SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General for the State of New York,

Petitioner,

-against-

THE KERMIT GITENSTEIN FOUNDATION, INC.

Respondent.

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DECISION and ORDER ON LIMITED ISSUE SUBMISSION/HEARING

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 604475-2016

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In the Matter of the Accounting by the Kermit Gitenstein Foundation, Inc., c/o Steven R. Schlesinger, Receiver, as the Administrator, c.t.a. of the Estate of

SHIRLEY GITENSTEIN,

Deceased.

File No. 346141/V

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In the Matter of the Accounting of the

KERMIT GITENSTEIN FOUNDATION, INC.,

By Steen R. Schlesinger, Esq., as the Permanent Receiver.

File No. 357003/A

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In the Matter of the Accounting STEVEN R. SCHLESINGER, Receiver of the KERMIT GITENSTEIN FOUNDATION, INC.,

as the Successor Trustee of

THE ARTICLE SEVENTH(c) TRUST f/b/o SHIRLEY GITENSTEIN u/w/o KERMIT GITENSTEIN

File No. 138481/A

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Accounting by the Kermit Gitenstein Foundation Inc., c/o Steven R. Schlesinger, Esq., Receiver, as the Administrator, c.t.a., of the Estate of

AARON L. GITENSTEIN,

File No. 301202D

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ONOFRY, A.J.S.C.

The following papers were read and considered on this Limited Issue Submission, as ordered by the Court, on the limited issue of the extent to which, if at all, the 8.1 million dollars in prior distributions made to charitable beneficiaries by the Former Receiver Steven R. Schlesinger, Esq., without prior Surrogate Court approval, should be set aside or whether the charitable distributions should be approved based upon the totality of the circumstances.

1. Affidavit-Exhibits A-NN - Memorandum of Law ..... EF 120-161
2. Memorandum of Law - Office of the Attorney General ..... EF 169
3. Reply Affirmation - Schlesinger - Exhibit A - Memorandum of Law..... EF 171-173
4. Supplemental Reply - Affirmation - Camhi ..... EF 174

Upon the foregoing papers, it is

ORDERED, that the $8.1 million dollars in prior charitable distributions made to charitable beneficiaries, as effectuated by Former Receiver and Intervenor-Respondent Steven R. Schlesinger, are hereby approved, *nunc pro tunc*, for the reasons set forth herein.

Factual Background/Procedural History

By Decision and Order dated November 3, 2016 (the "Decision and Order"), as supplemented by the Court's Order of November 22, 2016, this Court granted Petitioner's application to proceed with the judicial dissolution of the Foundation, appointed a Successor Receiver, and granted Proposed Intervenor Steven R. Schlesinger's application to intervene in the pending dissolution proceeding. The Court further ordered the removal of four pending accounting proceedings from Nassau Surrogate's Court and directed that they be consolidated with the pending dissolution proceeding.

Among the Accounting proceedings removed and consolidated was the Accounting filed by former Receiver, Steven R. Schlesinger, which related to his tenure as Foundation Receiver for the period January 1, 2009 through October 31, 2015. Schedule E of the Accounting reports

$11,221,000.00 in prior distributions effectuated by Schlesinger as Former Receiver of the Foundation, to various charitable beneficiaries. (Schedule "E").

In this Court's Decision and Order of November 3, 2016, the Court further referenced the prior findings of Surrogate Reilly, as contained in her May 26, 2015 Decision and Order (the "Surrogate Decision"), in which Surrogate Reilly concluded that $8.1 million in total distributions had been made without Nassau Surrogate Court approval.[1] Based upon the same, this Court concluded that the magnitude of that issue alone was sufficient to justify the necessity for requiring limited issue submissions and/or a limited issue hearing, or both, concerning the extent to which, if at all, those distributions would remain intact or whether the Successor Receiver would be vested with the requisite authority to recoup those distributions from the charitable recipients. (Decision and Order, at page 21).

The Court further noted that the mere identification of the distributions as being effectuated without prior court approval was not, in and of itself, necessarily dispositive of the issue of the propriety of those distributions. Instead, the Court noted that, the propriety of those distributions would require, as a minimum, an in depth examination of: the Foundational purpose; the applicable Internal Revenue Code ("IRC") compliance and distribution requirements for charitable entities; the

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[1]Surrogate Reilly identified 17 distributions that were effectuated, without court approval. These distributions consisted of the following: (1) We Care Fund - $5,000.00; (2) Holocaust Memorial and Tolerance Center of Nassau County - $25,000.00; (3) The We Care Fund of the Nassau County Bar Association - $10,000.00; (4) Nassau Health Care Corporation - $1,200,000.00; (5) Ezer Mizion Inc. - $100,000.00; (6) Molloy College Nursing Program - $300,000.00; (7) Surprise Lake Camp - $100,000.00; (8) Hofstra Medical School - $1,000,000.00; (9) North Shore-LIJ - $1,000,000.00; (10) Integrated Medical Foundation - $5,000.00; (11) IsraAid - $35,000.00; (12) Ezer Mizion, Inc. - $50,000.00; (13) North Shore-LIJ - $4,000,000.00; (14) North Shore-LIJ - $250,000.00; (15) Hofstra Law School - $10,000.00; (16) Lupus Foundation of America - $5,000.00; and (17) Holocaust Memorial & Tolerance Center of Nassau County - $5,000.00.

charitable status of the recipients and their charitable purpose; the extent to which, if at all, Schlesinger exceeded his statutory and court ordered powers; the extent to which those distributions conformed with the Gitenstein family members' prior actions, as directors; and whether recoupment and reclamation of those distributions by the Successor Receiver would be required, thereby necessitating the joinder of these charitable entities as necessary and indispensable parties.

In sum, the Court concluded that this was a threshold issue that would need to be addressed and resolved prior to the judicial settlement of the Accounting and that such issue needed to be done as expeditiously as possible, since it would materially affect the procedural posture of the Accounting and the Dissolution process itself.

Relevant to the same, and by Decision and Order dated November 23, 2016, the Court framed, and directed submissions on, the following limited issue:

> Should the 8.1 Million Dollars in prior distributions, effectuated without prior court approval, now be approved based upon the cumulative consideration and analysis of, among other things, the underlying Foundational purpose, State and Federal statutory and regulatory provisions, the charitable status and purpose of the recipients, the extent to which, if at all, Schlesinger exceeded his statutory and court ordered powers, and the prior dispositive charitable intent of the Foundation and the Gitenstein Siblings, or should those distributions be disallowed based upon the failure of Schlesinger to secure prior court approval?

In response to the Court directive, Intervenor-Respondent Steven R. Schlesinger and The Attorney General of the State of New York (the "OAG") have each filed their respective briefs and submissions.

Both concur that the $8.1 million dollars in prior charitable distributions, effectuated by Schlesinger during his tenure as Receiver from 2009-2015 (the "Unapproved of Subject

Distributions"), should be approved, and seek a judicial determination to that effect. The path each has taken in arriving at that position, however, differs and, in some cases materially so.

In seeking formal approval of the distributions at issue, Schlesinger's basis for approval is essentially three-fold: (1) That the distributions should not be disallowed based upon the lack of prior court approval, since prior court approval was not required in the first instance; (2) all of the distributions made to charitable beneficiaries were proper and within the parameters of the Foundation's purpose; and (3) that while he was not required to replicate the distributions made by Shirley Gitenstein in the latter years of her tenure as director, the distributions he effectuated were nevertheless consistent with what was previously done.

In support of the same, Schlesinger points to the thrust and stated purpose of the joint petition, dated November 1, 2007, initially filed by the OAG and the Public Administrator of Nassau County, which resulted in Schlesinger's appointment as Receiver, in which the co-petitioners articulated the necessity for the Foundation to make annual distributions to public charities "in an aggregate amount equivalent to five percent (5%) of its assets each calendar year and to comply with the relevant provisions of the Internal Revenue Code, the Estates Powers and Trust Law (EPTL), the Not for Profit Corporation Law (N-PCL) and the New York State Tax Law". Those very mandates, he argues, were specifically incorporated in the Court's Order of November 1, 2007 issued the same day. Moreover, he argues, there is nothing in the order that suggests, either directly or indirectly, that he could only satisfy those statutory mandates based upon prior court approval. He was directed to comply and he did so.

Second, he argues, all of the charitable distributions were made, and properly so, to charitable entities which had been organized, and were in fact operating, for religious, charitable,

scientific, literary or educational purposes or for the prevention of cruelty to children, and as such were all within the stated corporate foundational purpose.

He further argues that all of the distributions made were in accord with the general functions of a receiver of a private foundation, and cites to N-PCL §402 which sets forth the Foundation's purposes and the duties or activities that must be carried out in the furtherance of those purposes, duties, he asserts, which are further supplemented by the fiduciary duty which attaches to a receiver as a *de facto director* of the foundation or entity which he serves.

Lastly, Schlesinger argues, while the Foundational purpose and the underlying charitable intent expressed by Kermit Gitenstein in his Last Will and Testament [which are the governing documents] are considerably broader in scope than that gifts made by Shirley Gitenstein in the last days of her tenure as Foundation Director, the distributions he effectuated were nevertheless consistent with the distributions made by the Gitenstein family.

In its submission, the OAG "supports approval *nunc pro tunc* of the Unapproved Distributions because under the totality of the circumstances, it serves the best interests of the past and future charitable beneficiaries of the Foundation". OAG Memorandum, @ page 2. Retroactive authorization of the Unapproved Distributions, it asserts, is both warranted and equitable.

In so arguing, the OAG notes that notwithstanding the finding of the Surrogate as to Schlesinger's misconduct [which it asserts constitutes the "law of the case" and not subject to review by this court as a court of coordinate jurisdiction], to set aside the prior distributions would be inequitable and impose undue harm upon the past recipients who could conceivably be compelled to return the Unapproved Distributions long after they were received and utilized.

The OAG further argues that the documentation filed by Schlesinger, and a review of the record as a whole, warrants a finding that all of the recipient organizations were qualified charities under §501(c)(3) of the Internal Revenue Code and that the overwhelming majority served causes that the Gitenstein family historically supported. Moreover, there is no evidence to suggest that the Unapproved Distributions were used for non-charitable purposes.

As such, the OAG asserts, not only is there no justification for expending the Foundation's assets to investigate the issue, the final distributions that will be implemented upon dissolution are long overdue. In any event, the OAG argues, any remedies or surcharges which may be assessed or imposed by the Court, based upon the Receiver's delay or misconduct, can be addressed within the confines of the Accounting Proceedings themselves.

Furthermore, in preserving and deferring these issues for the Accounting Proceedings themselves, the OAG notes that Schlesinger, and impermissibly so, seeks by the application of the *de facto director doctrine* to not only expand the scope of his authority and relationship with the Court, but to validate his prior actions, i.e. the Unapproved Distributions, that were implemented without prior Court approval. Moreover, while Schlesinger had the obligation to comply with all applicable, IRC, EPTL, N-PCL, and Tax Law, requirements, he was still, the OAG asserts, subject to the court's oversight and advance approval.

In sum, the OAG argues, to the extent the *de facto director doctrine* is applicable to the issues at bar, it should be applied for the limited purpose of protecting the interests of the recipients of the Unapproved Distributions who received these grants, in good faith, not as reason to validate Schlesinger's otherwise unauthorized conduct.

In reply, Schlesinger argues, that the "law of the case" doctrine is inapplicable to present context and does not serve as a bar to the Court revisiting these issues, particularly the issue of the necessity for obtaining prior court approval, which is an integral part of the issues framed by the Court. Relevant to the same, he argues, that issue was never fully litigated and the parties were never afforded a "full and fair opportunity to address the issue" before Surrogate Reilly. Furthermore, the doctrine does not bar subsequent litigation where, as here, the determination was made by the court, *sua sponte* or where the purported findings were couched as *dicta.* Indeed, Schlesinger notes, even the Court Examiner, who was appointed as the investigative arm of the court, opined that no conclusions could be reached or determinations made until an evidentiary hearing was conducted, which never occurred.

In addition, and in view of what Schlesinger portrays as the OAG's continued mis-characterization of Schlesinger's actions as misconduct, Schlesinger seeks an order from the Court prospectively declaring that he is not subject to a surcharge or a denial of compensation concerning the "Subject Distributions" and that the prior order of Surrogate Reilly, which resulted in his removal, be vacated.

Discussion/Legal Analysis

Preliminarily, and as a threshold matter, the Court takes judicial notice of all prior proceedings, determinations, and filings under the four accounting proceedings at issue, as consolidated with the pending dissolution proceeding.

As a further threshold matter, save and except for the limited issue presented, i.e. the validity and/or approval of the "Unauthorized or Subject Distributions", all remaining issues relevant to the Accountings *supra* and the Dissolution of the Foundation, including, *inter alia*, whether the Former

Receiver was guilty of misconduct in discharging his duties, the extent to which, if at all, a surcharge and/ or denial of compensation is warranted, the longevity of the receivership itself, the prospective winding up and distribution of the Foundation assets, and the appropriateness of modifying and/or vacating any prior orders of the Court are reserved, and preserved, for such further proceedings.

Thus, these issues need not, and will not, be addressed within the confines of this Decision, except insofar as they may be deemed relevant to the resolution of the issues presented.

Furthermore, in the Court's Decision and Order of November 3, 2016, the Court outlined in significant detail the operative provisions of Kermit Gitenstein's Last Will and Testament as well as the relevant provisions of the Certificate of Incorporation of the Kermit Gitenstein Foundation, which defined its foundational purpose. As such, the Court need not, and will not, replicate these provisions, except to the extent that clarity requires and warrants.

The Distributions at Issue and their Consistency With The Foundational Purpose

Initially, and as a threshold finding, the Court concludes, and so finds, that the 8.1 million dollars in distributions (the "Unauthorized" or "Subject Distributions"), effectuated by Former Foundation Receiver Steven R. Schlesinger, were made to qualified charities under Section 501(c)(3) of the Internal Revenue Code and that the recipient organizations were organized and operated for religious, charitable, scientific, literary or educational purposes. As such, these distributions and grants were consistent with the overall foundational purpose articulated in the Certificate of Incorporation.

In so concluding, the Court begins its analysis with an examination of the Certificate of Incorporation of the Kermit Gitenstein Foundation, Inc. (the "Foundation") itself, which establishes

the parameters for the legitimacy of the distributions.

In addressing the issue of the eligibility for, and the purpose of, the distributions at issue, reference is made to paragraph SECOND subdivisions (c) and (f), of the Certificate of Incorporation. These provisions provide, in relevant part, for the following:

> (c) to make gifts of principal and income to corporations when they organized and operating exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children . . .
>
> (f) in the event of liquidation, dissolution or winding up of the corporate affairs, whether voluntary or involuntary or by operation of law, the corporate assets shall be distributed to one or more of the charitable organizations set forth in paragraph SECOND (c) above.

Here, neither Schlesinger nor the OAG dispute that the distributions at issue were made to qualified charities under 501(c)(3) of the Internal Revenue Code or that the purposes for which these recipients were organized falls within the parameters outlined in the Certificate of Incorporation. Furthermore, as both parties assert, there is no evidence to suggest, either direct or indirect, that the distributions at issue were diverted and/or used for non-charitable purposes. Further, neither party argues, nor has the Court found, that the distributions ultimately effectuated were not consistent with the distributions that historically had been made by the Gitenstein family members themselves.

The agreement of the parties on this issue is best summarized by reference to the relevant sections of the OAG's brief itself, which states the following:

> [Mr. Schlesinger] has produced sufficient evidence to establish that all of the [Subject] distributions were made to qualified tax exempt charities pursuant to Section 501(c) of the Internal Revenue Code. As such, the [Subject] distributions were consistent with the "exclusively charitable" corporate purpose of the Foundation ...in addition, close to all of the [Subject] distributions were made to organizations that advance causes historically supported by the Foundation . . .[and/or]

> the grants were appropriate in light of the broad mission statement in the Foundation's governing documents [which] supports authorizing the grants at this juncture. (OAG Memorandum of Law, at pages 9-10).

The Court concurs with the collective evidentiary assessment advanced by Schlesinger and the OAG, and therefore concludes, and so finds, that no material triable issue of fact exists (CPLR §3212; *Weingard v. New York University Center*, 64 N.Y.2d 851[1985]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]) concerning whether the Subject or Unapproved Distributions were consistent with the Foundational purpose or those historically distributed by the Gitenstein Family.

The Court further notes that the Foundational purposes expressed in the Certificate of Incorporation are broader in scope than that which may have been implemented by the Gitenstein Family itself. In that regard, the Court does not find that the distributions at issue were required to be totally consistent with the grants made by the Gitenstein family members. The mere fact that the Gitenstein Siblings, and Shirley Gitenstein herself, may or may not have chosen to exercise the full breadth and scope afforded to them under the Certificate of Incorporation [which the Court has concluded is the operative document] is neither controlling as to the validity of the grants and distributions made by Schlesinger, nor the parameters within which the Former Receiver was required to operate.

Documents are to be construed in accordance with the intent of the parties and the best evidence of that intent is what is expressly set forth in the writing itself. Moreover, the words so utilized are to be accorded their plain and natural meaning. *See, Goldman v. White Plains Center for Nursing*, 11 N.Y.3d 173, 896 N.E.2d 662, 867 N.Y.S.2d 27 (2008); *Maser Consulting, P.A. v. Viola Park Realty, LLC*, 91 A.D.3d 836, 936 N.Y.S.2d 692 [2nd Dept. 2012]. Here, the language set forth

in the Foundation's Certificate, which defined the foundational purpose as well as the qualification and eligibility of the recipients, is clear, complete and unambiguous, and as such is entitled to be implemented and enforced in accordance with its terms.

In sum, the Court concludes, and so finds, that the "Unapproved" or "Subject" distributions implemented by Former Receiver Schlesinger were made to qualified charities and were consistent with the overall foundational purpose.

Schlesinger's Court Ordered and Statutory Powers as Receiver

The Court now turns to the core issue of whether Schlesinger was required to obtain prior Court approval for the "Unapproved or Subject Distributions", based upon the cumulative consideration of, *inter alia*, the authority granted under the appointive order, the statutory and regulatory powers with which Schlesinger was vested, and the conduct of the parties.

At the outset, and as noted in the Court's Decision and Order of November 3, the Court, by necessity, has been compelled to rule on and analyze the prior orders, proceedings, and conduct of the parties, in rendering its determinations. Those determinations, while appearing critical at times, are being done so with the benefit of having been afforded the luxury of retrospective analysis, and should thus be viewed as such.

The Law of the Case Doctrine

First, and as a preliminary matter, the Court concludes that the "law of the case doctrine" is inapplicable to the current submissions. Correspondingly, the Court is not bound by the prior determination of Surrogate Reilly, at least within the confines of the limited issues presented.

The "law of the case doctrine" is an intra-action sub-species of the doctrines of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion). The doctrine of collateral estoppel

precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, or those in privity, whether or not the tribunals or causes of action are the same. *Ryan v. New York Telephone Company,* 62 N.Y.S.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984); *Mavro Realty Corp. v. M. Slayton Real Estate, Inc.,* 77 A.D.3d 892, 909 N.Y.S.2d 759 [2nd Dept.2010].

In contrast, the doctrine of *res judicata* is considerably broader and involves a final disposition on the merits and bars litigation between the same parties concerning *all claims or potential claims* arising out of the same transaction or out of the same or related set of facts, even if based upon a different theory involving materially different elements of proof. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. *Vitarelle v. Vitarelle*, 89 A.D.3d 931, 932 N.Y.S.2d 712 [2nd Dept.2011]; *Shelley v. Silvestre*, 66 A.D.2d 992, 887 N.Y.S.2d 662 [2nd Dept.2009].

While the two doctrines differ in scope, the common denominator as to both is that the parties who are potentially subject to such issue or claim preclusion must have been given a full and fair opportunity to contest the issue in the prior proceeding, i.e. the issue must have been litigated. *See, Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195, 868 N.Y.S.2d 563, 897 N.E.2d 1044 (2008); *Matter of Sherwyn Toppin Marketing Consultants, Inc. v. New York Liquor Authority*, 103 A.D.3d 648, 958 N.Y.S.2d 794 [2nd Dept.2013]. Both doctrines, once deemed applicable, are strictly applied.

In contrast, and as noted by the Second Department in *Ramanthan v. Aharon* (109 A.D.3d 529, 970 N.Y.S.2d 574 [2nd Dept.2013]),

> "the doctrine of the law of the case" is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined [within the action or proceeding] that should be the end of the matter as far as judges in the coordinate jurisdiction are concerned . . . The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision . . . and to the same questions presented in the same case . . . Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair opportunity to litigate the initial determination. [Internal citations omitted]. *Ramanthan v. Aharon @ 530.*

See also, *Brownrigg v. New York City Housing Authority,* 29 A.D.3d 721, 815 N.Y.S.2d 681 [2nd Dept.2006]; *Gay v. Farella,* 5 A.D.3d 540, 772 N.Y.S.2d 871 [2nd Dept.2004]; *Roddy v. Nederlander Pricing Co. of America, Inc.*, 15 N.Y.3d 944, 941 N.E.2d 1155, 916 N.Y.S.2d 578 (2010).

Furthermore, the law of the case doctrine does not apply to *sua sponte* determinations that have been made by the court without proper notice to the parties (*Debcon Financial Services, Inc. v. 83-17 Broadway Corp.,* 126 A.D.3d 752, 753, 5 N.Y.S.3d 478 [2nd Dept.2015]), or to dicta. *Liddle, Robinson & Shoemaker v. Shoemaker,* 309 A.D.2d 688, 691 [1st Dept. 2003]

Refinement of the doctrine and its application can also be found in the analysis offered by the Court of Appeals, in *People v. Evans* (94 N.Y.2d 499, 706 N.Y.S.2d 678, 727 N.E.2d 1232 [2000]). In *Evans,* the Court noted that the application of the "law of the case doctrine" is not subject to rigid application as is the case with *res judicata* or collateral estoppel, but is a matter of discretion to be applied by the court on a case by case basis. In so concluding, and in observing that not every pre-trial ruling is binding, the Court of Appeals stated the following:

> Beyond these procedural differences, law of the case rests on a foundation that further distinguishes it from issue and claim preclusion . . . whereas the latter concepts are rigid rules of limitation,

> law of the case is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided [and is] not a limit to their power . . . as such law of the case is necessarily amorphous in that it directs a court's discretion, but does not restrict its authority . . . *People v. Evans @ 503 [internal citations omitted].*

Here, there is nothing in the record that suggests, or supports a finding, that the issue of Schlesinger's removal, based upon his failure to secure prior court approval for the distributions at issue, was either "actually or fully litigated" by the parties or that he even had adequate notice that removal would be ordered. Indeed, even the Court Examiner, in acknowledging the direction from that Surrogate's Court that he discontinue any further inquiry, and whose findings were inconclusive, noted that his report was incomplete and that the issues could not be resolved without an evidentiary or fact finding hearing. Further, and as the Court noted in its November 3, 2016 Decision and Order, the mere fact that the Surrogate concluded that Schlesinger had failed to secure court approval for the "Unapproved or Subject Distributions", "merely scratched the surface" and was not necessarily dispositive of the issue of whether court approval was required in the first instance or whether the distributions were proper.

Moreover, the distributions effectuated by Schlesinger related to matters involving the internal operations, management, and governance of the Foundation. Notably, it was these same internal governance issues that ostensibly served as the predicate for Surrogate Reilly's determination that she lacked subject matter jurisdiction over the dissolution of the Foundation.

Accordingly, and based upon the foregoing, the law of the case doctrine is inapplicable to, and does not bar, this Court's determination on the limited issue of determining whether the Unapproved or Subject Distributions should be set aside based on Schlesinger's failure to secure prior court approval.

The Appointive Order, the Statutory Authority, and the Course of Conduct of the Court and the Parties

The Court now turns to the branch of the limited issue submission which examines the power and authority that Schlesinger was vested with at the time of his appointment and the extent to which, if at all, the subsequent conduct of the parties impacted upon or modified those powers.

Relevant to the same, and as preliminary observation, two recurring themes appear to have permeated and impacted on both the history and longevity of this case: (1) the demonstrable lack of clarity, from its inception, as to how the receivership would work and what powers the Receiver would have; and (2) the lack of consistency in the conduct of the parties and oversight by the court.

The Court begins its analysis with an examination of the appointive Order itself. By Order dated November 1, 2007 (Riordan, S.) Steven R. Schlesinger was duly appointed Receiver of the Kermit Gitenstein Foundation, Inc. In relevant part, the appointing Order provided for the following:

> ORDERED, that Steven R. Schlesinger . . . is hereby appointed Permanent Receiver of the assets of the Kermit Gitenstein Foundation, Inc., with the usual powers and duties according to the laws of the State of New York, including New York Not for Profit Corporation Law Section 1206; and it is further . . .
>
> ORDERED, that the Receiver is authorized to sell the marketable securities owned by the Kermit Gitenstein Foundation, and to reinvest the proceeds solely in bank accounts, and certificates of deposit in amounts insured by the Federal Depository Insurance Corporation, and insured and guaranteed notes, bonds and obligations of the United States of America; to retain attorneys to represent it in all actions and proceedings *upon the express approval of the Surrogate pursuant to 22 NYCRR 36.1 et seq.,*[2] *including those concerning the Estate of*

[2] The language requiring the prior "express approval of the Surrogate" for the retention of legal counsel, was handwritten and presumably inserted by the Court at the time the Order was signed. No such language of the same or similar import was included in the remainder of the Order, particularly in the section of the Order that preceded the language which directed the Receiver to *"cause the Kermit Gitenstein Foundation to comply with the relevant provisions of*

> *Shirley Gitenstein,* to file any reports, returns and other documents required to be filed with the Internal Revenue Service, the Attorney General of the State of New York, the Nassau County Surrogate's Court or any regulatory agency, and to retain certain accountants for such purposes*; and to cause the Kermit Gitenstein Foundation, Inc. to comply with the relevant provisions of the Internal Revenue Code, the New York Estates, Powers and Trusts Law, Not for Profit Corporation Law and Tax Law and all other federal, state and local laws affecting and governing the Kermit Gitenstein Foundation, Inc. . . . "* [Emphasis Supplied].

Schlesinger, upon his appointment as Receiver, became an officer of the court, was subject to its direction, and was duty bound to obey its orders. He was vested with title to the Foundation assets, and with the authority to, *inter alia*, collect and marshall the assets, sell and dispose of the Foundation assets, and to settle and compromise claims. He also assumed the statutory duty to account for and the keep books and records of the Foundation. N-PCL §§1206, 1207 and 1209. However, Schlesinger's remaining powers, duties, and the restrictions imposed upon him in discharging the same, have considerably less clarity.

In construing the Order at issue, and as noted *supra*, it is a fundamental interpretative precept that documents are to be construed in accordance with the intent of the parties and the best evidence of that intent is what the parties express in their writing. Moreover, the words so utilized are to be accorded their plain and natural meaning. *Goldman v. White Plains Center for Nursing,* 11 N.Y.3d 1173, 896 N.E.2d 662, 867 N.Y.S.2d 27 (2008); *Maser Consulting P.A. v. Viola Park Realty, LLC,* 91 A.D.3d 836, 936 N.Y.S.2d 693 [2nd Dept.2012]; *Innophos v. Rhodia, S.A.*, 10 N.Y.3d 25, 882 N.E.2d 389, 852 N.Y.S.2d 820 (2008). Furthermore, in discharging its interpretative function, the Court may not insert provisions or supply language that the parties or the court failed to include.

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the Internal Revenue Code, the New York Estates, Powers and Trust Law, the Not For Profit Corporation Law and the Tax Law . . . . . "

Bailey v. Fish & Neave, 8 N.Y.3d 523, 868 N.E.2d 956, 837 N.Y.S.2d 600 (2007); *Matter of Salvano v. Merrill, Lynch, Pearce, Fenner & Smith*, 85 N.Y.S.2d 173, 623 N.Y.S.2d (1995).

Applying companion statutory and legislative interpretative principles, where, as here, there is a failure to include a matter that is deemed to be within the scope of the act or legislative undertaking, such omission is typically viewed as intentional, not one of oversight. *See, e.g.*, Statutes, §§74,240; *Pajak v. Pajak*, 56 N.Y.2d 394, 452 N.Y.S.2d 381, 437 N.E.2d 1138 (1982); *Bayshore Family Partners v. Foundation,* 239 A.D.2d 373, 658 N.Y.S.2d 326 [2nd Dept. 1997].

Initially, it is noted that the November 1, 2007 Order did not expressly mandate that the Receiver secure court approval prior to effectuating any distributions of the Foundation assets. This is particularly perplexing since the entire thrust of the joint petition was necessitated by, *inter alia*, the absence of any governance structure, the mandated distribution requirements of the Internal Revenue Code, the Estates Powers and Trust Law, Not-for-Profit Corporation Law, and the New York Tax Law [¶41], and the necessity for the ultimate distribution of the Foundation assets, pursuant to ¶SECOND(f) of the Certificate of Incorporation.

In that regard, it is worth noting that the simple inclusion of a direction that the Receiver secure prior court approval for all distributions, coupled with the requirement that the Receiver file annual accountings, would have added considerable clarity in not only defining the parameters within which Schlesinger was to operate, but in providing the court with an enhanced mechanism to discharge its responsibility of oversight. Instead, the absence of these safeguards allowed both the administration and culmination of the four estates and the Foundation to drift. These omissions, at least in this Court's view, were further compounded by Schlesinger's appointment as Receiver of the Foundation [the ultimate receptacle of all of the Gitenstein estates' assets] and his appointment as the

fiduciary of each of the Gitenstein Estates. In essence, the accounting fiduciaries and the fiduciary to whom the accountings were purportedly to be made were one and the same; there was no internal check or balance.

The Order, as noted *supra*, did not expressly require prior court approval, except in instances where the Receiver sought to retain counsel. It did not expressly mandate that prior court approval be secured as a condition precedent for any distributions, charitable or otherwise, including those distributions necessitated by the compliance mandates of the IRC, EPTL, N-PCL, and Tax Law.

This omission takes on additional significance when viewed in the context of 26 U.S. §4942 which required the Foundation to distribute at least 5% of the average value of the Foundation's non-charitable use assets and EPTL §8-1.8 which reinforced that obligation by providing that a private foundation "shall distribute for each taxable year such amounts at such times and in such manner as sufficient for such [private foundation] to avoid liability for any tax imposed on undistributed income under section 4942 of the Code". EPTL §8-1.8(a)(1).

The clear import of these sections is that they establish a "floor", not a "cap", on such distributions. Moreover, and as noted *supra,* the Court does not read and interpret the Order, as the OAG suggests, as requiring Schlesinger to obtain advance approval for even these mandated distributions. There is simply no language in the Order that supports such an interpretation.

In sum, the November 1, 2007 Order did not clearly differentiate between what aspects of the Receivership required prior court approval and which did not.

However, the ambiguity of the Order notwithstanding, Schlesinger is not without blame. From the inception of the Order, and through at least 2009, Schlesinger embarked on a "course of

performance"[3] in which Schlesinger repeatedly sought, and received, court approval for the grant distributions, on notice to the OAG. That course of performance, particularly during the early years of the November Order's longevity, suggests, as a minimum, that the parties were operating under a shared and common belief that prior court approval was in fact required. Thus, when Schlesinger deviated from that established two year course of performance, and did so by effectuating grant distributions without notice to the OAG and without court approval, he breached, as a minimum, his duty of full disclosure to the court. If it was Schlesinger's bona fide belief that prior approval was not required then he could have, and should have, sought "advice and direction" from the court (SCPA §2107[2]) clarifying that obligation. Instead he unilaterally changed what was clearly an established pattern of conduct without formal notice to the court.

Furthermore, Schlesinger's reliance on his purported status as a *de facto director* as a justification for his actions is unpersuasive. While his status as a *de facto director* may have shaped his fiduciary duties to the Foundation (*Manhattan Eye, Ear & Throat Hospital v Spitzer*, 186 Misc.2d 126 [1999]; *Kessel v. Dodd*, 46 A.D.2d 645 [2nd Dept. 1974]), it did not expand his powers.

By the same token, the OAG did not avail itself of the powers it clearly had to compel the filing of annual accounting, to compel the receiver to show cause why the time for the filing of an accounting or distribution should not be extended, or to compel the final settlement of the Receiver's accounts. Indeed, after 18 months, it was their duty to do so. N-PCL §1216.

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[3]In the commercial context, a "course of performance" is defined as a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and an opportunity for objection to it, accepts the performance or acquiesces to it without objection. UCC §1-303(a)(1)(2).

The Totality of the Circumstances

Notwithstanding the Court's prior findings, to the extent that errors were made, such errors and/or omissions were not of sufficient magnitude to justify disallowance of the distributions, to compel joinder of the charitable entities as necessary parties, or to authorize the Successor Receiver to proceed with their recoupment.

Thus, having cumulatively considered the evidentiary record, the arguments of counsel, the Foundational purpose, the content of the appointive order, the conduct of the parties, and the potentially adverse and irreparable impact that disallowance of the prior distributions would have upon the recipient charitable beneficiaries, the Court concludes, and so finds, that disallowance of the $8.1 million dollars in prior distributions is simply not warranted and approves the same.

In so concluding, to the extent that errors or omissions were made by the Former Receiver, the Court, in the furtherance of justice, relieves the Former Receiver of such omissions or fault. N-PCL §§1213, 1216(c).

Furthermore, consistent with the request from the OAG, and based upon the subject matter jurisdiction issues raised by the Court in its November 3, 2016 Decision, *supra*, the $8.1 million dollars in prior charitable distributions are approved *nunc pro tunc*, as of the dates of their respective distributions, and the Former Receiver's Accounting is approved to that extent.

This constitutes the Decision and Order of the Court.

Dated: February 17, 2017
Goshen, New York

HON. ROBERT A. ONOFRY, ACTING SUPREME COURT JUSTICE

TO: Daniel L. Kurtz, Esq.
Shveta Kakar, Esq.
Pryor Cashman LLP
Attorneys for Steven R. Schlesinger
Petitioner in All Accounting Proceedings
and Intervenor Respondent in the
Instant Proceeding
Office & P.O. Address
7 Times Square
New York, New York 10036

Emily Stern, Esq.
Assistant Attorney General
Charities Bureau
Petitioner in the Instant Proceeding
and Party-in-Interest in All Accounting Proceedings
Office & P.O. Address
120 Broadway
New York, New York 10271

Richard T. Kerins, Esq.
Mahon, Mahon, Kerins & O'Brien, P.C.
Counsel to the Public Administrator
Party-in-Interest in the Estate Account Proceedings
Office & P.O. Address
254 Nassau Boulevard
Garden City South, New York 11530

Joseph W. Ryan, Jr., Esq.
Joseph W. Ryan, Jr., P.C.
Court Examiner in the Receivership Accounting
Office & P.O. Address
Melville Law Center
225 Old Country Road
Melville, New York 11747

Howard Protter, Esq.
Successor Receiver
Jacobowitz & Gubits, LLP
Office & P.O. Address
158 Orange Avenue
P.O. Box 367
Walden, New York 12586