

At a Trial Term of the Supreme Court, held
in and for the County of Ulster, in the City
of Kingston, New York on the 8th day of
April, 2013.

PRESENT: HON. RAYMOND J. ELLIOTT, III
Justice

SUPREME COURT
COUNTY OF ULSTER STATE OF NEW YORK

**ERIC T. SCHNEIDERMAN, Attorney General of the State
of New York, on behalf of the People of the State of
New York,**

Plaintiff,

-against-

DECISION AND ORDER
INDEX NO. 08-5067

**LOWER ESOPUS RIVER WATCH, INC.,
FREDERICK FRITSCHLER, R. DIXON ONDERDONK,
DAVID B. STRAUS, BRUCE C. DUFFY, JENNIFER A.
MCLEROY and JOEL SHUMAN,**

Defendants.

APPEARANCES: HON. ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
(NATHAN M. COURTNEY, ESQ., of Counsel)
(STEVEN SHIFFMAN, ESQ., of Counsel)
Assistant Attorney Generals
Attorney for Plaintiff

FREDERICK FRITSCHLER
Defendant pro se

RAYMOND J. ELLIOTT, III J.S.C.

This action was commenced by the Attorney General with a 43 page Verified Complaint

dated October 8, 2008, and filed with the Ulster County Clerk's Office on October 10, 2008, that alleged ten (10) causes of action against the above named Defendants. In the First and Second Causes of Action it was alleged that Defendants, Frederick Fritschler ("Fritschler") and Lower Esopus River Watch, Inc. ("LERW"), as Fritschler's alter ego, violated Section 63-c of the Executive Law (the so-called Tweed Law) by breaching their respective fiduciary duties and committing fraud. The Third and Fourth Causes of Action were brought pursuant to Sections 717 and 720 of the Not-For-Profit Corporation Law ("N-PCL") and Section 8-1.4 of the Estates Powers and Trust Law ("EPTL") seeking an accounting and restitution from Fritschler. In the Fifth Cause of Action, the Attorney General alleged that Fritschler was a convicted felon and sought an injunction to prohibit Fritschler from soliciting charitable contributions in New York State.

The remaining five (5) Causes of Action are alleged against the other named Defendants and LERW but are not germane to this instant matter since all of the other Defendants, including LERW, have settled with the Attorney General. Defendant David B. Straus ("Straus") paid \$15,000.00 in restitution, Defendants R. Dixon Onderdonk ("Onderdonk"), Bruce C. Duffy ("Duffy"), Jennifer A. McLeroy ("McLeroy") and Joel Shuman ("Shuman") collectively paid restitution in the sum of \$31,000.00 and as members of the LERW Board, consented to the dissolution of LERW.

Efforts were made to settle this matter with Fritschler, but he refused to do so. Consequently, this Court embarked upon an eight day bench trial, heard the testimony of 19 witnesses, including Fritschler, and received 76 exhibits into evidence, many of them consisting of hundreds of pages and filling four file boxes.

The Attorney General has submitted extensive, detailed, and exhaustive proposed Findings of Fact which the Court will not attempt to improve upon. For the most part, these Findings of Fact accurately set forth the testimony of the witnesses and references to the relevant exhibits. In those areas where Fritschler's proposed Findings of Fact differ from those proposed by the Attorney General, the Court has determined that the Attorney General's version of the trial testimony is more accurate.

Fritschler contends that he was "impaired" during the course of the trial, but the Court saw no evidence of this fact. Fritschler attended the trial dates on time, returned to Court after every recess and fully participated in the trial by cross-examining witnesses, calling and examining witnesses, and introducing exhibits into evidence. Only on one occasion, on the seventh day of trial, October 19, 2012, did Fritschler indicate to the Court that he was ill. He asked the Court if he could adjourn his taking the stand to testify until the next day because he was feeling ill. The Court granted the adjournment, but immediately thereafter, Fritschler was outside the Courtroom discussing the trial with reporters.

The Attorney General has pointedly advised the Court that in 1975 Fritschler was convicted of armed robbery and served approximately three and half years in prison. However, there was no evidence produced that Fritschler ever tried to cover up the fact that he was a convicted felon. In fact, his felony conviction was apparently widely known throughout Ulster County. Fritschler's felony conviction has played no part in the Court's decision in this matter.

As can be seen from the Findings of Fact set out below, the Court has given great weight to the testimony of Lester Dier ("Dier") who was an experienced Forensic Accountant and Senior

Investigator formerly serving with the Attorney General’s office. (Dier retired before this matter came to trial.) Dier worked on and developed many of the Exhibits that were used by the Attorney General to present this case to the Court and to calculate the damages and restitution sought to be imposed upon Fritschler.

FINDINGS OF FACT

1. Defendant LERW was incorporated under the N-PCL by Schuman on October 26, 1992, as a Type B (i.e., charitable or educational) not-for-profit corporation. (Ex. 20 at 1-5.)¹ LERW is tax-exempt pursuant to Internal Revenue Code (“Code”) Section 501(c)(3). (*Id.* at 9-10.) LERW never registered or filed annual financial reports with the Office of the Attorney General (“OAG”). (10/15/12 Tr. 88:16 – 89:12 (Former OAG Investigator Lester Dier) (“Dier”).)² Pursuant to an Order and Judgment of Dissolution on Consent, LERW was dissolved on December 4, 2009. (Ex. 18; 53 at ¶¶ 9-10.)
2. Fritschler served as the Chairman of the Ulster County Environmental Management Council (“EMC”) from approximately 1995 through January 8, 2007. (Ex. 54 (02/14/08) 15:6 – 15:14; Ex. 49.)
3. From approximately 1996 through 2006, Onderdonk, Straus and Duffy were members of the EMC’s Executive Committee as well as members of LERW’s board of directors (the “LERW Board”). (*See, e.g.*, Ex. 21 at 33; Ex. 31 at 2; Ex. 43 at 1-2.) Onderdonk continues to serve as LERW’s President and as a member of the LERW Board as LERW winds down its affairs, post-dissolution. (Ex. 53 at ¶¶ 5-6, 12.) Duffy remained a member of the LERW Board at the time of

¹References to “Ex. _” are to the exhibits introduced into evidence at the trial of this matter.

²References to “_/_ Tr. _” are to pages from the transcript of the referenced trial date.

his death on or about August 10, 2011. (*See* Ex. 53 at ¶ 5.) Straus was voted off the LERW board on July 23, 2009. (Ex. 20 at 223; Ex. 53 at ¶ 5.)

4. Schuman was a member of the LERW Board from its inception in 1992 through approximately December 12, 2007. (Ex. 20 at 1-5, 99-101; Ex. 21 at 33.). McLeroy has served continuously on the LERW Board from approximately 1999 through the present. (Ex. 20 at 11; Ex. 21 at 33; Ex. 53 at ¶ 5.)

5. On January 18, 2007, by a 28 to 2 vote, the Ulster County Legislature (the “Legislature”) passed a resolution requesting that the Attorney General investigate allegations of financial impropriety with respect to the Ulster County’s (the “County”) contracts with LERW (the “LERW Contracts”). (Ex. 1 at 117-18.)

6. After conducting an investigation, on October 10, 2008, the Attorney General commenced this proceeding, asserting claims for fraud and breach of fiduciary duty against the individual defendants, including Fritschler, and seeking dissolution of LERW.

7. In the First and Second Causes of Action, brought on behalf of the County, the Attorney General’s Complaint asserts claims against Fritschler pursuant to the Tweed Law for common law fraud and breach of fiduciary duty. (Compl. ¶¶ 112–30.) These claims arise out of Fritschler’s use of his position as EMC Chairman to cause the County to enter into contracts with LERW, which he secretly dominated and through which he realized material financial benefits, pursuant to which LERW received millions of dollars from the County. (*Id.*)

8. In the Third and Fourth Causes of Action, brought on behalf of LERW, the Complaint asserts breach of fiduciary duty claims against Fritschler pursuant to the N-PCL and the EPTL for his misappropriation of charitable assets, including making purchases with LERW’s credit card

account for his personal benefit. (*Id.* at ¶¶ 131-39.)

9. The Fifth Cause of Action seeks injunctive relief against Fritschler to limit his future conduct on behalf of charities in the State of New York. (*Id.* at ¶¶ 140-44.)

10. The Court has determined that the testimony of Fritschler and Straus was not entirely credible. Their testimony was often contradicted by documents or their own prior testimony. (*See, e.g.*, Ex. 15(c) at 322; 10/22/12 Tr. 75:14 – 79:6 (Fritschler) (Fritschler submitted a sworn statement to the Court in which he falsely denied having been paid as an LERW consultant during 2002 through 2006); *id.* at 104:16 – 108:16 (Fritschler falsely denied being in control of LERW’s finances and using LERW’s credit card); *id.* at 124:9 – 127:15 (Fritschler falsely denied using software to wipe data off of the LERW computers before they were turned over to the County); 10/18/12 Tr. 135:6 – 135:25 (Straus) (contradicting his deposition testimony, Straus falsely denied that the LERW Board had prohibited Fritschler from using LERW’s credit card for meals unless volunteers were present).

11. The Legislature established the EMC in 1972 “to coordinate environmental matters among all agencies of the County” and to advise the Legislature “on all matters affecting the preservation, conservation and ecologically suitable use of the natural resources of the county.” (Ex. 1 at 1-3; Ex. 42(Clark 1) at 1.) EMC members were appointed annually by the Chairman of the Legislature. (Ex. 1 at 1.)

12. Fritschler was appointed by the Chairman of the Legislature to serve as the unpaid EMC Chairman in 1995. (Ex. 54 (02/14/08) at 15:6 – 15:14; 10/10/12 Tr. 59:21 – 60:12 (Legislator and former Chairman of the Legislature, David Donaldson (“Donaldson”) (as Chairman of the EMC, Fritschler was “strictly a volunteer”).) Fritschler was re-appointed, annually, to this

position and served continuously as Chairman of the EMC until he tendered his resignation on January 8, 2007. (*See, e.g.*, Ex. 2 at 47, 242; Ex. 43 at 1; Ex. 49; 10/10/12 Tr. 57:13 – 58:1 (Donaldson).)

13. During the time Fritschler served as its Chairman, the decision-making authority within the EMC was concentrated in the hands of the EMC Executive Committee, the members of which included Fritschler, as well as Straus, Onderdonk and Duffy. (*See, e.g.*, Ex. 31 at 2; 10/12/12 Tr. 27:14 – 27:16 (Onderdonk); 10/11/12 Tr. 114:8 – 114:19 (EMC Member and County Director of Planning, Dennis Doyle (“Doyle”).)

14. During his tenure as EMC Chairman, Fritschler reported to the Legislature’s Environmental and Consumer Affairs Committee (the “Environmental Committee”). (*See, e.g.*, Ex. 2 at 47, 242; (10/11/12 Tr. 15:6 – 15:15 (Former Legislator and Chairman of the Environmental Committee, Brian Shapiro (“Shapiro”); 10/22/12 Tr. 97:18 – 97:24 (Fritschler).)

15. Functionally, the EMC was a department of the County and Fritschler acted as its department head. (Ex. 54 (02/14/08) at 16:8–13; 10/15/12 Tr. 149:08 – 149:11 (County Insurance Officer, Bonnie Szpulecki (“Szpulecki”); 10/18/12 Tr. 14:1 – 14:4, 14:23 – 15:8 (Legislator Richard Parete (“Parete”); 10/11/12 Tr. 59:8 – 60:1, 70:21 – 71:8 (Former Legislator, Fawn Tantillo (“Tantillo”).)

16. As part of his duties as Chairman, Fritschler drafted the EMC’s budgets, (*See, e.g.*, Ex. 33 at 30, 51; Ex. 54 (02/14/08) at 17:5 – 17; 10/18/12 Tr. 11:3 – 11:7 (Parete); 10/17/12 Tr. 174:5 – 175:1 (Straus)) and also supervised the EMC’s employees and provided the County Personnel Office with the information used to prepare their job descriptions. (Ex. 51; Ex. 54 (02/14/08) at 16:8–11); 10/11/12 Tr. 84:1 – 84:8, 86:17 – 87:7 (County Director of Personnel,

Brenda Bartholomew (“Bartholomew”); 10/18/12 Tr. 165:24 – 166:11, 178:3 – 178:15 (Former Environmental Management Program Coordinator, Mary Ellen Strouse (“Strouse”).)

17. As Chairman of the EMC, Fritschler was given substantial discretion to interpret the EMC’s mission and design the EMC’s programs. (Ex. 4 at 58–60; Ex. 54 (02/14/08) at 15:21–25; 10/12/12 Tr. 92:2 – 92:18 (Onderdonk) (Fritschler created the EMC’s 2003 Annual Plan of Work).)

18. As EMC Chairman, Fritschler sought from the Legislature, and received, an expansion of the EMC’s authority, budget and staff in order to carry out various environmental programs on behalf of the County. (*See, e.g.*, Ex. 1 at 1–115; Ex. 33 at 1– 97; Ex. 34(2) at 25–129; Ex. 51.) As stated in the EMC’s 2003 Annual Plan of Work, the EMC sought to address environmental issues “through direct action to remedy problems and through education.” (Ex. 4 at 59.) During Fritschler’s tenure as Chairman, the EMC maintained offices at a building known as the Kelder Center on the campus of the Ulster County Community College in Stone Ridge, New York. (10/11/12 Tr. 19:7 – 20:16 (Shapiro); 10/18/12 Tr. 173:5 – 174:2 (Strouse).)

19. One of the programs carried out by the EMC was environmental education for Ulster County high school students under the federally funded (and state-administered) Learn and Serve America (“LSA”) program. (*See, e.g.*, Ex. 4 at 59-60; Ex. 31 at 13-28; Ex. 40; 10/11/12 Tr. 51:1 – 51:22 (Tantillo).) Under this program, EMC employees under Fritschler’s supervision planned and conducted stream, forest, wetland and other studies with area students. (Ex. 40; 10/18/12 Tr. 166:13 – 167:22, 168:5 – 168:21 (Strouse); 10/22/12 Tr. 46:8 – 48:3 (Fritschler).)

20. Another program run by the EMC used geotechnologies, such as Geographic Information System (“GIS”), Global Positioning System (“GPS”), and Remote Sensing technologies, to

create a Natural Resource Inventory (“NRI”) for the County and its constituent local governments. (Ex. 4 at 60; Ex. 36; 10/10/12 Tr. 54:20 – 55:3 (Donaldson); 10/11/12 Tr. 109:5 – 109:9 (Doyle); 10/19/12 Tr. 78:14 – 79:17 (Strouse).) The EMC maintained a “GIS Lab” at the Kelder Center where classes were taught on these technologies to local students, teachers and officials. (Ex. 4 at 60; 10/18/12 Tr. 173:10 – 174:2 (Strouse).) During 2004 through 2006, these programs were coordinated by David Scherf, EMC’s full-time GIS Specialist, under Fritschler’s supervision. (Ex. 36; Ex. 51; 10/11/12 Tr. 88:13 – 88:20 (Bartholomew).)

21. EMC staff also worked to improve and expand public access to outdoor recreation areas by, for example, creating an extensive trail system at Ulster Landing Park. (*See, e.g.*, Ex. 2 at 86, 92; Ex. 4 at 60; Ex. 40 at 2; 10/18/12 Tr. 20:15 – 21:13, 22:7 – 22:22 (Parete).) In November 2003, the Legislature also assigned to the EMC the responsibility for administering the County’s “municipal separate stormwater sewer system” (“MS4 Compliance”) program. (Ex. 1 at 35; 10/11/12 Tr. 15:15 – 16:18 (Shapiro); 10/10/12 Tr. 55:4 – 56:10 (Donaldson).) The MS4 Compliance program was initiated by the EPA to reduce the harmful effects of rainwater runoff pollution. (10/11/12 Tr. 15:15 – 16:18 (Shapiro); Ex. 31 at 94.) The EMC established a Cooperative Stormwater Management Program pursuant to which the EMC agreed to assist eleven local municipalities with the development of their MS4 programs as well as with their reporting to the NYS Department of Environmental Conservation. (Ex. 3 at 145-79; Ex. 31 at 92, 98; 10/11/12 Tr. 112:1 – 112:23 (Doyle).)

22. In February 2004, the Legislature directed the EMC to coordinate and review the County’s Open Space and Parks Plan (“Open Space Plan”). (Ex. 1 at 40-41.). As part of the Open Space Plan, the EMC’s Environmental Planner and GIS Specialist, under Fritschler’s

supervision, drafted a lengthy report, including maps, to provide guidance to the Ulster County Planning Board on preserving open spaces in Ulster County. (*Id.*; Ex. 36 at 5; 10/11/12 Tr. 105:5 – 105:16 (Doyle).)

23. For the years 2002 through 2006, the County’s expenditures for the EMC averaged over \$500,000 annually. (Ex. 34 at 72-130.) These expenditures were paid for with funds from the County’s general accounts. (10/22/12 Tr. 113:22 – 115:5 (County Commissioner of Finance, Burton Gulnick, Jr. (“Gulnick”).)

24. During the years 2002 through 2006, the EMC’s programs were carried out by a staff that included two to four full-time County employees as well as six to eight part-time Youth Workers. (Ex. 36; Ex. 51; Ex. 54 (02/14/08) 16:21 – 17:4; 10/11/12 Tr. 84:1 – 84:6 (Bartholomew).) In addition, the EMC contracted with various vendors to assist it in carrying out its programs.

25. Like each of the other department heads at the County, Fritschler, as the EMC Chairman, drafted the EMC’s contracts for services and equipment with third-party vendors and submitted them to the County’s Insurance and Purchasing Departments for approval. (10/15/12 Tr. 148:11 – 148:21 (County Insurance Officer, Bonnie Szpulecki (“Szpulecki”)); 10/17/12 Tr. 16:12 – 17:11, 18:10 – 18:12, 19:20 – 19:25, 29:6 – 29:11 (County Director of Purchasing, Robin Peruso (“Peruso”)); 10/11/12 Tr. 106:10 – 107:7 (Doyle).) Each of these contracts was accompanied by a Contract Approval Routing Slip that Fritschler signed on the line designated for “Dept. Head or Designee.” (*See, e.g.*, Ex. 3 at 4, 78–79, 83; Ex. 54 (02/14/08) at 28:23 – 30:3.)

26. The activities described above establish that the EMC functioned as an Ulster County agency or department, with responsibility for carrying out the County’s conservation and other environmental programs. Fritschler’s contention that the EMC was merely an “advisory body” is

rejected and, moreover, is contradicted by his own contemporaneous statements. (Ex. 42(Clark 1); 10/22/12 Tr. 91:24 – 94:16 (Fritschler).)

27. In 2004, Fritschler requested that the Legislature pass a resolution which would recognize and further expand the EMC's responsibilities by formally designating the EMC as the County's Water Quality Management Agency ("WQMA") pursuant to County Law § 220-A. (Ex. 1 at 44-46.) In a memo sent to the County Attorney, Fritschler addressed questions that had arisen regarding what he described as "[his] resolution." (Ex. 42(Clark 1) at 1-3.) In his memo, Fritschler acknowledged that the EMC was not merely an "advisory body" and asserted that it could be authorized to conduct the activities of a WQMA. Thus, Fritschler wrote that:

There was never any intent by the New York State Legislature to strictly constrain EMCs to any advisory role nor can such an inference be made from the language of Article 47. In fact EMCs *have exceptionally broad authority to engage in environmental matters and their activities* are only limited by the local governing bodies [sic] willingness to approve their work and to fund their activities.

...

[The Ulster County] Legislature has consistently approved the EMC's annual plans of work, grant requests, and budget requests for funding to undertake [a] broad array of environmental and conservation projects.

(*Id.* at 2 (emphasis added).)

28. The resolution Fritschler proposed was passed unanimously by the Legislature. (Ex. 4 at 45.) Thereafter, Fritschler changed the EMC's letterhead to include the following description: ULSTER COUNTY EMC/WQMA - GETTING THINGS DONE!!! (Ex. 42(Clark 2); 10/22/12 Tr. 97:5 – 97:17 (Fritschler).)

29. Although his responsibilities as the EMC Chairman were significant, Fritschler was not compensated for performing those services. (10/10/12 Tr. 59:21 – 60:12; 64:10 – 64:15)

(Donaldson).) He was, as he repeatedly stressed to County Legislators and officials, a volunteer. (See, e.g., Ex. 33 at 30; 10/11/12 Tr. 17:4 – 17:11 (Shapiro); 10/18/12 Tr. 56:24 – 57:2 (Parete); 10/11/12 Tr. 53:10 – 53:22 (Tantillo).)

30. County Legislators, who served on a part-time basis themselves, understood, based on their conversations with him, that Fritschler made a living, not as a County administrator, but from his own business doing construction, landscaping and property maintenance. (10/10/12 Tr. 60:1 – 60:12 (Donaldson); 10/11/12 Tr. 53:10 – 54:10 (Tantillo).) Similarly, the County employees with whom he interacted, such as Planning Director Dennis Doyle and Personnel Director Brenda Bartholomew, understood that Fritschler performed his duties for the County as a volunteer and that he supported himself by performing other work unrelated to his work at the EMC. (10/11/12 Tr. 114:23 – 116:1 (Doyle); 10/11/12 Tr. 89:4 – 89:6 (Bartholomew).)

31. In November 1996, three members of the EMC's Executive Committee, Fritschler, Straus and Duffy, were elected to the LERW Board. (Ex. 19 at 1; see 10/12/12 Tr. 24:20 – 26:10 (Onderdonk).) Following that election, the LERW Board had five members. (Ex. 19 at 1.) Schuman, the founder of LERW, recognized that with the results of that election, Fritschler and his colleagues from the EMC had established control over LERW; as Schuman stated in his transmittal letter to Fritschler attaching the minutes of the 1996 board meeting, "It's your baby, now." (*Id.* at 2.)

32. Onderdonk was added to the LERW Board soon thereafter. (10/12/12 Tr. 24:20 – 27:16 (Onderdonk).) By 1999, Onderdonk had been appointed to serve as LERW's President. (Ex. 20 at 11; see 10/12/12 Tr. 26:11 – 26:20 (Onderdonk).) Fritschler was formally appointed to serve

as LERW's Executive Director in 1999, although it is apparent from the testimony of witnesses that he had actually been running LERW since 1996. (Ex. 20 at 11.)

33. After Fritschler was appointed Executive Director in 1999, the LERW Board delegated control over LERW's finances and operations to Fritschler and failed to hold regular meetings. (Ex. 54 (02/14/08) at 114; 10/12/12 Tr. 49:7 – 49:17 (Onderdonk); 10/15/12 Tr. 76:20 – 77:9 (Onderdonk).) For the years 2000 through 2005, LERW maintained minutes of only three board meetings, each of which took place during 2003. (Ex. 20 at 12-18.)

34. In addition, although LERW's checking account (the "LERW Bank Account") required the signatures of both Onderdonk and Schuman, (*see, e.g.*, Ex. 27), both Onderdonk and Schuman authorized Fritschler to sign their names on LERW checks. (10/12/12 Tr. 39:11 – 39:20, 45:14 – 46:9 (Onderdonk); 10/22/12 Tr. 69:11 – 69:15 (Fritschler). Onderdonk also authorized Fritschler to sign his name on any contracts that Fritschler decided that LERW should enter into. (Ex. 54 (02/14/08) at 57; 10/12/12 Tr. 46:18 – 47:11 (Onderdonk).)

35. Although, in his sworn response to the Attorney General's Supplemental Notice to Admit, Fritschler denied having access to LERW's credit card, Fritschler was issued a credit card on LERW's American Express Corporate Card account (the "LERW Credit Card"). (Ex. 54 (02/10/11) 104:17 – 104:21, 117:7 – 118:15; 10/22/12 Tr. at 104:16 – 108:16 (Fritschler).) Fritschler used the LERW Bank Account to pay the monthly balances on the LERW Credit Card. (Ex. 54 (02/10/11) 102:19 – 104:8.)

36. In his capacity as EMC Chairman, Fritschler proceeded to draft the LERW Contracts pursuant to which the County retained LERW as a vendor to provide certain services to it in connection with the EMC's environmental programs. (Ex. 3; Ex. 54 (02/14/08) 196:1–12

(Fritschler.) When Fritschler presented these contracts as the EMC “Dept. Head or Designee,” to the County Insurance and Purchasing Departments for approval, he did not disclose his role at LERW. (See ¶¶ 56, 62-63, *infra*.)

37. Once County funds were paid over to LERW pursuant to the LERW Contracts, Fritschler used the funds to, among other things, to purchase equipment and supplies for use in connection with the EMC’s programs. (See, e.g., Ex. 24.)

38. The County Legislators who authorized the EMC’s budgets and the County employees to whom Fritschler presented the contracts were also unaware that Fritschler was being compensated by LERW. (10/10/12 Tr. 60:1 – 60:12, 62:6 – 62:16 (Donaldson); 10/11/12 Tr. 17:4 – 17:18, 18:23 – 19:2, 20:17 – 21:2, 28:10 – 28:20 (Shapiro); 10/11/12 Tr. 58:17 – 59:5 (Tantillo); 10/15/12 Tr. 156:20 – 156:23 (Szpulecki); 10/17/12 Tr. 28:11 – 28:15 (Peruso).)

39. In early 2002, the County Administrator and the County’s outside auditor learned that Fritschler may have been acting as both a director and officer of LERW, as well as EMC Chairman, and in the latter capacity made decisions to award contracts to LERW. (Ex. 33 at 2, 132-33); 10/11/12 Tr. 58:5 – 58:24 (Tantillo); 10/12/12 Tr. 36:23 – 38:11 (Onderdonk).)

40. At a subsequent meeting in early 2002 with Sheldon Quimby, a Deputy County Administrator, and the County’s outside auditor, Fritschler was informed that he could not serve as EMC Chairman and, at the same time, as a director and officer of LERW because it was a conflict of interest. (10/22/12 Tr. 101:22 – 104:15 (Fritschler).) To remove the conflict, Fritschler was advised to resign as a director and officer of LERW. (Ex. 54 (02/14/08) 23:6 – 25:10.)

41. Fritschler agreed to resign from LERW and went through the motions of doing so, but it is apparent that he never surrendered his effective control over LERW. (10/22/12 Tr. 103:6 – 103:16 (Fritschler); 10/18/12 Tr. 119:11 – 121:7 (Straus); 10/12/12 Tr. 36:23 – 38:11 (Onderdonk).) Although LERW was purportedly run by Onderdonk, its President, after Fritschler’s “resignation” in 2002, Onderdonk was not actively engaged in LERW’s financial affairs and, as he admitted, was nothing more than a “figurehead.” (10/12/12 Tr. 34:11 – 35:1 (Onderdonk); 10/22/13 Tr. 66:22 – 67:06 (Fritschler).)

42. Even after his “resignation” from LERW, Fritschler continued to control the organization in the same manner as he had previously and simply “performed the same functions for LERW without a title.” (10/12/12 Tr. 38:6 – 38:15 (Onderdonk).) He continued to control its finances, make decisions for it, use the LERW Credit Card, and sign its checks. (10/22/12 Tr. 104:16 – 105:13 (Fritschler).) Straus confirmed that, after resigning from the LERW Board, Fritschler continued to act as LERW’s “CEO” and “report[] to the board.” (10/18/12 Tr. 121:8 – 124:11 (Straus); *see also* 10/12/12 Tr. 44:5 – 44:9 (Onderdonk) (nothing really changed and “he was *de facto* ... director of operations”).) Fritschler also continued to attend its board meetings – the few that were actually held – but purportedly did so as a guest, not as a board member. (*See, e.g.*, Ex. 20 at 13 (listing Fritschler as attending as an “LERW contractor”).)

43. After his purported resignation from LERW, Fritschler was no longer publicly identified as an LERW Board member or as LERW’s Executive Director. For example, the EMC produced a newsletter, the Green Heron, which included a masthead of the organizations with which the EMC partnered to carry out its programs. (Ex. 31 at 2, 14, 30, 42, 54, 66, 81, 93.) On the masthead, the EMC is listed as the “Lead Agency” of the partnership. (*See, e.g.*, Ex. 31 at 2.) In

the September 2001 issue of the Green Heron, Fritschler is listed as both Chairman of the EMC and as LERW's Executive Director. (Ex. 31 at 2.) Consistent with his alleged resignation in 2002, the September 2002 issue of the Green Heron removed Fritschler's name from the list of LERW directors, officers and staff. (Ex. 31 at 14.) Similarly, on all subsequent issues of the Green Heron, Fritschler's name appears solely as Chairman of the EMC. (Ex. 31 at 30, 42, 54, 66, 81, 93.)

44. Notably, even when he met with the County in early 2002, Fritschler did not disclose that he was using LERW's bank account and credit card for his personal use. (Ex. 54 (02/14/08) 24:18 – 25:10.) The County did not learn about Fritschler's personal use of the LERW bank account and credit card until after the Attorney General's investigation leading to this litigation commenced. (*Id.* at 185:22 – 186:1; 10/11/12 Tr. 62:10 – 62:12 (Donaldson).)

45. After his purported resignation from LERW, Fritschler signed contracts with the County -the LERW Contracts- on behalf of LERW, but in Onderdonk's name rather than his own. (*See, e.g.*, Ex. 3 at 5, 77, 79, 118; Ex. 54 (02/10/11) at 28:23 – 30:3; 10/12/12 Tr. 76:6 – 77:6, 79:2 – 79:17 (Onderdonk); 10/22/12 Tr. 88:5 – 88:18 (Fritschler).) It was Fritschler's decision to enter into these contracts. (10/12/12 Tr. 48:19 – 49:22 (Onderdonk); 10/18/12 Tr. 132:11 – 132:25 (Straus).) Although Fritschler had Onderdonk's permission to sign Onderdonk's name, Fritschler did not reveal to anyone else that the signature was his own, not Onderdonk's. (Ex. 3 at 240-48; Ex. 54 (02/14/08) at 36:12 – 36:21; *id.* (02/10/11) at 47:2 – 48:10; 10/22/12 Tr. 121:13 – 122:8 (Fritschler).) Over the years, Fritschler got better and better at imitating Onderdonk's signature. (10/22/12 Tr. 121:13 – 122:20 (Fritschler).)

46. When Fritschler presented contracts with LERW (and amendments to those contracts) to the County for approval, he misrepresented their provenance and never disclosed and, in fact, actively concealed, his role at LERW and the fact that he was signing the contracts on behalf of that organization. (Ex. 54 (02/10/11) at 28-30.) In particular, Fritschler failed to inform either Szpulecki or Peruso, the County Insurance Agent and County Purchasing Agent respectively, that he was signing Onderdonk's name to contracts with the County prior to presenting the contracts to them (which he often delivered personally). (10/15/12 Tr. 153:16 – 153:24 (Szpulecki); 10/17/12 Tr. 27:22 – 28:10 (Peruso).) Instead, by presenting contracts that had purportedly been signed by Onderdonk, Fritschler made it appear that LERW was an independent third party with which he had no relationship. (See 10/12/12 Tr. 86:5–86:13 (Onderdonk) (admitting that Fritschler's signing of his name on the LERW Contracts was "misleading" and "inappropriate").)

47. Peruso testified, that an essential part of her review of contracts on behalf of the County was to check for the signature of the third-party vendor to ensure that the contract had been agreed to with that party. (See 10/17/12 Tr. 16:7 – 17:2 (Peruso).) Szpulecki and Peruso each testified, that if either of them had known that Fritschler in his capacity as Chairman of the EMC, was presenting contracts to the County that he had signed on behalf of the vendor (LERW), it would have raised a red flag that would have caused them each to report the issue immediately to the County Attorney. (10/17/12 Tr. 23:23 – 24:10 (Peruso); 10/15/12 Tr. 153:16 - 154:09 (Szpulecki).)

48. The Legislators who voted on the EMC's budgets were also unaware that Fritschler was signing Onderdonk's name on LERW contracts with the County that Fritschler, in his capacity as EMC Chairman, was instrumental in awarding to LERW. This was confirmed by the trial

testimony not only of the Legislators called by Plaintiff – Legislators Donaldson, Shapiro and Tantillo – but also by the Legislators called by Fritschler – Legislators Parete and Hathaway. (10/10/12 Tr. 70:1 – 71:13 (Donaldson) (practice would “create a great deal of concern” and raise red flags); 10/11/12 Tr. 63:10 – 63:18 (Tantillo) (“was shocked” when she learned that Fritschler was signing Onderdonk’s name); 10/11/12 Tr. 21:3 – 21:7 (Shapiro); 10/18/12 Tr. 71:25 – 72:4 (Parete); 10/18/12 Tr. 161:23 – 162:2 (Hathaway).

49. Each of these Legislators testified that he or she would have wanted to know about this practice before voting on the EMC budget. (10/10/12 Tr. 66:16 – 66:19 (Donaldson); 10/11/12 Tr. 21:3 – 23:17 (Shapiro); 10/11/12 Tr. 63:10 – 64:6 (Tantillo); 10/18/12 Tr. 71:25 – 73:10 (Parete); 10/18/12 Tr. 162:3 – 162:5 (Hathaway).)

50. Fritschler further misrepresented and concealed his association with LERW in other materials he presented to the County when seeking approval of contracts. In 2005, Fritschler submitted a contract amendment to the County that included a Worker’s Compensation Board form that he had filled out and asked Onderdonk to sign before a Notary Public. (Ex. 3 at 236–39; 10/12/12 Tr. 81:20 – 82:11 (Onderdonk); 10/15/12 Tr. 156:7 – 156:19 (Szpulecki).) On this form, before he had Onderdonk sign it, Fritschler checked the box next to the following statement:

the applicant is a nonprofit entity (under IRS rules). With the exception of clergy or teachers, the nonprofit ***has no compensated individuals providing any services.***

(*Id.* (emphasis added).) This statement was false because Fritschler, who was neither a teacher nor a member of the clergy, was writing checks to himself (through his wholly-owned company, Environmental Research Associates) from LERW’s Bank Account for purportedly providing

services to it. (*See* ¶¶ 68-69, *infra*.) Onderdonk testified that he affixed his own signature to LERW documents when, as with Workers Compensation Board documents, it was required that his signature be notarized.

51. In addition to signing Onderdonk's name on the LERW Contracts, after his alleged resignation from LERW, Fritschler continued to sign Onderdonk's name, and Schuman's as well, on virtually all LERW checks during the period 2002-06. (*See, e.g.*, Ex. 27 (Checks 1261 – 64 and 1102 – 04); Ex. 54 (02/10/11) at 19:12–21; 10/12/12 Tr. 124:5 – 124:15 (Onderdonk); 10/22/12 Tr. 104:16 – 105:13 (Fritschler).)

52. Fritschler never informed any County official or Legislator of his control over LERW's finances or that he continued to act as LERW's Executive Director. (Ex. 2; 10/22/12 Tr. at 97:18 – 98:4 (Fritschler); 10/22/12 Tr. 97:18 – 98:4; 10/15/12 Tr. 156:24 – 157:3 (Szpulecki); 10/17/12 Tr. 28:11 – 28:20 (Peruso).) There is no evidence – whether in the form of an actual disclosure form, records of legislative sessions, minutes of the Environmental Committee, EMC Budgets or trial testimony – that Fritschler disclosed his role at LERW to County officials or to the Legislature. (*See, e.g.*, Exs. 1-2; Ex. 33 at 1–97; 10/22/12 Tr. 72:1 – 72:11 (Fritschler); 10/15/12 Tr. 169:4 – 174:20 (Former Clerk of the Legislature, Kathleen Mihm).)

53. Similarly, after his alleged resignation from LERW, Fritschler did not disclose to the County Attorney, County Administrator, County Purchasing Agent, County Insurance Agent or any other County official that he was using LERW's checking account and credit card for his personal use and writing checks to himself from its checking account. (10/15/12 Tr. 156:20 – 156:23 (Szpulecki); 10/17/12 Tr. 28:11 – 28:15 (Peruso).) Fritschler wrote checks to himself

made out to Environmental Research , his wholly-owned company. (Ex. 15(c) at 322.) Nor did Fritschler disclose these facts to the County Legislature, the Environmental Committee of the County Legislature, or any sitting Legislator. (Ex. 2; 10/22/12 98:5 – 100:21 (Fritschler); 10/10/12 Tr. 60:1 – 60:12; 62:6 – 62:16 (Donaldson); 10/11/12 Tr. 17:4 – 17:18, 18:23 – 19:2, 20:17 – 21:2, 28:10 – 28:20 (Shapiro); 10/11/12 Tr. 58:17 – 59:5 (Tantillo).) Legislators Hathaway and Parete, both of whom were called by Fritschler, testified that they had a vague understanding that Fritschler may have been receiving some compensation in connection with his grant writing, but were not so informed by Fritschler and did not gain this understanding at any meeting of the Legislature or its committees. (10/18/12 Tr. 147:12 – 147:18 (Hathaway); 10/18/12 Tr. 38:10 – 38:21 (Parete).) Legislator and former Chairman of the Legislature Frederick Wadnola (“Wadnola”), who did not serve on the Legislature from 2002 through 2009, testified that he had not heard of LERW until approximately 2008. (10/19/12 Tr. 93:2 – 93:5, 99:14 – 99:22 (Wadnola).)

54. During the period of 2002 to 2006, there was no disclosure of the fact that any payments from County funds would be used to pay Fritschler. Even Legislator Parete, who was called as a witness by Fritschler, testified that he did not believe that Fritschler was being paid either directly or indirectly using County funds. (10/18/12 Tr. 62:3–10 (Parete).)

55. Despite his purported status as a volunteer with the County, Fritschler wrote checks to himself made out to the Environment Research Association on LERW’s checking account. (10/22/12 Tr. 78:10 – 79:2 (Fritschler).) For the period 2002 through 2006, these checks totaled

\$87,921.54. (Ex. 15(c) at 322). In addition, Fritschler used the LERW Credit Card to pay for his meals, clothing, entertainment, vacation, Christmas gifts, medical expenses and other personal expenses. (Ex. 15(c).) Also, Fritschler lived for periods of time in the office trailer that LERW maintained at its property located in Rosendale and known as Burnt Swamp. (Ex. 54 (02/10/11) at 13:2 – 14:16; 10/12/12 Tr. 61:18 – 61:20 (Onderdonk).)

56. In a sworn affidavit submitted in response to Plaintiff's Supplemental Notice to Admit just before the start of trial, Fritschler denied having worked for LERW as an officer, employee or consultant at any time during 2002 through 2006. (10/22/12 Tr. 75:20 – 78:4 (Fritschler).) At trial, however, Fritschler admitted that his sworn denials in the affidavit were untrue. (*Id.*) The evidence introduced at trial established that Fritschler received payments from LERW during this period for purported services rendered to it by his company, Environmental Research Associates, and that his receipt of those payments was concealed by Fritschler. (*See, e.g.*, Ex. 15(c) at 322 and ¶¶ 35–36, 54–58, 68–69, *supra.*)

57. Fritschler used LERW's credit card and checking account to pay for meals for himself almost every day. (*See, e.g.*, Ex. 16 at 181; Ex. 15(c) at 337.) Indeed, Fritschler sometimes used the LERW Credit Card for meals 2-3 times per day. (*See, e.g.*, Ex. 15(b) at 118:1105, 118:1107, 124:1369–70, 142:2139–40, 142:2150–51.) This use of LERW's funds was not authorized by the LERW Board. As Straus, who was called by Fritschler, testified, the LERW Board did not authorize Fritschler to use the LERW Credit Card to pay for meals unless volunteers were being fed while carrying out an LSA project. (10/18/12 Tr. 135:6–25 (Straus).)

58. Fritschler also used the LERW Credit Card to pay for meals in connection with what he claims were LERW Board meetings in the 2002 to 2006 time period. (*See, e.g.*, Ex. 15(b) at

117:1054, 117:1060, 121:1240.) However, the LERW Board minutes do not reflect any meetings at restaurants during this period. Moreover, LERW practice required that if Board members met at a restaurant, they would pay for their own meals. (10/18/12 Tr. 136:6 – 136:14 (Straus).) During this period, Fritschler was not officially on the LERW Board, but he did attend the rare Board meetings that did occur as an alleged guest. (Ex. 20 at 13.)

59. Fritschler also used the LERW Credit Card to purchase meals after regular business hours and on weekends (when students were not likely to be in attendance). (*See e.g.* Ex. 15(b) at 95:98, 120:1193, 145:2268, 150:2465, 172:3410.) Fritschler consumed alcohol at many of these meals (presumably where students were unlikely to have been in attendance). (*See, e.g.*, Ex. 16 at 591, 600, 1411, 1412.) Fritschler also used the LERW Credit Card and checking account to purchase meals at local establishments for himself, dining alone. (*See, e.g.*, Ex. 15(b) at 97:177, 143:2195, 148:2397, 166:3146.)

60. Fritschler further used the LERW Credit Card to pay for meals for himself and his friends on holidays. (Ex. 54 (02/14/08) at 109:11-20; *see e.g.*, Ex. 15(b) at 111:795, 129:1561, 133:1731; 180:3768.) One Christmas Eve, Fritschler took a friend to the DePuy Canal House, and spent \$466 (for two people), a bill that included two \$96 bottles of Stag's Leap wine as well as a \$75 tip. (Ex. 54 (02/10/11) at 115:10-23; Ex. 15(b) at 228:1088; 10/22/12 Tr. 141:24 – 142:10 (Fritschler).)

61. Fritschler often used the LERW Credit Card at other restaurants, as well, including Friends and Family, the Hoffman House and the Rosendale Cement Company. (Ex. 15(b) at 242, 274-75, 308.) On one occasion, a dinner at The Inn at Stone Ridge on Friday, December 19, 2003, Fritschler used the LERW credit card to pay for a \$306.05 meal for himself and

Onderdonk. (Ex. 15(b) at 133:1760.)

62. Fritschler also used the LERW Credit Card to pay for dozens of trips to the movies, usually on the weekend, including trips to the movies when he went alone. (Ex. 15(c) at 357; 10/22/12 Tr. 143:11 – 145:6 (Fritschler).)

63. Investigator Dier testified that none of the purchases described in Paragraphs 57-62, above, were adequately documented as valid charitable expenditures. (Ex. 15(c) at 323-54; 10/15/12 Tr. 107:14 – 108:03 (Dier).)

64. Fritschler also used LERW's equipment, particularly a lawn mower and tractor, in his own property maintenance business. (Ex. 54 (2/14/08) at 191:20–25, 192:1-4; *id.* (2/10/11) at 90:11-25, 91:1-25, 92:1-4; *id.* (2/10/11) at 189:23-25, 190:1-13.) The use of LERW equipment by Fritschler in his personal business was never authorized by the LERW Board. (*See* 10/18/12 Tr. 133:9 – 134:14 (Straus).)

65. None of Fritschler's personal expenditures were reflected in the filings that LERW made (belatedly) to the IRS. (Ex. 21.)

66. Fritschler was responsible for LERW's financial affairs, including any necessary filings with government agencies, but failed to ensure that all necessary tax returns and other reports were filed. (10/12/12 Tr. 61:21 – 62:5, 129:24 – 131:16 (Onderdonk).) LERW did not file its IRS Forms 990 until December 2006 and never registered or filed annual financial reports with the Office of the Attorney General ("OAG"). (*Id.*; 10/15/12 Tr. 88:16 – 99:12 (Dier).) Similarly, during the period 2002-2005, Fritschler failed to pay any income tax or file any returns with respect to the payments he received from LERW (or from any other source). (10/22/12 Tr. 74:15

– 75:19 (Fritschler).)

67. In approximately 2004 or 2005, the Chairman of the Legislature raised the possibility of making Fritschler a full-time paid County employee. According to Onderdonk, Fritschler rejected this idea and his official status remained that of a volunteer. (10/12/12 Tr. 64:17 – 66:1 (Onderdonk).)

68. Fritschler continued to use his power as EMC Chairman to ensure he would continue to be paid by diverting to LERW the assets (cash and equipment) that the County had allocated to carry out the work of the EMC. Fritschler apparently knew that by diverting the EMC’s assets to LERW, LERW would be indispensable to the EMC or, at a minimum, have a sufficient stockpile of equipment used by the EMC so that if he was removed from the EMC, he could still continue to lead “his program.” (10/12/12 Tr. 31:12–24, 34:1 – 34:10 (Onderdonk).)

69. Fritschler apparently further believed that his future at LERW was secure because of his complete control of its Board and its operations and he hoped to one day receive a substantial retirement payment from it. (Ex. 54 (02/14/08) at 115:13–24; 10/12/12 Tr. 69:3 – 70:24 (Onderdonk).)

70. In 2006, the newly appointed County Auditor began to scrutinize the EMC’s relationship with LERW. (Ex. 1 at 130–220; 10/11/12 Tr. 23:18 – 24:20 (Shapiro).) This review included a hold on the payment of a \$58,200 obligation from the County to LERW. (See 10/11/12 Tr. 27:1–15 (Shapiro).) Also during 2006, members of the Legislature’s Environmental Committee began questioning the EMC’s relationship with LERW. (Ex. 2 at 314–44.)

71. As it apparently became clear to him that his conduct was being scrutinized, and that his

ability to usher contracts with LERW through the County was in jeopardy, Fritschler took steps to dismantle the EMC and attempted to recreate its programs directly under the aegis of LERW. (*See, e.g.*, Ex. 25.)

72. In late 2006, Fritschler directed Onderdonk to assist him in moving LERW's equipment, including vehicles and computer equipment, off of County property. (Ex. 24; 10/12/12 Tr. 132:15 – 133:7 (Onderdonk); 10/22/12 Tr. 122:21 – 124:8 (Fritschler).) Some of this equipment was moved to LERW's property in Rosendale known as Burnt Swamp; other equipment was moved to the Century House, the home of Fritschler's friend Dietrich Werner; and still other equipment was put into storage. Then, on January 8, 2007, Fritschler resigned from his position as EMC Chairman. (Ex. 49.)

73. At about the same time, LERW finally filed five years' worth of IRS Forms 990 with the IRS. (Ex. 21; 10/12/12 Tr. 129:24 – 131:16 (Onderdonk).) In the following months, LERW reached out to the ten local municipalities with whom Fritschler had been working on MS4 Compliance in his capacity as EMC Chairman, offering to have LERW – which ceased to be a vendor to the County upon Fritschler's resignation from the EMC – replace the EMC in assisting them with MS4 Compliance. (*See, e.g.*, Ex. 25.) Fritschler also entered into a formal contract with LERW that provided him with a \$56,800 salary per year. (Ex. 23.) Although it was not entered into until March 2007, the contract purported to cover the period from September 2006 through September 2007. (*Id.*)

74. As a result of Fritschler's actions, the County was faced with fulfilling its environmental obligations in 2007 without access to equipment and data necessary to carry out the EMC's

programs that Fritschler had surreptitiously arranged to be transferred to LERW. (10/11/12 Tr. 119:23 – 131:23, 160:4 – 160:11 (Doyle).) In particular, the County needed certain mapping and pollution abatement equipment to assist localities in complying with MS4 Compliance. (*Id.* at 123:13 – 124:11, 132:9 – 134:2.) After Fritschler’s resignation from the EMC, this equipment was, however, unavailable to the County and instead was used by Fritschler to further his attempt to have LERW provide services to the localities. (Ex. 25.)

75. Requests from the County for the return of this equipment were met with silence or refusals. (Ex. 42(Clark 3); 10/11/12 Tr. 126:25 – 130:2 (Doyle).) Fritschler ultimately did return to the County certain digital data, but in a manner that omitted a crucial data key, thus rendering the data useless. (10/11/12 Tr. 126:25 – 130:2 (Doyle).) Moreover, when, over a year after the commencement of this action, LERW’s computers finally were turned over to County, Fritschler had wiped them clean of all data (including data that should have been preserved because litigation had commenced) using a program specifically designed for that purpose. (10/22/12 Tr. 124:9 – 127:15 (Fritschler).)

76. As a result of Fritschler’s conduct, the County was forced to purchase the same type of equipment it had previously acquired for the EMC, but which Fritschler had improperly transferred to LERW. (10/11/12 Tr. 132:13 – 134:3 (Doyle).) The equipment that the County was forced to re-purchase included a hydromulcher worth \$45,650 and various cameras and GIS mapping equipment. (*Id.*; Ex. 33 at 135-43.)

77. During the period 2002-06, the County paid approximately \$1.7 million to LERW pursuant to the contracts that Fritschler, in his capacity as EMC Chairman, awarded to LERW.

(Ex. 15(c) at 321(a)-(c).)

78. The funds paid to LERW pursuant to these contracts came from the County's accounts. (10/22/12 Tr. 113:22 – 115:5 (Gulnick).) The grant funds received by the County were not held in escrow and did not belong to anyone other than the County. (*Id.*) Contrary to Fritschler's assertion, whether or not the County received these funds from grants or as a result of taxes levied on County residents, the funds belonged to the County as soon as they were received and deposited into County accounts. (10/22/12 Tr. 113:22 – 115:5 (Gulnick).)

79. Pursuant to the LERW Contracts, the County sub-contracted much of its environmental programming to LERW. (*See* Ex. 3 at 1–288.) Nevertheless, during 2002 through 2006, it was the staff of the EMC, together with Fritschler, the head of the EMC, that primarily carried out these programs. (Ex. 36, 40, 51; 10/12/12 Tr. 32:03 - 32:14 (Onderdonk); 10/11/12 Tr. 84:1 – 84:6 (Bartholomew).) Although Fritschler was involved in carrying out these programs, the County believed he was doing so on a volunteer basis in his capacity as EMC Chairman. (*See* ¶¶ 17, 35, 52, *supra*.) In essence, the County overpaid LERW for services that were already being provided by the EMC or easily could have been provided by it. Fritschler has asserted that it was necessary for the County to contract with LERW because federal rules pertaining to LSA funding required that a community-based organization such as LERW be involved in the programs for which the LSA grants were awarded. (Ex. 3 at 120; 10/19/12 Tr. 60:9 – 61:8 (Strouse); 10/22/12 Tr. 38:11 – 38:20; (Fritschler).) However, the LSA grants that Fritschler submitted identified the EMC/MHI as the community-based organization, not LERW. (Ex. 3 at 120; 10/22/12 Tr. 85:13 – 87:8, 87:25 – 88:18 (Fritschler).)

80. The funds paid by the County to LERW, pursuant to the LERW Contracts, constituted over 92% of LERW's income during the period 2002-06. (Ex. 15(c) at 321(a)-(c); 10/15/12 Tr. 97:14 – 97:22 (Dier).) During this period, LERW's checking account balance grew from \$149,121.02 to \$262,244.11, nearly all as a result of funding that it received from the County that was not utilized on any program activity. (Ex. 52; 10/15/12 Tr. 123:4 – 123:17 (Dier).)

81. Fritschler apparently viewed these funds as earmarked to pay for his retirement. (Ex. 54 (02/14/08) at 115:13-24; 10/12/12 Tr. 69:3 – 70:24 (Onderdonk).) The difference between the amount in LERW's account at the beginning of 2002 and at the end of the period, \$113,123.09, represents the excess amount paid by the County above what was necessary for LERW to carry out the EMC's programs (assuming *arguendo* that any funds paid to LERW were used to carry out the EMC's programs) and should be returned to the County as restitution.

82. During the period of 2002 through 2006, by using LERW's Credit Card, Fritschler spent another \$38,070.29 of LERW's funds for meals at restaurants and delis and another \$26,151.95 of LERW funds for other personal expenditures, including groceries, a vacation, clothing, movies, books, music, pet care, Christmas gifts and drug store items. (Ex. 52 at 1; Appendix 2.) Even after Fritschler resigned from the EMC in 2007 and began receiving a \$56,800 salary from LERW, he continued to use the LERW Credit Card to pay for \$3,424.87 in personal expenditures. (Ex. 52 at 2; Appendix 2.)

83. If the County had known of Fritschler's role at LERW or that he was benefitting from the contracts from the EMC, it would have had the opportunity to terminate its contractual relationship with LERW and take any other necessary steps to protect itself from the damages

that resulted from Fritschler's divided loyalties. (*See* ¶ 49, *supra*.) However, Fritschler's misrepresentations prevented the County from learning the details of his role at LERW.

84. Fritschler used LERW, in essence, as a holding company for the significant array of equipment used to carry out the EMC's environmental programs. (10/12/12 Tr. 31:12–24, 34:1 – 34:7 (Onderdonk); 10/17/12 Tr. 190:14 – 190:25, 192:11 – 192:13 (Straus).) Had County officials been apprised of Fritschler's conflict of interest with LERW in a timely manner, they could have taken steps to protect themselves from the diversion of County assets to LERW by Fritschler. Instead, upon Fritschler's resignation from the EMC in January 2007, the County was left to fulfill the EMC's programs without the benefit of the equipment held by LERW.

85. In its 2006 IRS Form 990, LERW valued its inventory at the end of 2006 at \$118,896. (Ex. 22 at 4; Ex. 52; 10/15/12 Tr. 125:8 – 126:3 (Dier).) As a result of the 2009 Settlement, equipment worth \$43,516 was returned to the County. (Ex. 54 at 4; Ex. 52.) The Attorney General contends that the difference, \$72,699, represents the diminution in value of the equipment that Fritschler rendered unavailable to the County before it was returned to the County pursuant to the 2009 Settlement. (Ex. 52.) The Attorney General argues that the full amount of the difference, \$72,699, should be returned to the County as restitution.

86. On May 12, 2008, LERW sued the County for payment of the \$58,200 due to LERW pursuant to its contracts with the County that had been withheld by the County Auditor. (Ex. 44.) As with all of the LERW Contracts, Fritschler had signed Onderdonk's name on each of the three contracts on which this payment was allegedly due when they were entered into in 2005 and 2006. (Ex. 3 at 280, 282, and 285; 10/12/12 Tr. 83:19 – 84:14 (Onderdonk).) Two days after

LERW commenced its action against the County, on May 14, 2008, the Legislature considered a resolution proposed by Legislator Parete, who Fritschler called as a witness at trial, to direct the County Treasurer to pay this amount to LERW. (Ex. 45.)

87. Fritschler again failed to inform the Legislators voting on Legislator Parete's proposal of his role with respect to the award of these contracts, his signing Onderdonk's name to them, his payments to himself from the LERW Bank Account or his personal use of the LERW Credit Card. (Ex. 45, 47 & 48.)

88. Legislator Parete testified that when he voted on the resolution, he did not know about Fritschler's practice of signing Onderdonk's name on LERW's contracts with the County. (10/18/12 Tr. 73:11 – 73:24, 75:24 – 76:6 (Parete).) Parete and the other Legislators who testified at the trial that were on the Legislature at the time of the 2008 vote, Legislators Donaldson and Shapiro, confirmed that this was material information that the Legislature should have had before voting on the resolution. (*Id.*; 10/10/12 Tr. 75:12 – 76:9 (Donaldson); 10/11/12 Tr. 27:1 – 28:8 (Shapiro).)

89. The Legislature voted in favor of Legislator Parete's resolution and the \$58,200 was paid to LERW. (Ex. 34 at 138; Ex. 46.) Less than two weeks later, LERW issued a check for \$40,000 payable to Fritschler. (Ex. 6 at 577; Ex. 15(a) at 32.) The Attorney General contends that because the Legislature remained uninformed regarding Fritschler's conflict of interest at the time of this resolution and would not have approved it if this information had been disclosed, the full \$58,200 should be repaid to the County as restitution.

CONCLUSIONS OF LAW

I find that the Attorney General has prevailed on the his First and Second Causes of Action against Fritscher that allege violations of the Tweed Law (Executive Law Section 63-c).

Executive Law Section 63-c entitled “Action by the people for illegal receipt or disposition of public funds or other property” provides in part at subsection 1. “Where any money, funds, credits, or other property, held or owned by the state, or held or owned officially of otherwise for or in behalf of a governmental or other public interest, by a domestic, municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the state, or of a city, county, town, village or other division, subdivision, department, or portion of the state, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or both, may be maintained by the state in any court of the state... having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority...The attorney-general shall commence an action, suit or other judicial proceeding, as prescribed in this section, whenever he deems it for the interests of the state so to do; or whenever he is so directed, in writing, by the governor.”

As pointed out by the Court in *State v. Grecco*, 21 A. D.3d 470 (2d Dept 2005): “In sum, the Tweed Law vests the Attorney-General with the discretionary authority to seek the recovery of money or property (other than real property) belonging to the State or a municipality, or to recover damages or other compensation for the same, or both, pursuant to any viable action or proceeding at law or in equity available to the State or municipality.” (at 477)

Pursuant to the January 8, 2007, Resolution of the County Legislature, the Attorney

General began his investigation that led to the filing of the lawsuit that was the subject of this Trial. The Tweed Law confers authority on the Attorney General to prosecute common law fraud and breach of duty claims against Fritschler on behalf of the County.

The Court finds that the Attorney General has satisfied its burden of proving that Fritschler committed fraud against the County. The elements of a cause of action for fraud are: (i) a misrepresentation of a material fact; (ii) the party making the misrepresentation knew it to be untrue; (iii) the misrepresentation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; (iv) the other party justifiably relied on the misrepresentation and was thereby induced to act or refrain from acting; and (v) injury or damage. [see *Eurycleia Partners v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).]

In a case against a fiduciary, like Fritschler, a fraud action may be maintained where the fiduciary intentionally conceals a material fact and the principal relies on this non-disclosure to the principal's detriment. [see *American Baptist Churches of Metropolitan New York v. Galloway*, 271 A.D.2d 92, 100 91st Dept 2000).]

During the period from 2002 through the end of 2006, Fritschler made numerous misrepresentations in order to conceal his role at LERW, intentionally deceiving County employees and Legislators into believing that he had no official role at LERW after his sham resignation and that he was not receiving financial and other benefits from it. For example, Fritschler presented contracts to the County that gave no indication of his role with LERW and that did not give any indication that he, and not Onderdonk, had signed Onderdonk's name and had made the decision to sign them.

Fritschler also made numerous fraudulent misrepresentations to County officials and Legislators to convince them that he performed his environmental work on a volunteer basis and concealed the fact that he was receiving payments from LERW with County funds. When asked about his means of livelihood, Fritschler actively misled these County officials by telling them that he worked as a contractor or maintained estates. He also routinely stated that he was performing work on environmental matters as a volunteer.

In addition, by failing to register LERW with the OAG and timely filing LERW's IRS Forms 990, Fritschler concealed from the public information that could have alerted County officials to his continued control over and receipt of money and other benefits from LERW. In particular, the IRS Form 990, which is filed with the OAG as part of the annual financial reports of registered charities, requires charities to list their "current officers, directors, trustees, and key employees." (Ex. 21, Part V-A.) Fritschler's control over LERW warranted his inclusion on this list.

During 2002 through 2006, Fritschler used his position as EMC Chairman to obtain sizable budgets for the EMC from which he directed approximately \$1.7 million be paid to LERW pursuant to the LERW Contracts. Fritschler apparently knew that this scheme would be impossible to carry out if the County Legislators and officials were aware of his control over LERW's affairs and his receipt of money and other benefits from that entity. Fritschler knew this because, in 2002, County officials had told him that his resignation from LERW was a precondition for his continued service as EMC Chairman.

To maintain his scheme post 2002, Fritschler intentionally concealed his ongoing role at

LERW by falsely asserting that he had resigned from LERW and by making representations that concealed his continued association with LERW, such as misrepresenting his own signature as that of Onderdonk's and falsely stating that he worked on environmental matters as a volunteer. [see *Striker v. Graham Pest Control*, 179 A.D.2d 984, 985 (3d Dept 1992), where it was held that an intent to deceive can be inferred from the failure to disclose].

Fritschler's admission that he worked hard to make Onderdonk's signatures on the LERW Contracts appear genuine, rather than indicating that he was signing his name for him, further establishes that Fritschler intended to deceive the County. [see *Cetnar v. Kinowski*, 263 A.D.2d 842 (3d Dept 1999), where it was held that an intent to deceive can be inferred from circumstantial evidence.]

The County relied on Fritschler's misrepresentations in numerous ways. Peruso, the County's Purchasing Agent, relied on the fact that Onderdonk signed the LERW Contracts in order to determine that they were arm's length transactions. As Peruso testified, if she had known that Fritschler was, in effect, signing both sides of the LERW Contracts (both as the EMC department head on the Contract Approval Routing Slip and as LERW's representative on the contract), it would have raised a red flag. (10/17/12 Tr. 24:16 – 24:20 (Peruso).) In such a case, she would not have approved the LERW Contracts, but rather would have reported the matter to the County Attorney immediately.

Similarly, the County's Insurance Agent, Szpulecki, relied on the forms filed by Fritschler regarding LERW's lack of "compensated individuals" in order to approve the LERW Contracts without the usual presentation of proof of Workers Compensation Insurance. In addition, she

would have been concerned if she learned Fritschler was signing Onderdonk's name on the LERW Contracts and, like Peruso, would have reported the matter to the County Attorney immediately.

Each of the current and former Legislators who testified at trial indicated that Fritschler's signing of the contracts for LERW was material information that the Legislature should have had at the time the contracts were being entered into.

As a result of Fritschler's fraud, the County entered into and made payments on the LERW Contracts which substantially harmed the County in the following ways:

Firstly, the County overpaid LERW by \$113,123.09, the amount that the LERW Bank Account grew as a result of Fritschler's awarding contracts to it during 2002 through 2006. Since LERW received virtually all of its funds from the County, this increase in its assets was a direct result of the County overpaying LERW for the services it purportedly provided.

Secondly, Fritschler used \$152,143.78 in County funds for his personal use during 2002 through 2006, a time when he held himself out as a volunteer. The use of County funds for Fritschler's personal use was not approved by the County and, as a result, all unauthorized benefits Fritschler received must be disgorged and returned to the County.

Thirdly, Fritschler deprived the County of the use of equipment worth \$118,896 that he had put in LERW's name, by moving this equipment off County property and by causing LERW to refuse to make it available to the County upon his resignation from the EMC in 2007. As a result of the 2009 Settlement, equipment worth \$43,516 was returned to the County. The difference, \$72,699, represents the diminution in value of the equipment that Fritschler rendered

unavailable to the County before it was returned to the County pursuant to the 2009 Settlement.

Fourthly, Fritschler defrauded the County into paying an additional \$58,200 in 2008 to LERW for contracts that he caused the EMC to enter into without fully disclosing the material facts detailed above.

Accordingly, the Court finds that the County has been damaged by Fritschler's fraud in the principal sum of \$396,165.87. This amount was determined by adding up the \$113,123.09 representing the increase in LERW's bank account, the \$152,143.78 in funds used by Fritschler for personal use, the \$72,699.00 representing the diminution in the value of the equipment, and \$58,200.00 in funds for LERW contracts for a total of \$396,165.87.

The Court finds that the Attorney General has met his burden of proving that Fritschler breached his fiduciary duty to the County. The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary duty; (ii) its breach; and (iii) damages flowing from the breach of fiduciary duty. [see, e.g., Bromwell Ault v. Soutter, 204 A.D.2d 131, 131 91st Dept 1994).]

A fiduciary relationship arises when a party reposes trust in another to carry out certain duties and the other party agrees to accept that delegation of trust and carry out those duties. *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005) Thus, a fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Id.* at 19 (quoting Restatement (Second) of Torts § 874, cmt. [a]). "This definition expressly refers to an agency relationship and an advisory relationship in the disjunctive. Hence, either is sufficient to establish the

fiduciary relationship.” *Pergament v. Roach*, 41 A.D.3d 569, 571 (2nd Dep’t 2007).

A fiduciary duty will attach even in circumstances when the party advises the principal, but does not have the power to bind the principal. *Pergament*, 41 A.D.3d at 571 (“since one can give advice to an entity without having the authority to bind it, the Supreme Court’s conclusion that the moving defendants were not fiduciaries because they had no authority to bind [the principal] is incorrect”).

Fiduciary duties arise regardless of whether the party in whom trust is reposed is a volunteer or is compensated. Restatement (3rd) Agency § 8.01, cmt. (c) (“the fiduciary principle is applicable to gratuitous agents as well as agents who expect compensation for their services”).

Fritschler owed fiduciary duties to the County because the County entrusted him with wide powers and granted him discretion in managing the EMC’s affairs and he accepted the County’s delegation of trust by acting as Chairman of the EMC for a decade. The discretion and trust given to Fritschler included the authority to: (i) draft and submit the EMC’s budget to the County Administrator; (ii) design the EMC’s programs; (iii) select the County’s vendors for services contracts; and (iv) supervise and work with the EMC’s employees in carrying out the County’s environmental conservation programs. The performance of these duties also cloaked Fritschler with public officer status, and thus he had fiduciary responsibilities to the County for this reason as well.

Throughout the trial, Fritschler contended that he did not owe a fiduciary duty to the County because he was not an “officer” of the County but a mere volunteer. He argued that since

the EMC was not established by a local law, his position as Chairman of the EMC could not be considered as a “public office”. He also argued that since he was not an office holder or an employee of the County, he was not bound by the County’s Ethic’s Law (the Ethic’s Law).

The Court has accepted the Attorney General’s contention that as chairman of the EMC, Fritschler was a public officer. The Court concurs with the Attorney General’s argument that there is no requirement that the office occupied by a public officer be established by local law. The Attorney General has pointed out that pursuant to County Law Section 153(1), counties can exercise their powers through the adoption of a resolution. Citing an Informal Attorney General’s Opinion, the Attorney General has further pointed out that the statutory designation of a position as an office is but one of several possible indications for the recognition of public office.

The essential and dispositive element of public office is that “the duties to be performed shall involve the exercise of some portion of the sovereign power, whether great or small.” *Held v. Hall*, 741 N.Y.S.2d 648, 657 (Sup. Ct. Westchester Cty. 2002) (quoting *People ex rel Corkhill v. McAdoo*, 90 N.Y.S. 689 (2d Dept 1904); *Dawson v. Knox*, 231 A.D. 490, 492 (3d Dept 1931), *aff’d* 267 N.Y. 565 (1935)). In determining public officer status, whether the individual exercised discretion and independence in carrying out government functions is the key factor. *County of Suffolk v. State of New York*, 138 A.D.2d 815, 816 (3d Dept 1988) (a public officer “exercises a high degree of initiative and independent judgment”), *aff’d*, 73 N.Y.2d 838 (1988). Another indicia of public officer status, applicable here to Fritschler, is the person’s “appointment for a definite term.” 1995 N.Y. Op. (Inf.) Att’y Gen. 4; 1995 N.Y. AG LEXIS 96 at

*2; Finally, public officer status may arise whether or not someone is paid. 2008 N.Y. Op. (Inf.) Att’y Gen. 5, 2008 N.Y. AG LEXIS *2 (uncompensated ethics board members were public officers); *see also* Public Officers Law § 64 (providing for reimbursement of expenses for unpaid public officers).

By accepting the County’s request that he carry out the County’s environmental programs, as Chairman of the EMC, and by undertaking this duty, Fritschler satisfies the common law standard for the establishment of public officer status.

As a public officer, as well as because of his undertaking the duties entrusted to him as EMC Chairman, Fritschler owed fiduciary duties to the County. [*see Grecco*, 21 A.D.3d at 474-78 (County officials are required to act faithfully in the course of their employment with the County); *Tuxedo Conservation & Taxpayers Assoc. v. Town Bd. of Town of Tuxedo*, 69 A.D.2d 320, 324 (2d Dept 1979) (fiduciary duty of “the punctilio of an honor the most sensitive” applies to public servants) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)); *Landau v. Percacciolo*, 66 A.D.2d 80, 87 (2d Dept 1978) (“[t]he relationship between a municipality and its servants springs from the fiduciary roots of agency, a concept deeply embedded in the common law”), *aff’d*, 50 N.Y.2d 430 (1980).]

“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.” Restatement (Third) Agency § 8.01. Fiduciary duty requires the “avoidance of situations in which a fiduciary’s personal interest possibly conflicts” with the interests of his principal. *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989); *see also*

Restatement (Second) of Agency § 387 (“an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency”). In particular, “[a]n agent has a duty not to acquire a material benefit from a third party in connection with transaction conducted or other actions taken on behalf of the principal or otherwise through the agent’s use of the agent’s position.” Restatement (Third) Agency § 8.02. This is true even if the agent does not believe any harm will befall the principal as a result of the agent’s taking the benefit. *Id.*, cmt.(b).

As an agent and public officer of the County, Fritschler owed the County this duty of trust and loyalty. See Restatement (Second) of Agency § 13; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416 (2001); *American Map Corp. v. Stone*, 264 A.D.2d 492, 492-93 (2d Dept 1999). Fritschler breached his duty of loyalty to the County by using his position as EMC Chairman to divert County funds to LERW, an entity that he controlled and from which he received substantial benefits. In so doing, Fritschler surreptitiously provided himself with compensation using County funds.

In addition, the work that had ostensibly been outsourced to LERW was, in fact, performed by County employees under Fritschler’s supervision. Accordingly, LERW served no purpose other than as a holding company for the cash surpluses generated by the EMC’s programs and for the vehicles and equipment used by the EMC. As such, Fritschler ensured that these resources were available to him – but not the County – upon his resignation from the EMC on January 8, 2007.

A fiduciary with divided loyalties must disclose any potential conflicts to his principals.

In particular, a fiduciary must disclose “any substantial advantage” he receives “from third persons,” and any advantage which may have “eroded [the fiduciary’s] duty of undivided loyalty to [its] employer.” *Black v. MTV Networks Inc.*, 172 A.D.2d 9, 11 (1st Dept 1991); *TPL Associates v. Helmsley-Spear, Inc.*, 146 A.D.2d 468, 470 (1st Dept 1989) (holding that principal has no duty to inquire into agent’s relationships with third parties and that the agent has the affirmative obligation to disclose any conflicts to the principal).

This common law fiduciary duty to disclose one’s conflicts of interest applies to public officials. *Grecco*, 21 A.D.3d at 477-78 (which reinstated the Attorney General’s claim for common law breach of fiduciary duty against Suffolk County official who failed to disclose his conflict of interest in real estate transaction to Suffolk County).

The common law duty of public officials to disclose their conflicts of interest to the municipalities that they serve is consistent with General Municipal Law (“GML”) § 803, which requires such disclosure. *Landau*, 66 A.D.2d at 87-88 (Putnam County official breached his statutory duty to disclose to the County his interest in real estate transaction). GML § 803 provides that: “Any municipal officer or employee who has, will have, or later acquires an interest in . . . any actual or proposed contract . . . with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.”

Trial testimony established that Fritschler had a direct financial interest in LERW, which

received a significant portion of the EMC's budget, that plainly conflicted with his duties as the EMC Chairman to make independent decisions concerning to whom to award County contracts. The evidence at trial also established that Fritschler failed to make any disclosure to the County officials and Legislators who acted on EMC's proposed budget requests and contracts that he, Fritschler, maintained complete control over LERW's finances, signed virtually all LERW checks, had exclusive use of the LERW Credit Card, and reaped substantial financial benefits through his control of LERW's accounts. Notwithstanding his clear fiduciary duties, Fritschler never disclosed his financial interest in or control over LERW to the County Legislature or any of the County employees with whom he dealt.

Fritschler argued that he did not have any duty to disclose his conflicts of interest because he was not specifically listed among the County officers that were required to make financial disclosures under Section 3 of the Ethics Law. However, other sections of that law refute his argument. In particular, while Section 3 of the Ethics Law only applies to "Certain County Officers," Section 1 of the Ethics Law applies to all officers and employees, even unpaid ones. (Ex. EE at 31 § 1; *see id.* § 1(E) (referring to paid and unpaid officers). As EMC Chairman, Fritschler presented proposed budgets to the Legislature and awarded contracts to LERW without disclosing his association with, or compensation from, that entity. His failure to fully disclose his conflicts violated a number of provisions in Section 1 of the Ethics Law.

Section 1(E) of the Ethics Law requires all County officers, whether "paid or unpaid" who participate in discussions with the County Legislature concerning legislation to "publicly disclose on the official record the nature and extent of any direct or indirect financial or other

private interest he or she has in such legislation.” (Ex. EE at 31-32.) Similarly, Section 1(C) precludes all employees and officers from entering “into any agreement, express or implied, for compensation for services rendered in relation to any matter before any municipal agency over which he or she has jurisdiction or to which he or she has the power to appoint any member, officer or employee.” (Ex. EE at 31.) Finally, Section 1(G) provides that County employees and officers “shall not . . . render services for private interests when such employment or service creates a conflict with or impairs the proper discharge of his or her official duties.” (Ex. EE at 32.)

“It is fundamental that a fiduciary must make whole a beneficiary of the trust for any damage resulting from a breach of the fiduciary’s duty.” *Evans v. Catalino*, 88 A.D.2d 780, 781 (4th Dept 1982); *see Matter of Rothko*, 43 N.Y.2d 305, 322 (1977). “[B]reaches of a fiduciary relationship ... comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.” *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 188-89 (1st Dept 2000) (quoting *Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon*, 13 F.3d 537, 543 (2nd Cir. 1994)). Thus, a plaintiff need only allege that “the offending parties’ actions were a substantial factor in causing an identifiable loss.” *Gibbs*, 271 A.D.2d at 189 (quoting *Milbank Tweed*, 13 F.3d at 543).

Accordingly, the Court finds that the County has been damaged pursuant to the Second Cause of Action by Fritscher’s breach of his fiduciary duty to the County in the sum of \$396,165.87. This amount was calculated by following the same reasoning used by the Court in determining the damages owed to the County because of Fritschler’s fraud as proven under the

First Cause of Action.

The Court finds that the Attorney General has prevailed on his Third Cause of Action against Fritschler alleging the Fritschler breached his fiduciary duty to LERW.

The N-PCL requires directors and officers of not-for-profit corporations to adhere to basic fiduciary duties that include the duty of care, the duty of loyalty and the duty of obedience. N-PCL § 717; [see *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 224 F. Supp.2d 567 (S.D.N.Y. 2002); see also *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 186 Misc.2d 126, 151 (Sup. Ct. New York Cty. 1999) (“As caretaker, the board ha[s] the fiduciary obligation to act on behalf of the corporation . . . and advance its interests”)]

Pursuant to the N-PCL §713, an officer of a not-for-profit corporation is someone elected or appointed to certain positions of responsibility by the corporation’s board of directors. The Court finds that as the individual charged by the LERW Board with managing LERW’s affairs and administering its accounts, Fritschler was an officer within the meaning of N-PCL § 713.

In addition, it is well established that even if a person is not officially appointed as an officer, he may be considered to be a *de facto* officer by virtue of his actions and the responsibilities that are delegated to him in running the organization. [see *Kessel v. Dodd*, 46 A.D.2d 645, 646 (2d Dept 1974) (“[t]he doctrine of *de facto* officers is of ancient origin and applies to private as well as public officers”), *aff’d*, 35 N.Y.2d 722 (1974); *Tzolis v. Wolff*, 13 Misc. 3d 1151(A), 2006 N.Y. Misc. LEXIS 1125, (Sup. Ct. N.Y. Cty. 2006); *aff’d in relevant*

part, 39 A.D.3d 138, 140-41, 146 (1st Dept 2007). A *de facto* officer has the same fiduciary duties to a charity as its named officers. see *Tzolis*, 2006 N.Y.Misc. LEXIS 1125 at *8 – *9 (party acting as a *de facto* manager of an LLC subject to fiduciary duties to the LLC.)]

The use of a charity’s assets by a director or officer (titular or *de facto*) for his or her personal benefit constitutes a violation of his fiduciary duties. A fiduciary who violates this duty is responsible for making the corporation whole and is required to repay the losses sustained by the corporation due to his breach. N-PCL § 720(a)(1)(B).

N-PCL § 720 provides a cause of action, *inter alia*, against a director or officer for the “acquisition by himself or transfer to others, loss, or waste of corporate assets due to neglect of, failure to perform, or other violation of his duties.” *Vacco v. Aramony*, N.Y.L.J., Aug. 7, 1998, at 21 (Sup. Ct. N.Y. Cty. 1998) (Attorney General had standing to sue officers of the United Way pursuant to N-PCL § 720 for losses suffered by the not-for-profit entity as a result of officers’ breaches of fiduciary duty, including the misappropriation of United Way funds for personal use). *See also* *People v. Grasso*, 54 A.D.3d 180, 204 (1st Dep’t 2008) (by giving Attorney General standing to sue directors and officers under N-PCL § 720, State Legislature has made a “public policy determination that it is in the public interest for the Attorney General to police not-for-profit corporations.”)

Any compensation paid by a not-for-profit corporation to its directors and officers must be “commensurate with the services performed.” N-PCL § 202(a)(12).

Even after his sham resignation from LERW, Fritschler continued to run LERW as the

“*de facto* unofficial director of operations.” The LERW Board continued to cede complete control of LERW to Fritschler. Fritschler continued to make all decisions concerning LERW’s day to day management and continued to: (i) act as its Executive Director; (ii) sign all checks (with Schuman’s and Onderdonk’s names); (iii) review and sign LERW’s contracts (under Onderdonk’s name); and (iv) be the primary user of the LERW Credit Card (under his own name). Indeed, Straus recognized that Fritschler continued to be LERW’s “CEO” even after his sham resignation. Under these circumstances, Fritschler was an officer, pursuant to N-PCL Section 713, as well as a *de facto* officer of LERW, and subject to fiduciary duties pursuant to N-PCL Section 717. see Tzolis, 2006 N.Y.Misc. LEXIS 1125 at ***8 – ***9.

By 2002, LERW was used primarily as a holding company for the EMC’s equipment and the excess revenue generated by the EMC. In addition, to the extent that Fritschler rendered environmental services for the County, it was in his capacity as Chairman of the EMC. As Chairman, Fritschler developed budgets, established policy, supervised County staff, and reported to the Environmental Committee. None of these activities were done in the name of LERW. Therefore, the \$87,921.54 in checks that Fritschler paid to his own company, on LERW’s Bank Account, does not, therefore, qualify as compensation under the N-PCL. Because the services that Fritschler performed in the area of environmental conservation were to the County as the volunteer Chairman of the EMC, not to LERW, it was improper for him to be paid at all by LERW. *See* N-PCL § 202(a)(12) (compensation must be commensurate with services performed).

In addition, during the years 2002-06, Fritschler used LERW’s bank account and credit

card for over \$64,222.24 in personal expenditures. Many of these purchases were for meals and entertainment for which he maintained no documentation of charitable purpose. Even after he resigned from his position as EMC Chairman in January 2007, Fritschler continued to use the LERW Credit Card for his personal benefit, charging an additional \$3,424.87 to LERW.

Under these circumstances, Fritschler's use of the LERW Bank Account to pay himself and his use of the LERW Credit Card for his own personal use constitute waste and self-dealing, in violation of his duty of loyalty to LERW, and renders him liable to LERW under N-PCL § 720(a)(2)(B). Similarly, Fritschler's use of LERW's property for his personal landscaping business constitutes waste.

Accordingly, the Court finds that as a result of Fritschler's breaches of duty to LERW, LERW has been damaged in the principal sum of \$155,568.65 and is owed restitution in this amount. This amount was determined by adding up the \$87,921.54 in checks paid to Fritschler's Company, Environmental Research Associates, the \$64,222.24 in personal expenditures and the \$3,424.87 in personal expenses charged on the LERW Credit Card. Pursuant to the December 3, 2009, Stipulation of Settlement, any damages that are owed to LERW after its dissolution are to be paid to the County.

The Court finds that the Attorney General has prevailed on his Fourth Cause of Action against Fritschler alleging that Fritschler breached his fiduciary duty to LERW as a charitable organization.

In addition to the obligations imposed by the N-PCL, trustees of charities are accountable

under the EPTL for the “proper administration” of the assets entrusted to them. [see EPTL § 8-1.4(a),(m); *Vacco v. Aramony*, N.Y.L.J., Aug. 7, 1998, at 21 (Attorney General had standing to sue officers of the United Way pursuant to EPTL § 8-1.4 for losses suffered by the not-for-profit entity as a result of their breaches of fiduciary duty, such as the loss of charitable funds used for the personal benefit of the officers).]

The EPTL defines a trustee broadly; it is defined as “any individual . . . holding and administering property for charitable purposes.” EPTL § 8-1.4(a). The Court finds that as a *de facto* officer of LERW, a not-for-profit corporation organized for charitable purposes, and as the individual charged by the LERW Board with managing its affairs and administering its accounts, Fritschler was a “trustee” within the meaning of EPTL § 8-1.4(a). Accordingly, Fritschler is responsible for LERW’s failure to administer its charitable assets properly.

Fritschler violated his fiduciary duties under the EPTL by engaging in the self-dealing transactions set forth above, namely, using LERW’s bank account and credit card and equipment for his undocumented and unreported personal benefit, rather than for the charitable purposes to which they were obligated to be used. Therefore, pursuant to EPTL Section 8-1.4(m), Fritschler must make restitution to LERW for these wasted funds.

New York charities, such as LERW, are required to register and file annual financial reports with the OAG pursuant to EPTL Section 8-1.4(c). LERW was also subject to the registration and reporting requirements of Executive Law Article 7-A, which requires the registration of entities that solicit charitable contributions from, among other sources, governmental agencies. [see Exec. L. §§ 171-a(2), 172.]

Contrary to Fritschler's assertion, the contracts solicited from the County on behalf of LERW constitute contributions pursuant to Executive Law Section 171-a(2). As a charity subject to the registration and reporting requirements of both EPTL § 8-1.4 and Article 7-A of the Executive Law, LERW should have been a "dual" registrant. LERW has never registered or filed annual reports with the OAG, as required under the EPTL and the Executive Law.

Fritschler, as the *de facto* Executive Director of LERW, is one of the individuals responsible for LERW's failure to register and file the required registration and annual financial reports.

Accordingly, the Court finds that as a result of Fritschler's breaches of duty to LERW by failing to administer its charitable assets, LERW has been damaged pursuant to the Fourth Cause of Action in the principal sum of \$155,568.65 and is owed restitution in this amount. This amount was calculated by following the same reasoning used by the Court in determining the damages owed to LERW under the Third Cause of Action.

The Court finds that the Attorney General has prevailed on his Fifth Cause of Action against Fritschler seeking a permanent injunction to forever bar him from serving in any capacity for a charitable entity and from soliciting directly or indirectly for any charitable contributions.

The Attorney General has proven that Fritschler engaged in a scheme to defraud County taxpayers and to enrich himself by controlling and misappropriating the assets of a not-for-profit corporation, LERW. This scheme included passing off his own signature as the signature of the president of a New York not-for-profit corporation in order to obtain access to County funds.

Fritschler carried on this scheme over a period of at least 7 years. Numerous witnesses testified that they were unaware that Fritschler was serving dual roles with the EMC and the LERW. Nor has Fritschler acknowledged or even appeared to recognize his wrongdoing. On the contrary, by maintaining his lack of liability despite admitting the key facts underlying the Attorney General's claims, Fritschler has demonstrated that he does not understand, and is likely not to follow, the obligations required of a director or officer of a not-for-profit corporation, and cannot be trusted with those obligations in any future role. Because there is a tangible likelihood that Fritschler would violate New York law were he permitted to serve again as an officer or director of a charity, the Court finds that injunctive relief is fully warranted.

The Attorney General contends that he is entitled to pre-judgment interest at the rate of nine (9) percent on the First, Second, Third and Fourth Causes of Action against Fritschler.

CPLR Section 5001(a) provides in part: "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the Court's discretion".

As pointed out by the court in *Huang v Fabian A. Sy* (62 A.D. 3d 660 [2d Dept 2009]): "The Supreme Court properly awarded pre-verdict interest as a matter of right pursuant to CPLR 5001 (a) upon the principal sum awarded in connection with the plaintiff's causes of action to recover damages for fraud and breach of fiduciary duty (*citations omitted*)...Contrary to the

defendant's contention, these causes of action sounded in law, rather than equity. (*citations omitted*).”(at 661-662) Pursuant to CPLR Section 5004, the applicable rate of pre-judgment interest is nine (9) percent.

It is necessary for the Court to determine at what point in time, the pre-judgment interest began to accrue. CPLR Section 5001 (b) provides in part: “Interest shall be computed from the earliest ascertainable date the cause of action existed...Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.”

The Court is not persuaded by the argument of the Attorney General that the date for the start of pre-judgment interest should be set at January 8, 2007, for Fritchler's refusal to turn over the equipment having a value of \$72,699.00; for May 16, 2008, for the payment of the \$58,200.00 to LERW; for July 1, 2004, for the accumulation in the LERW bank account of \$113,123.09 and Fritschler's personal expenses of \$64,222.24, and for January 1, 2008, for purchases of \$3,424.87 Fritschler made on the LEWR Credit Card.

Under CPLR Section 5001 (b), the Court is allowed to compute pre-judgment interest upon all of the damages from a single reasonable intermediate date. In the exercise of its discretion, the Court has determined that pre-judgment interest on all of the damages and restitution awarded herein will be calculated from the date the Attorney General's Verified Complaint was filed with the Ulster County Clerk's Office, which is October 10, 2008.

The Attorney General has also sought that costs and disbursements be imposed upon Fritschler pursuant to CPLR Sections 8101 and 8301(a)(9) in the sums of \$700.00 and \$250.00.

This relief is granted.

JUDGMENT

In making its final determination, as to the total damages and restitution owed by Fritschler, the Court is mindful of the fact that pursuant to the Stipulation of Settlement dated December 3, 2009, any damages that are owed to LERW after its dissolution are to be paid to the County. The Court is also mindful of the fact that the County cannot have a “double recovery” on some of the damages nor should Fritschler be made to pay twice for the same damages and restitution. The \$87,921.54 in checks paid on LERW’s checking account to Fritschler’s company were counted as damages on the Attorney General’s First and Second Causes of Action and on his Third and Fourth Causes of Action. Likewise, Fritschler’s LERW Credit Card expenditures of \$64,222.24 for his personal expenses were counted as damages on the Attorney General’s First and Second Causes of Action and on his Third and Fourth Causes of Action.

Therefore, the total of the principal damages that should be paid collectively on the First and Second Causes of Action is \$244,022.09 which sum includes the increase in the LERW checking account of \$113,123.09, the \$72,699.00 value of the equipment improperly withheld and the 2008 payment of \$58,200.00 to LERW. Further, the total of the principal damages and restitution that should be paid collectively on the Third and Fourth Causes of Action is \$155,568.65 which sum includes the \$87,921.54 in checks payable to Fritscher’s company, and the \$64,222.24 and the \$3,424.87 personal expenses on the LERW Credit Card.

Thus, the total of the principal damages and restitution to be paid by Fritschler is \$399,590.74. Fritscher is entitled to have this sum offset by a portion of the settlement proceeds

paid by the other Defendants. The Court will subtract \$14,168.27 which is reached by adding the \$33.42 balance left over from the 2009 Settlement to Straus's \$15,000.00 settlement and reducing it by \$865.15, the cost to provide Fritschler with a copy of the trial transcript, to arrive at a final principal sum of \$385,422.47. The Court will not include the \$1,158.00 used to pay the final bill for LERW's counsel to further reduce the offset. The \$14,168.27 will be subtracted from the total of damages to be awarded under the First and Second Causes of Action.

Accordingly, it is hereby

ORDERED, that the Attorney General shall have judgment against Fritschler on his First and Second Causes of Action in the sum of \$229,853.82 with pre-judgment interest at the rate of nine (9) percent accruing from the date of October 10, 2008; and it is further

ORDERED, that the Attorney General shall have judgment against Fritschler on his Third and Fourth Causes of Action in the sum of \$155,568.65 with pre-judgment interest at the rate of nine (9) percent accruing from the date of October 10, 2008; and it is further

ORDERED, that pursuant to Executive Law Sections 63(12) and 175(2) and EPTL Section 8-1.4, Fritschler is hereby enjoined from:

a. serving as a trustee, director, officer, or in any other fiduciary capacity, of any charitable trust, not-for-profit corporation, or other charitable entity, domestic or foreign, conducting activities (as defined in N-PCL Article 13) in the State of New York; and

b. engaging, directly or indirectly, in any solicitation of any person in the State of New York for a contribution to any charitable organization, or participation in or controlling such

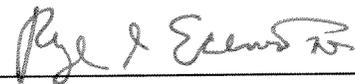
solicitations (as the terms person, solicit, contribution, and charitable organization are defined in Executive Law Section 171-a); and it is further

ORDERED, that the Attorney General is awarded costs and disbursements in the sum of \$950.00.

This shall constitute the Decision, Order and Judgment of the court. All papers, including this Decision, Order and Judgment are being returned to the attorney for the Plaintiff. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

**SO ORDERED AND ADJUDGED
ENTER.**

Dated: April 8, 2013
Kingston, New York



RAYMOND J. ELLIOTT, III
Supreme Court Justice

Papers Considered:

1. Bench Trial Transcripts dated October 10, 2012, October 11, 2012, October 12, 2012, October 15, 2012, October 17, 2012, October 18, 2012, October 19, 2012 and October 22, 2012.
2. Trial Exhibits: 1-17, 18-28, 31-37, 40, 42-58, A-C, E-F, I-K, N, P-T, V-X, AA, CC-GG.
3. Plaintiff's Proposed Findings of Fact and Conclusions of Law, dated March 11, 2013.
4. Defendant's Findings of Fact and Conclusions of Law and Amended Findings of Fact and Conclusions of Law.