and place, are necessarily greater than that of the appellate courts and its judgment should not be interfered with except for plain error, as our Supreme Court noted more than a century ago in *In Re Good's Estate*, 150 Pa. 307, 310, 24 A. 623 (1892).

All that has been said regarding Norris's executor fees in Tiger's Estate applies with exponentially greater force to Sir John's Estate. Sir John's Estate was valued at death in at $50,087,109.49 in Sir John's Initial Account, OBJ 6-230, and $40,290,470 in the Revised Account. Sir John's Revised Account (on file with the court) at p. 2. Latourette, using what he understood to be audited tax values of the estate of $46,775,505, determined that under the *Johnson Estate* guidelines, Norris's fee would not exceed $409,000 and it was his opinion it should be reduced in view of the accounting fees Furman had charged, which totaled $1,013,000.

The court points out that it needed no testimony from an estate expert, having administered estates and practiced orphans' court litigation for over thirty (30) years before ascending to the bench in the Orphans' Court. The court has been involved in the adjudication of issues arising from the administration of these Estates for a number of years and thus can make an informed and reasoned judgment on the question of the fee to be allowed to the executor and to the attorney from the Estates' assets. But it tolerated Mr. Latourette's thoughts and largely agrees with them.

The court has taken into consideration the nature and composition of the Estates' assets, the relationship of the interests of the Estates and the Executor, the nature and duration of the litigation to which the Executor has been a party, the benefits and detriments which have accrued to the Estates, and the like, all the while keeping in mind the principles of law enunciated herein.

Norris charged Sir John's Estate $2,793,000 in executor fees and also charged an additional $1,507,913 in management fees, for a total of $4,300,913. This total is more than ***ten (10) times*** the *Johnson Estate* guidelines figure. Maillie's accounting fees to Sir John's Estate total $1,279,139 through February 2016, less the previously surcharged amount for preparation of the Initial Accounts of $115,359, or $1,163,780. The court, for convenience, nets out the Maillie's estimated fees for preparing the Initial Accounts against the amounts charged Sir John, rather than attempt an allocation between the two (2) Estates. The total of $5,464,693 is nearly ***fourteen (14) times*** the guidelines figure. Norris's executor/accounting fees alone are **13.6%** of the gross value of Sir John's Estate**.** These charges are, on their face, excessive. A better adjective is outrageous.

Norris failed entirely to justify these extraordinary amounts. This conclusion is borne out by all the considerations noted above with regard to Tiger's Estate.

First, Norris hired even more counselors and advisors for Sir John's Estate than he engaged for Tiger's, adding to the Lamb firm, Smith, Gibbs and Maillie a new financial advisor, Greycourt, at a cost to the Estate of $351,000, more accountants in Morison Cogen at a cost of over $100,000, and an array of further counsel, all of whom, together with the Lamb firm, ran up professional bills totaling more than $6.4 million But Norris

kept no records of what he actually did, and there is little to substantiate his involvement beyond occasional emails or correspondence.

Second, in fact, the evidence is clear that Norris relied on these various professionals to perform the functions essential to the handling of the Estate and partnerships and, in particular, much of what the Lamb firm charged for attorney hourly rates was simply oversight of day-to-day management. Norris played the part of an owner or CEO, making ultimate decisions as required, but relying on paid professionals to perform the work and the analysis necessary to allow them to offer Norris advice. He caused the Estate to pay extraordinary sums to have virtually all the work done for him, and then paid himself a "CEO salary", equivalent to over $1 million a year for four (4) years, to wind up an estate.

It is basic that the law contemplates an executor will act as a hands-on fiduciary, not someone who delegates all of the real work to third-parties, charges the estate large amounts for the services of such third-parties, sits back, and then charges the estate for executor fees as if he had done the work himself. Sir John did not form the FLPs in order to have them operate indefinitely as a "long term project" so as to allow the transfer of substantial portions of his wealth to Norris, but as vehicles to be administered under his will as a means of transferring his wealth for the benefit of his grandchildren. The evidence established that Norris took a very different, and incorrect, view of his role. Sir John's estimate of Norris was woefully misplaced.

Third, Norris and his team have overstated the "complexity" of the estate work they were called upon to do, and of what they "achieved" in addressing such complexity. Family limited partnerships are not unusual in large estates. There were challenges for

the Thouron partnerships posed by the lack of documentation of certain transactions. There were some odd assets like Scottish properties. But by August 2007, after Donohue had undertaken an investigation that Norris should have conducted years before, all that could be known was known. Norris did nothing to take any restorative action when he determined that transactions were not properly documented or recorded in the partnership books and records. Although Norris did nothing because of a concern that the IRS would disapprove of corrections made after the fact, he testified that Kate Boyle, the IRS auditing agent, actually *suggested* that Norris should take restorative actions. N.T. (12/2/15) at 15:12-156:1. The positions that Norris ultimately took with the IRS, however, were the same ones formulated in 2007, within months of Sir John's death. Yet Norris continued to pay himself millions in compensation for the next four (4) years.

Fourth, Norris is again legally responsible for much of the work he and his team had to undertake. It was Norris who abdicated his responsibilities to the partnerships while Tiger engaged in transactions that posed problems for the estate years later in a tax audit. Norris could not have had a "good faith" belief that his abdication of his duty to provide independent management input to the FLPs, which was the purpose for which he was made a co-general partner, "was in the best interest of the Company." To the contrary, his doing so put Tiger's and Sir John's entire tax planning in jeopardy by (1) adversely affecting the likelihood that the FLPs would be effective as vehicles to deliver estate tax savings and (2) allowing Tiger to engage in the very transactions that Norris now, as executor, contends were irregular and inadequately documented and because of which he now contends he should be afforded a higher than usual executor fee.

While Norris seeks to pass off the abandonment of his LLC responsibilities as a deference to Tiger, it was, as a matter of law, "gross negligence, gross misconduct, . . . breach of fiduciary duty, or a breach of this [the LLC] Agreement." Norris was obliged, as a member of the LLC, not only to vote on "all decisions and actions" of the LLC, but also to "devote such time and attention to the business of the Company as shall be necessary or appropriate to the conduct of the Company's business and the fulfillment of the Member's duties." *Id.* at § 5.5 (Exec. 59 at 0268). By abandoning his responsibilities, Norris caused, or through supine negligence permitted, the LLCs to breach their fiduciary duties to the limited partnerships. *Clement*, 436 Pa. at 468, 260 A.2d at 729 ("There is a fiduciary relationship between partners."); *Wurtzel v. Park Towne Place Apts. Ltd. Partnerships*, 2001 WL 1807405, at *5 n.12 (Pa. Ct. Com. Pl. Sept. 11, 2001) ("Unless expanded or limited by the partnership agreement, the general partner has a fiduciary duty to manage the partnership in its interest and in the interests of the limited partners."). He therefore bears full responsibility for the LLCs' lapses and the costs of addressing those in the administration of Tiger's and Sir John's Estates.

It also was Norris who decided to pay himself lavishly, to acquire the Suphin property and make distributions, to invest heavily in legal talent and other professionals to do his job – all of which led to a liquidity problem in 2010 that a prudent and careful manager could and should easily have avoided.

It was Norris who signed a tax extension request he was expected to read and understand, leading to a $1 million penalty and years of litigation.

It was Norris who swore to the accuracy and completeness of accounts that were neither and insisted on defending them over objections.

Fifth, the Estate matters that Norris did not himself complicate may have been unique, but they were not extraordinary. The Scottish properties were disposed of. Doe Run was readied for sale and sold; so were the Florida properties. State inheritance taxes were filed. Further, the work that was handled effectively, the IRS audit, was chiefly the work of Gibbs and Donohue; Norris was involved in the initial meeting, but did not even attend the second meeting with the IRS.

Finally, the record overwhelmingly demonstrates that Norris preferred his own interests to those of the estate and the Beneficiaries from the very outset of his administration. Throughout the time Norris claims Sir John's Estate was illiquid, facing problems with the IRS and dealing with the effects of a worldwide recession, Norris paid himself over $4 million. This is not what a fiduciary does in service of an estate and its beneficiaries, to whom he owes the highest obligation of loyalty and trust.

ii. Maillie's Fees in Sir John's Estate

Maillie's charges to Sir John's Estate total $1,279,139, and there was no testimony from Norris, Furman or others at the hearing close to justifying them. The evidence at trial showed that Sir John's Estate involved a number of bank, investment and other accounts, but why the management of these accounts during a period of estate administration required the investment of $1.3 million, even over a nine (9) year span, was never explained to the court's satisfaction. As noted above, Maillie provided absolutely no detailed information as to the services for which it was charging the estate. One of the most significant services that Maillie provided to the Estate, the preparation of

the Initial Accounts, was not competently done. The Initial Accounts were useless and reflected a system of accounting and bookkeeping that was Byzantine. Norris, throughout the administration, had concerns about Maillie's responsiveness and performance, but stuck with it nonetheless. In any event, it was Norris's burden to support Maillie's charges as a reasonable element of his compensation as executor and he did not carry it.

In the absence of evidence, and recognizing that some routine bookkeeping and check writing services were provided, the court will disallow 80% of Maillie's charges, or $1,023,311. The allowed charges are $255,828. Norris owes the balance to the Estate.

iii. Legal Fees in Sir John's Estate

The Lamb firm invoiced Sir John's Estate a total of $5,882,342 through August 2016. Sir John Revised Account, ¶ 67. Of this amount, $2,861,585 was billed prior to January 2013, and thus prior to the filing of the Beneficiaries' Objections. *Id.*, ¶ 62. This last figure includes billings for the domicile litigation, the tax penalty litigation, and the Smith litigation. The Beneficiaries challenge those billings, which total about $1.5 million, not merely on grounds of reasonableness, but also on the independent basis that they are unrecoverable as a matter of law because they were incurred for the personal benefit of Norris and the Lamb firm, and not to benefit the Estate. Post-Objections fees will also be addressed separately. At issue now is whether the Lamb firm has demonstrated the reasonableness and justice of the pre-Objection charges levied against the estate. The court finds it has not.

The Lamb firm's fees are extraordinary when evaluated under any analysis, the *Johnson Estate* guidelines or the *LaRocca* factors. Most of the difficult work, such as the valuation of the partnerships, analysis of allowable discounts, federal tax work including much of the joint audit that resulted, was handled by other, separately compensated, lawyers. Their charges were, while substantial, quite modest in comparison to the Lamb firm's charges. The fees include approximately 5,000 hours, almost two years' worth of forty hour weeks, of pre-Objections time expended by one lawyer, Donohue, who acted as the "point person" for the Lamb firm and for Norris. While Donohue did a number of things the court would expect an executor to do, and deserves compensation for that work, there is no apparent reason why the day-to-day activities he was commissioned to help manage could not have been done less expensively and perhaps more efficiently by a professional administrator who would not have charged a law firm senior partner's billing rate. Donohue is the head of the Lamb firm's business group. Certainly there was legal work to be done. But Norris marshaled his resources without regard to efficiency and the net effect was a very large legal bill from the Lamb firm, month in and month out.

Latourette reviewed in detail the Lamb firm's activities and charges and saw no reason the Lamb firm should receive more than the *Johnson Estate* guidelines amount of $303,000, reduced again by the fact that many other lawyers had been hired, including Smith and Gibbs for all tax and audit work at a fixed fee of $450,000. Latourette's opinion was that a proper guidelines fee for the Lamb firm was $254,000.

Neither the Executor nor his counsel adduced evidence sufficient to justify a fee for pre-Objections work that is almost ten (10) times the *Johnson Estate* guidelines -- including non-litigation work that is at least five (5) times that of the guidelines. Nor did

they adequately demonstrate to this court how application of the *LaRocca* factors would lead to any result appreciably different than the *Johnson Estate* "rule of thumb."

iv. Conclusion Regarding Executor and Legal Fees in Sir John's Estate

Executor, accountant and pre-Objections legal fees charged to Sir John's Estate totaled $13,439,888. Stipulation re: Revised Accounts, ¶¶ 56-57, 61, 62, 68-72 This amounts to **33.36%** of the gross value of Sir John's Estate at death in Sir John's Revised Account. For all of the reasons outlined above, the fees charged by the Executor and these professionals are excessive and unreasonable.

The court will approve a guidelines executor fee for Norris in Sir John's Estate of $409,000, which is inclusive of $255,828 of Maillie's charges to Sir John's Estate.

The balance of the executor's fees Norris paid himself from Sir John's Estate, $3,891,913, is disallowed. With the $1,023,311 in fees the Estate paid to Maillie that has been disallowed, a total of $4,915,224 in fees attributable to the Executor is disallowed and surcharged to the Executor. As previously noted, a surcharge is proper in these circumstances, where the Executor has advanced fees without prior court approval and fails to prove they are reasonable and justified. *Compare*, *In re Thouron's Est.*, 182 Pa. 126, 37 A.861, 862-63 (1897)(trust estate) (where accountant had "a most successful management in every respect," and "wisely and skillfully managed" real estate; Supreme Court observed that "nothing but praise be awarded to him . . ..")

The court will approve a legal fee for the Lamb firm in Sir John's Estate of $1,000,000, 332% of the *Johnson Estate* guidelines. This fee recognizes that the Lamb firm did assist in the management of the Estate, playing part of the role Norris ought to

have played but did not, and was brought in to assist in the audit when Smith was relieved of his duties with respect to that matter. It also recognizes, however, that numerous other professionals contributed to the role that estate counsel would ordinarily play in the administration of a large estate. The balance of the Lamb firm's pre-Objection fees charged to Sir John's Estate for matters other than the domicile litigation, the tax penalty litigation, and the Smith litigations is disallowed in the amount of $1,861,585, and the Lamb firm is directed to disgorge and pay that amount to Sir John's Estate.

IX. Post-Objections Fees

As noted in the Findings, the Lamb firm claims $2,489,728 in post-Objections fees and Maillie (whose fees must be considered part of Norris's compensation) has charged the estates an additional $250,000.

A. The Lamb Firm's Post-Objections Fees

The burden is on the Lamb firm to prove the recoverability of its post-Objections fees, and on Norris to do the same with respect to Maillie's fees. *See Estate of Harper*, 975 A.2d 1155, 1162 (Pa. Super. Ct. 2009); *In re Padezanin*, 937 A.2d 475, 485 (Pa. Super. Ct. 2007); *Susick Estate*, 6 Fiduc. Rep. 3d 209, 213 (Philadelphia O.C. 2015); *Estate of Wanamaker*, 314 Pa. Super. 177, 180, 460 A.2d 824, 825 (1983) (citing *Hempstead v. Meadville Theological Sch.*, 286 Pa. 493, 134 A. 103 (1926)).

Based upon the evidence presented at the hearings before the court, and the fact that the Lamb firm's post-Objections time records do not reflect work being done on general estate administration, the court concludes that the bulk of the post-Objections

fees that the Lamb firm seeks to retain or recover were incurred in connection with the following matters:

(a) Efforts to justify pre-Objections executor and counsel fees charged to the Estates;

(b) Efforts to defend against Objections to the adequacy of the original accounts submitted in Sir John's and Tiger's Estates;

(c) Efforts to resist surcharge claims;

(d) Efforts to defeat the Beneficiaries' opposition to the award of post-Objections fees because of the Lamb firm's conduct during the discovery phase of these proceedings, and to resist the Beneficiaries' related Motion for Sanctions; and

The court will address these issues in order.

First, the court observes that, like an executor seeking allowance of fees from an estate, "an attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation." *Estate of Wanamaker*, 314 Pa. Super. 177, 180, 460 A.2d 824, 825 (1983) (*citing Hempstead v. Meadville Theological Sch.*, 286 Pa. 493, 134 A. 103 (1926)). Part of that burden is to establish that the work was undertaken for the benefit of the estate. Since, the executor's and attorney's fees are for the personal benefit of the executor or counsel and not for the benefit of the estate, that burden cannot be met with regard to fees sought to justify fees. The executor and counsel must bear the cost of justifying their own fees just like any other litigant. *See, e.g, McCann Trust (No. 3)*, 10 Fiduc. Rep. 2d at 54; *Nicely Estate*, 18 Fiduc. Rep. 2d at 415; *Broadwater Estate (No. 2)*, 12 Fiduc. Rep. 2d at 296-97.

Second, the Initial Accounts were so fundamentally deficient that the court was required to reject them *sua sponte*. The court concludes that no executor or counsel could reasonably have believed that attempting to defend the Initial Accounts was justified. Certainly, the efforts to do so did nothing to benefit the Estates, and in fact merely required the Beneficiaries to incur needless costs in establishing, through multiple trial days, that the Initial Accounts were in fact useless. It would not be appropriate to award fees for efforts to defend indefensible accounts.

Third, the court does recognize that it may allow an executor his counsel fees if incurred in successfully resisting a surcharge claim. *In re Barkowsky's Estate*, 437 Pa. 282, 284 (1970). The operating principle is that where a beneficiary seeks to surcharge a trustee, and is successful, the trustee will be personally liable in damages and must pay its own costs and counsel fees; if on the other hand the beneficiary is unsuccessful, the trustee will be entitled to reimbursement out of the trust estate. *In Re Wormley's Estate*, 359 Pa. 295, 301, 59 A.2d 96 (1948).

However, the Beneficiaries have met their burden of proof with respect to several of the principal surcharges that they have claimed, including for the ultimate net loss to Sir John's estate and for the interest Sir John' estate was required to pay on the Bancorp loan. Accordingly, the work done to oppose surcharge requests (other than for the domicile issue in which the Executor was successful) was not for the benefit of the estate, but for the benefit of Norris and the Lamb firm. It would be inequitable to allow the fees for such work to be charged to the Estates (the domicile fees excepted).

Fourth, the court has determined that the Lamb firm's conduct in the discovery phase of this proceeding fell woefully short of its discovery duties. It resulted in

unnecessary delay and caused the Beneficiaries to be denied access to relevant non-privileged documents. The court has concluded that sanctions are appropriate in light of that conduct.

It is elemental that decedents' estates are subject to the jurisdiction of the Orphans' Court Division of the Court of Common Pleas. 20 Pa. C.S.A. §711. Counsel fees payable to an attorney for an estate are paid from funds subject to the Orphans' Court jurisdiction and scrutiny. Counsel for an executor has a fiduciary relationship with the personal representative who himself has a similar fiduciary obligation to the estate. It is not enough that the executor approve counsel fees. The Orphans' Court, which has jurisdiction over the estate from which the fee is to be paid, must also approve the reasonableness. *Dorsett v. Hughes*, 353 Pa. Super. 129, 135, 509 A.2d 369, 372.

The Lamb firm is not itself a party in these proceedings. Unlike the case with an accountant, such as Maillie, the Orphans' Court has historically exercised its power over counsel for the personal representative. Despite not being a party as such, counsel must apply for and justify fees paid to it by the personal representative and, when adjudged to be excessive, can be and are regularly ordered to disgorge them to the Estate.

The issue of an attorney's liability to an estate when that attorney has represented the executor was addressed in *Estate of Westin*, 874 A.2d 139 (Pa. Super. 2005). The attorney in *Westin* likewise argued that since he acted only as legal counsel to the estate he had no attorney-client relationship with appealing creditors in that case. The Superior Court rejected that argument and emphasized that it is well established that Pennsylvania courts may impose surcharges against counsel for an estate or counsel for the executor

when there is a breach of the standard of care. Indeed, if the loss to an estate exceeded the attorney's fees, the attorney can be held liable for such loss. 874 A.2d at 147-48.

One who knows this principle well is William Lamb who assured the Beneficiaries as much at the outset of the administration of Sir John's Estate a decade ago. (FOF, 83-84, 90).

The court orders that the Lamb firm disgorge all post-Objection fees that it has already been paid and that the Lamb firm immediately release to the Estate all funds in the escrow account ordered to be established by this court's Order of April 2, 2015, with the exception as stated of post-Objection fees concerning the domicile issue.

B. Maillie's Post-Objections Fees

With regard to Maillie's post-Objections fees, it is impossible to determine how much, if any, of those fees were incurred for ordinary Administration work. Maillie failed to provide, or apparently to keep, any detailed time records, merely submitting summary invoices that reflected a monthly total and did not itemize charges. *See Estate of Phillips*, 616 A.2d 667, 668-69 (Pa. Super. 1992) (noting that the fiduciary and his counsel have the burden of "proving facts that will allow the court to make an informed judgment as to the work actually done by each," noting that the appellant had "failed to provide this court with the specifics of the work performed" and rejecting his attempt to rely on "reconstructed time sheets he assembled without benefit of time records"); *see also Estate of Sonovick*, 373 Pa. Super. 396, 400, 541 A.2d 374, 376 (1988). However, upon the conclusion of the tax penalty litigation and the Smith litigation, there was very little, if anything, for Maillie left to do other than handle day to day payments and disbursements as required. Compensation of $1,000 per month should have been

sufficient for such work. All of Maillie's post-Objections fees in excess of that amount are disallowed.

Maillie, unlike the Lamb firm (which as counsel has an independent obligation to justify its fees and which participated in the hearing and called witnesses in an effort to do precisely that), may reasonably have relied upon Norris to defend its fees because they are to be considered part of Norris's compensation under Pennsylvania law. Therefore, without prejudice to any recourse the estate or the Beneficiaries may have against Maillie, the court does not order Maillie directly to disgorge fees it has taken in this matter, but orders Norris to repay such fees to the Beneficiaries as a distribution from the Estate.

X. Sanctions Matters

A. Inadequacy of Norris's Production of Hard Copy Files in Electronic Form

Beneficiaries' first challenge to the Executor's conduct during the document production phase of this matter focuses on the quality of the electronically produced "administrative files." According to the Beneficiaries, the Executor's conduct must be judged against the requirements of Rule 4009.1(b) of the Pennsylvania Rules of Civil Procedure, which governs the production of electronic data. They argue that the Executor's production of the administrative files in this case failed to comply with Rule 4009.1(b) and warrants the imposition of sanctions. The court disagrees with Beneficiaries on this part of the discovery dispute.

Beneficiaries first raised the issue of the "quality" of the Executor's electronic production of the 81 boxes of administrative files in October, 2014. At that time, Beneficiaries filed a motion to compel seeking among other things an order requiring

Executor to reproduce the electronically produced files in the format they requested. The court denied the motion. Later, Beneficiaries filed a motion seeking reconsideration of the court's October, 2014 Order. In that motion, Beneficiaries represented to the court that they were not revisiting the electronic data issues. The court sees no basis for revisiting the issue now.

B. Inadequacy of Norris's Assertions of Privilege

Cunningham conceded it was not until after this court's Order of August 11, 2015 that the privilege logs the Lamb firm produced contained any information about the subject matter of any of the documents Norris was withholding beyond the mere recitation of the privilege claimed, that is, a "defensive issue" attorney-client privilege or the "defensive issue" work product exemption.

Under Pennsylvania law, Norris's and his counsel's mere recitation of the privilege claimed was ineffective to preserve any otherwise applicable privilege. Pennsylvania law requires that any party asserting a privilege must set forth *facts* supporting the basis for such assertion. *See, e.g., Joyner v. Se. Pa. Transp. Auth.*, 736 A.2d 35, 38 n.3 (Pa. Commw. Ct. 1999) (citing *Commonwealth v. Maguigan*, 511 A.2d 1327, 1334 (1986), for the proposition that "the party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked" and only then does the burden shift to "the other party to prove why the applicable privilege would not be violated by the disclosure"); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) ("The party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked . . . .").

Pennsylvania law is also clear about the consequences of a failure to provide facts sufficient to support a claim of privilege: the protection of the privilege is waived. *See, e.g., Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1267 (Pa. Super. Ct. 2007) ("If the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then . . . the communication is not protected under attorney-client privilege."); *see also Red Vision Sys., Inc. v. Nat'l Real Estate Info. Servs., L.P.*, 108 A.3d 54, 70 (Pa. Super. Ct. 2015) (holding that the attorney-client privilege, as codified at 42 Pa.C.S. § 5928, did not protect against the disclosure of communications where "the record contain[ed] insufficient proof that the attorney-client privilege [was] applicable to the information or documents" and "the privilege ha[d] not been invoked properly."); *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.*, 39 A.3d 372, 379-80 (Pa. Super. Ct. 2012) (affirming the trial court's holding that two memoranda in the possession of defendant were discoverable and not protected by the attorney-client privilege, after finding that defendant failed to meet its "initial burden of producing sufficient facts to show that it ha[d] properly invoked the privilege for the communications that it ha[d] declined to disclose."); *US Airways, Inc. v. Fed. Express, Inc.*, No. 2928 EDA 2009, 2009 WL 5164519 (C.P. Phila. Cnty. Nov. 23, 2009) ("Since [defendant] has failed to produce a privilege log that comports with the Rules in a timely fashion, it has not demonstrated the applicability of the privilege in this instance. Thus, the privilege does not apply and the court properly ordered that [defendant] produce un-redacted documents.") (citation omitted).

In attempting to defend its assertions of privilege, the Lamb firm appears to place the blame for their inadequate logs at the feet of the court. According to the Lamb firm,

"[t]he court's Order did not direct 'that any particular details be included in the descriptions of the documents in the privilege log.'" (Exec.'s FOF 4, at 84). It is not, however, the court's responsibility to tell experienced counsel how to prepare a proper privilege log. Furthermore, the court's Order of October 21, 2014, denying Beneficiaries' motion, which included a request for relief in the form of production of documents claimed to be privileged, was not, as reflected by the court's subsequent rulings and lack of accompanying opinion, intended as a disposition of the parties' discovery differences on the merits, nor could the Lamb firm or Norris reasonably have so construed it. They had asked the court to dismiss the Beneficiaries' motion on the basis that no certificate had been filed establishing that counsel had met and conferred prior to the motion's being filed. (Exec.'s Mem. in Resp. to Mot. to Compel, dated Oct. 16, 2014, at p. 2.)

In August 2015, the Beneficiaries again filed a motion to compel and additionally requested that the court reconsider its October 2014 order. At that time, the court ordered the production of any number of documents and ordered Norris, if he intended to withhold any documents required to be produced, "to provide a brief description of its subject matter sufficient to support the claim of privilege." In response to this final discovery order, the Lamb firm, for Norris, simply continued to withhold documents without providing any adequate justification for doing so.

Norris and his counsel had two choices. They could produce logs that provided a factual basis for the privileges being asserted, or they could produce the documents they were withholding. They repeatedly refused to do either in the face of this court's orders, with the result that the Beneficiaries filed a Motion for Sanctions on November 13, 2015.

The filing of the motion at that juncture was justified given the dispute's history. Norris and the Lamb firm had been ordered to produce an "appropriate privilege log" on October 17, 2013. They first produced a privilege log almost *one year* later, with a September 2014 production. After further motion practice directed to documents, they persisted in withholding proper logs, even in response to the court's August 11, 2015 Order. The Lamb firm's final logs were produced on October 12, 2015, and remained inadequate. With trial on the Beneficiaries' Objections already delayed to allow resolution of the document production issues and then rescheduled firmly for early December, 2015, another motion to compel was not viable.

C. Standards Governing the Imposition of Sanctions

Under Pennsylvania Rule of Civil Procedure 4019 (c), as sanctions for discovery abuses, the court is authorized to make:

> (1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony . . . ;
>
> (3) an order . . . entering a judgment . . . by default against the disobedient party or party advising the disobedience;
>
> (4) an order imposing punishment for contempt . . . : [or,]
>
> (5) such order with regard to the failure to make discovery as is just.

Pa. R.C.P. 4019(c)(1)-(5).

Further, under Rule 4019(g)(1):

> Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Pa. R.C.P. 4019(g)(1).

While the Beneficiaries' entitlement to review non-privileged files relating to Norris's administration is a matter of right, and not discovery, the discovery rules governing a party's obligations when ordered to produce documents are an appropriate standard by which to measure Norris's and the Lamb firm's conduct in producing and withholding documents in this matter.

Norris and the Lamb firm have argued that in deciding Beneficiaries' Motion for Sanctions the court must consider the five factors enumerated in *Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating*, 698 A.2d 625, 629 (Pa. Super. Ct. 1997), specifically: (1) the nature and severity of the discovery violation; (2) the defaulting party's willfulness or bad faith; (3) prejudice to the opposing party; (4) the ability to cure the prejudice; and (5) the importance of the precluded evidence in light of the failure to comply.

By way of background, *Croydon* involved the affirmance of a pretrial order barring plaintiff from introducing expert testimony. On appeal, the court (1) rejected plaintiff's argument that the lower court "utterly failed to consider the relevant

substantive factors . . . ." 698 A.2d at 629 (internal quotation marks omitted); (2) specifically noted the court's authority to make appropriate orders pursuant to Pa. R.C.P. 4019; (3) observed that the "decision whether to sanction a party, and if so the severity of such sanction, is vested in the sound discretion of the trial court"; and (4) noted that each of the factors "represents a necessary consideration and not a necessary prerequisite" to the imposition of sanctions finding. *Id.* The appellate court found that the "evidence amply support[ed] a finding that [plaintiff] repeatedly and willfully failed to comply with court orders respecting discovery" and accordingly prejudiced defendant, *id.* at 630, and further observed that "when asked by the court to explain its dilatory behavior, [plaintiff] gave answers which were, at turns, implausible, incredible and irrelevant." *Id.* at 629.

Norris and the Lamb firm, like the defaulting party in *Croydon*, have repeatedly and willfully failed to comply with several of this court's Orders regarding their production of the administrative files and requisite privilege logs. The nature and the severity of their violation is significant: without properly justifying their actions, in the face of repeated orders, Norris and his counsel have withheld tens of thousands of documents that are part of the administrative files of these Estates and are presumptively relevant to Norris's administration and the issues involved in the Beneficiaries' Objections.

Further, the Beneficiaries have been prejudiced as a result. Numerous documents have been withheld such that it is impossible to tell how important any of them might be – and that is inherently prejudicial. The Beneficiaries and the court made considerable efforts to cure this prejudice. Yet Norris and the Lamb firm failed to comply with this

court's August 11, 2015 Order, even by the extended deadline to which the Beneficiaries agreed. With a rescheduled trial date set firmly for December 1, 2015, and after multiple efforts to compel production of information for which no privilege had been established through this court's orders, the Beneficiaries were no longer in a position to cure the prejudice to which they had been subjected other than through a motion for sanctions.

In addition to the court's authority under Pa.R.C.P. 4019,"[i]t is well-established that the courts possess the inherent power to enforce their orders and decrees by imposing penalties and sanctions for failure to comply. Such penalties and sanctions, including attorneys' fees, may be imposed against either an attorney or an individual party who has been guilty of misconduct during the pendency of any litigation. Even where an attorney alone engages in misconduct, "a client may be held liable for the resulting penalties because a client is generally liable to a third person injured by an act which the attorney does in execution of matters within the attorney's authority." *Davis v. SEPTA*, 680 A.2d 1223, 1226-27 (Pa. Commw. Ct. 1996) (internal citations omitted).

D. Relief on Motion for Sanctions

Based on its Findings and Conclusions in the matter, the court grants the Beneficiaries' request for sanctions against Norris and the Lamb firm. However, despite the serious discovery violations, the Beneficiaries have substantively prevailed on their Objections and post-Objection claims. Having received relief on those claims, the court regards the relief sought under the sanctions claim as essentially moot; granting all the additional relief they seek would be inappropriate. In no sense should this result be viewed as a condonation by the court of the discovery conduct identified above.

The court does award the Beneficiaries their reasonable attorneys' fees incurred in (i) all motions they filed in an effort to obtain compliance with this court's Order of October 17, 2013 following the initial motion to compel which the court denied and subsequent orders relating to the production of documents and (ii) the prosecution of their Motion for Sanctions, including reasonable fees paid for the two (2) days of trial time devoted to that motion and for preparation for that portion of the hearing.

The Beneficiaries' counsel shall submit an itemized timesheet within three (3) weeks for the court's review. The Executor and his counsel shall have three (3) weeks from their receipt of a copy thereof to respond in writing with any objections, and on that basis the court will rule.

CONCLUSIONS OF LAW

I. Objections to Initial Accounts

A. Objections directed to the form, content, accuracy, adequacy and propriety of each of the Initial Accounts and to payment of legal and accounting fees and other costs related to these accounts (Tiger's Estate, Objection Nos. 1, 4, 5; Sir John's Estate, Objection Nos. 1, 4, 6, 7, 10, 16)

1. Norris could not reasonably have determined consistent with his fiduciary obligations and his duty of care, that either of the Initial Accounts was proper in content or form or in any way usable by the court.

2. Norris was not well served by Furman and Maillie, for whom he, as Executor was responsible.

3. Norris and the Lamb firm had more than sufficient reason to question Furman's and Maillie's competence to prepare the Initial Accounts, both before and after this assignment was given.

4. Both Norris and his counsel failed to exercise sufficient care to assure that Furman was proceeding knowledgably or appropriately.

5. It was Norris's job to assure the competence of his accountants and to assure that that each account was "true and correct," as his oath asserted.

6. Norris breached his fiduciary duties to the Beneficiaries in signing and filing the Initial Accounts.

7. The Lamb firm also failed to exercise due care in reviewing the Initial Accounts and counseling Norris.

8. Furman and Maillie provided incompetent work on the accountings and the Executor and the Lamb firm knew or reasonably should have known that the Initial Accounts were inaccurate and misleading.

9. Thereafter, a diligent executor and his counsel, in the exercise their fiduciary duties of loyalty and due care, would not have vigorously defended them from the date the Objections were filed in April 2013 until April 29, 2016, when the court ruled *sua sponte* that they must be amended and restated.

10. This conduct was inconsistent with the fiduciary duties of loyalty and due care that Norris and the Lamb firm owed the Beneficiaries.

11. The fees charged by Maillie, for which Norris as Executor is responsible, in connection with the Initial Accounts are disallowed in the amount of $115,360.

12. The fees charged by the Lamb firm in connection with the Initial Accounts are disallowed in the amount of $41,638.

B. Objection to legal fees charged to and tax payments incurred by Sir John's Estate as a result of Norris's decision to probate Sir John's will in Pennsylvania as the estate of a Pennsylvania domiciliary and the related litigation over Sir John's domicile.

13. Norris acted within reason on the issue of domicile.

14. The Executor and the Lamb firm did not breach their fiduciary duties to the Estate or the Beneficiaries by treating Sir John as a Pennsylvania domiciliary or paying the resulting Pennsylvania inheritance tax.

15. The fees and commissions charged against the Estate of Sir John related thereto were appropriate.

C. Objection to legal fees incurred in connection with efforts to abate tax penalty charged to Sir John's Estate for untimely filing.

16. Norris, as executor, was responsible for timely filing of tax returns and extension requests.

17. Norris cannot rely on Smith's advice to excuse his own failure to independently address the tax due date.

18. His failure to do so was a breach of his duty of care to the Estate and the Beneficiaries.

19. The Lamb firm breached its obligations to the Estate and the Beneficiaries in failing to investigate and "check the proper box."

20. The IRS tax penalty resulted from Norris's and his counsel's breaches of their fiduciary duties to the Estate and the Beneficiaries.

21. Norris should be surcharged as necessary to make the Estate whole.

22. The Lamb firm's fees incurred in an effort to remedy the effects of the penalty are not properly chargeable to the Estate.

23. The ultimate net loss to Sir John's Estate, after netting recoveries against the $1 million penalty and the at least $1,032,000 in legal fees the Lamb firm billed to sue the IRS and Smith, is $557,001.

24. Norris and the Lamb firm are surcharged $557,001, for which they shall be jointly and severally liable.

D. Objection to the borrowing costs Sir John's Estate incurred in connection with Bancorp loan.

25. The $3.9 million that the Estate borrowed from Bancorp Bank in 2010 to pay its tax liabilities following the audit was necessary only because Norris mismanaged the Estates' assets in the preceding four (4) years of his administration.

26. Norris had managed by September 2010 to pay himself $3.9 million in executor and management fees from the Estates.

27. The payment of fees of this dimension, by an Estate allegedly facing a large liquidity problem, constituted a breach of the Executor's fiduciary duty to prefer the interests of the Estate and its Beneficiaries over his own and his duty of care in the management of the Estate's assets.

28. The Bancorp loan was necessary only because Norris failed to manage the Estate's assets in accordance with his fiduciary duties to the Estate and the Beneficiaries.

29. Norris is surcharged in the amount of $263,947.25, the amount of interest charges the Estate paid for the Bancorp loan.

E. Objections to the Executor fees charged by Norris to each Estate as grossly excessive and unreasonable.

30. Norris failed to prove that the fees he, his accountants and his counsel charged each of the Estates are reasonable and just.

31. Norris's total executor fees for Tiger's Estate were $543,000, nearly five (5) times the *Johnson Estate* guidelines.

32. After Tiger died, Norris paid himself from the partnerships a "management fee" of $30,000 per month; these are additional amounts that Norris took from the assets of Tiger's estate.

33. Norris bears a significant amount of the responsibility for challenges Norris incurred in dealing with the tax authorities concerning Tiger's partnerships.

34. Norris failed to provide any clear evidence to support or justify Maillie's charges and therefore one-half (1/2) of those charges, or $43,000, is disallowed.

35. Norris is surcharged the balance of $43,000.

36. Norris is entitled to a guidelines executor fee for Tiger's Estate of $118,000.

37. The balance of the executor fees Norris paid himself from Tiger's Estate, $425,000, is disallowed.

38. A total of $468,000 in executor fees paid from Tiger's Estate is surcharged to the Executor.

39. The entirety of the "management fees" paid to Norris from Tiger's Estate, $360,000, is likewise disallowed and Norris is surcharged the full amount.

40. Norris charged Sir John's Estate $2,793,000 in executor fees and also charged an additional $1,507,913 in management fees.

41. Maillie's accounting fees charged to Sir John's Estate total $1,279,139 through February 2016.

42. The total of $5,464,693 in executor and managements fees in Sir John's Estate is nearly fourteen (14) times the *Johnson Estate* guidelines figure.

43. These charges are, on their face, excessive.

44. Norris failed to meet his burden to show that Maillie's charges were a reasonable element of his compensation as executor.

45. Eighty (80) percent of Maillie's charges to Sir John's Estate, or $1,023,311, is disallowed and Norris is surcharged this amount.

46. Norris preferred his own interests to those of the Estates and the Beneficiaries.

47. Norris is entitled to a guidelines executor fee in Sir John's Estate of $409,000, which is inclusive of $255,828 of Maillie's charges to Sir John's Estate.

48. The balance of the executor fees Norris paid himself from Sir John's Estate, $3,891,913, is disallowed.

49. A total of $4,915,224 in executor fees paid from Tiger's Estate is surcharged to the Executor.

50. A surcharge is proper in these circumstances, where the Executor has advanced fees without prior court approval and fails to prove they are reasonable and justified.

F. Objections to the legal fees paid to the Estates' counsel, the Lamb firm, in both Estates and Smith in Sir John's Estate as grossly excessive and unreasonable.

51. The Lamb firm billed Tiger's Estate fees totaling $335,882, roughly three times the *Johnson Estate* guidelines of $118,000 to prepare the Pennsylvania Inheritance Tax Return.

52. By comparison, Norris hired Smith and Gibbs, at a price of $200,000, to do all federal estate tax and valuation work.

53. To the extent Donohue's role was to serve as a "point person", he was filling a role for which Norris was already being paid as Executor.

54. The Lamb firm's other significant role was in assisting with preparation of the unusable Initial Account, and it did not distinguish itself in that effort.

55. Norris and the Lamb firm did not offer evidence sufficient to justify a $335,882 fee.

56. A reasonable legal fee for the Lamb firm for the work in Tiger's Estate is $200,000, almost sixty percent (60%) of its charges.

57. The Lamb firm did assist in the management of the Estate, playing part of the role Norris ought to have played but did not, but much of the important and complex work relating to valuation and federal taxes was performed separately by Smith and Gibbs, and involved additional charges to the estate of $200,000.

58. The balance of the Lamb firm's fees for Tiger's Estate, $135,882, is disallowed and the Lamb firm is directed to pay that amount to the Estate.

59. The Lamb firm invoiced Sir John's Estate $2,861,585 prior to January 2013 and the filing of the Beneficiaries' Objections, which includes billings for the domicile litigation, the tax penalty litigation, and the Smith litigation.

60. The *Johnson Estate* guidelines amount is $303,000.

61. The Lamb firm failed to demonstrate the reasonableness of the pre-Objection charges to Sir John's Estate.

62. The Lamb firm's fees are extraordinary when evaluated under any analysis, the *Johnson Estate* guidelines or the *LaRocca* factors.

63. Most of the difficult work, such as the valuation of the partnerships, analysis of allowable discounts, federal tax work including much of the joint audit that resulted, was handled by other, separately compensated lawyers.

64. The Lamb firm did assist in the management of the Estate, playing part of the role Norris ought to have played but did not, and was brought in to assist in the audit when Smith was relieved of his duties with respect to that matter.

65. Neither the Executor nor his counsel adduced evidence sufficient to justify a fee for pre-Objections work that is almost ten times the *Johnson Estate* guidelines -- including non-litigation work that is at least five (5) times that of the guidelines.

66. A reasonable legal fee for the Lamb firm in Sir John's Estate of $1,000,000, 332% of the *Johnson Estate* guidelines.

67. The balance of the Lamb firm's pre-Objection fees charged to Sir John's Estate is disallowed in the amount of $1,861,585, for matters other than the domicile litigation, the tax penalty litigation, and the Smith litigation.

68. The Lamb firm is directed to disgorge and pay that amount to Sir John's Estate.

II. Post-Objections Fees

69. The Lamb firm claims $2,489,728 in post-Objections fees.

70. The bulk of the post-Objections fees that the Lamb firm charged were incurred in connection with (i) efforts to justify pre-Objections executor and counsel fees charged to the Estates; (ii) efforts to defend against Objections to the adequacy of the

original accounts submitted in Sir John's and Tiger's Estates; (iii) efforts to resist surcharge claims; and (iv) efforts in response to the Beneficiaries' motion for sanctions.

71. An attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation.

72. Executor and attorneys' fees are for the personal benefit of the executor or counsel and not for the benefit of the estate.

73. Fees incurred to justify fees are not recoverable from the Estate.

74. The Beneficiaries met their burden of proof with respect to several of the principal surcharges that they have claimed, as discussed *supra*.

75. The work done to oppose surcharge requests (other than for the domicile issue in which the Executor was successful) was not for the benefit of the estate, but for the benefit of Norris and the Lamb firm.

76. The fees for such work are not chargeable to the Estates (the domicile fees excepted).

77. The Initial Accounts were so deficient that the court was required to reject them *sua sponte*.

78. It was not reasonable for the Executor or counsel to attempt to defend those accounts.

79. The fees for efforts to defend the accounts are not chargeable to the Estates.

80. The post-Objections fees incurred for work done to oppose the Beneficiaries' challenges to the discovery conduct did not benefit the Estates.

81. It would be inequitable to allow any such fees as charges against the Estates.

82. The Lamb firm must disgorge all post-Objection fees that it has already been paid.

83. The Lamb firm must release to the Estate all funds in the escrow account ordered to be established by this court's Order of April 2, 2015, with the exception as stated of post-Objection fees concerning the domicile issue.

84. Despite not being a party as such, counsel must apply for and justify fees paid to it by the personal representative and, when adjudged to be excessive, can be and are regularly ordered to disgorge them to the Estate.

85. Maillie has charged the Estates an additional $250,000.

86. As for Maillie's post-Objection fees, compensation of $1,000 per month should have been sufficient for such work.

87. All of Maillie's post-Objections fees in excess of that amount are disallowed.

88. Norris must repay Maillie's fees to the Beneficiaries as a distribution from the Estates.

III. Motion for Sanctions

89. Norris and the Lamb firm have repeatedly and willfully failed to comply with several of this court's Orders regarding their production of the Estates' administrative files and requisite privilege logs.

90. The Lamb firm could not have reasonably believed that the massive redactions (reflected in OBJ 72) were necessary to protect privileged material, were

reasonably tailored to protect only privileged material, or were conducted pursuant to a process reasonably calculated to ensure that the redactions would be limited to the removal of only privileged material or protected work product.

91. This conduct prejudiced the Beneficiaries.

92. The Beneficiaries and the court made considerable efforts to cure this prejudice.

93. Despite the violations, the Beneficiaries have substantively prevailed on their Objections and post-Objection claims.

94. Thus, the relief sought under the motion for sanctions is essentially moot.

95. The Beneficiaries are entitled to their reasonable attorneys' fees incurred in (i) all motions they filed in an effort to obtain compliance with this court's Order of October 17, 2013 following the initial motion to compel which the court denied and subsequent orders relating to the production of documents and (ii) the prosecution of their Motion for Sanctions, including reasonable fees paid for the two (2) days of trial time devoted to that motion and for preparation for that portion of the hearing.

An appropriate Order follows.

Date:_____ BY THE COURT:

/S/_____
Mark L. Tunnell, J.