

I. INTRODUCTION

Plaintiff Rhode Island Economic Development Corporation ("EDC") has submitted this and another factual appendix that taken together set forth virtually¹ the whole picture that Plaintiff believes should be considered in connection with the resolution of Defendants' motions for summary judgment.

This Appendix sets forth the facts and evidentiary support for Plaintiff's claims for fraudulent scheme and conspiracy in opposition to the motions of those Defendants² who seek summary judgment dismissing these claims. These same facts are relied upon in Plaintiff's memoranda in opposition to Defendants' individual motions for summary judgment.

The facts concerning both the knowledge of the EDC Board and the EDC's agents and employees that Defendants seek to impute to the Board are set forth in a separate document, the Detailed Timeline and Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motions for Summary Judgment Based on the Knowledge of the EDC Board and the EDC's Agents and Employees and Imputation ("Appendix on Directors' Knowledge" or "ADK").

¹ "Virtually" because Plaintiff has made a very limited additional factual submissions in its memorandum opposing Defendant First Southwest's request for summary judgment on the issue of damages and in Plaintiff's memorandum in support of partial summary judgment against Wells Fargo.

² Defendant First Southwest does not seek summary judgment on these claims, except insofar as dismissal of all claims is warranted by its motions for summary judgment based on lack of damages or imputation. Defendant Stokes' submissions are limited to joining the motions submitted by other Defendants on these two grounds.

**II. STATEMENT OF MATERIAL FACTS (DISPUTED AND UNDISPUTED)³
THAT PRECLUDE SUMMARY JUDGMENT**

The following numbered paragraphs set forth the evidence viewed in the light most favorable to the EDC, with all reasonable inferences drawn in favor of the EDC, and with all issues of credibility decided in favor of the EDC. Some of the evidence is undisputed, some is disputed, but in its totality this evidence proves that Defendants are not entitled to summary judgment dismissing Plaintiff's claims of fraudulent scheme and conspiracy, or other claims involving Defendants' individual knowledge or misconduct.

1. In 2009 the EDC sought legislation to provide the EDC with bonding authority of \$25,000,000 to support development of "soft asset" companies in Rhode Island.⁴ The EDC was completely unsuccessful.⁵

2. Prior to March 2010, executives from 38 Studios met with a Rhode Island businessman, lawyer and tax credits broker named Michael Corso.⁶ Mr. Corso

³ For purposes of these motions only. See First Southwest's Amended Memorandum of Law in Support of its Motion for Partial Summary Judgment on Liability at 3 n.3 ("For purposes of this Motion only, First Southwest does not allege or contend that Stokes, Saul, or Esten breached any duty to the EDC."). See also Kaplan v. Plymouth Rock Assur. Corp., 2008 Mass. App. Div. 160, at *1-2 (Mass. App. Ct. 2008) (summary judgment motion's statement of facts qualified by language "undisputed for purposes of this motion only" held not to be a judicial admission); Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including . . . stipulations (including those made for purposes of the motion only) . . .").

⁴ Exhibit. 1 (Stokes depo. at 298) (characterizing it as a "soft asset capital program").

⁵ Exhibit 2 (Saul depo. at 49:15-19) (quantifying it as \$25 million and testifying the effort was unsuccessful).

⁶ Exhibit 3 (Murphy depo. at 11:21-12:7) ("Q. All right, so there was a meeting in the fall of 2009? A. Well, it wasn't a meeting with me. What happened was 2009 at the Rhode Island State House, I was leaving for the night. I went to see Majority Leader Fox at the time to tell him I was leaving for the night, and in his office was Mr. Corso and Mr. Zaccagnino, and I was introduced

informed them that the Rhode Island Speaker of the House Gordon Fox was willing to meet with them to discuss financial support in return for 38 Studios relocating operations to Rhode Island. According to Defendant Zaccagnino, he believed that Mr. Corso had a business relationship with Mr. Fox.⁷ In return for Mr. Corso's efforts, 38 Studios agreed to pay Mr. Corso a commission⁸ of 5% of any financing 38 Studios would obtain from Rhode Island government, and warrants entitling him to 2% of 38 Studios' shares.⁹ This agreement was approved by Defendant Schilling.¹⁰

to Mr. Zaccagnino. Q. And do you know why Mr. Corso and Mr. Zaccagnino were meeting with then-Majority Leader Fox? A. I have no idea.").

⁷ Exhibit 4 (MacLean depo. at 53:16-24) ("Q. Okay. Fair enough. So, Zaccagnino was telling you that Corso and the Speaker had been in the past or were currently in business together; is that what you're saying? MR. BERTHIAUME: Objection. A. As I recall, I don't remember if he said they had been or were currently, but I remember -- as I recall, Tom mentioning there was a business relationship between Mike Corso and Gordon Fox.").

⁸ Exhibit 5 (Wester depo. at 63:2-64:18) ("Q. Okay. And she's writing to you on July 21st and she says, 'Hey, Rick. We forgot to discuss the Commission Agreements.' Do you know what commission agreements she was referring to? A. From looking at the e-mail, it says the Corso agreements. Q. Well, who said that? Who said it was the Corso agreements? Was that you? A. Yes. Q. Okay. So we know what commission agreements she's referring to. A. Yes. Q. It was the Corso commission agreements; yes? A. Correct. Q. And why was it called a commission, do you know? A. I don't. Q. You have no idea? A. No, not that I can remember. Q. Was he going to get a commission on the amount lent by the EDC, do you know? A. You know, I assume so, if it says the Corso agreements, that there was something there. It was probably that original agreement we wanted to send over. Q. Well, when I say 'commission,' what do you -- do you have an understanding of the term "commission" in everyday business? A. Yes. Q. What's a commission? A. It's an incentive payment for sale. Q. For sale. For achievement. A. For -- yeah, bonus would be achievement. I think commission is typically... Q. So here the commission was to be paid on the closing of the bonds; correct? MR. CONNOLLY: Objection. Q. It was proposed. A. I, you know, I was saying pay everyone post, since we really didn't have a lot of cash; so... But I don't really remember. Q. Yeah, post the closing. A. Post, yes.").

⁹ Exhibit 6 (Depo. Exhibit 299 which is Exhibit 22 to Affidavit of Jeff Easley); Exhibit 7 (Wester depo. at 65:15-66:10) ("Q. Does this refresh your recollection that Jen [MacLean] told you that, 'For your information, Mike and I agreed to 5% in cash and 2% in warrants'? A. (Deponent reviews document). Okay. Q. Does it refresh your recollection? A. It does, yes. Q. So she did

3. Although 38 Studios and Mr. Corso agreed in writing to a 5% commission and warrants granting him a 2% ownership stake in the company, they never entered into a formal written agreement with Mr. Corso¹¹ notwithstanding that he was working to obtain financing from the EDC.¹² Defendants Wester, MacLean, and Zaccagnino were concerned that the Corso agreement would be a "disclosable event."¹³

tell you that she had an agreement with Mike for 5 percent in cash and 2 percent in warrants; yes? A. Yes. I'm cc'd on this e-mail. Q. Yes. Now, explain to me -- I think I know what 'cash' is. 'Cash' is dollars; yes? A. Correct. Q. And what does that mean, '2% in warrants'? Did you have an understanding, when you got this e-mail, what she's referring to? A. I think it could be interpreted different ways, but it would basically be 2 percent of the market value of the company. Q. In addition to the cash. A. Correct.")

¹⁰ Exhibit 8 (MacLean depo. at 90:13-91:3) ("Q. I'm talking about this e-mail. I'm not talking about discussions with Corso. I'm asking you a very specific question of what you asked Schilling for in this e-mail, and you said 'The biggest thing I need from you is an OK to move forward with Corso's deal'; isn't that so? Isn't that what that says? MS. CONCANNON: Objection. MR. BERTHIAUME: Objection. That's what it says, and she's answered. MR. WISTOW: No, I want an answer to that. Q. Isn't that what that says? A. Yes. Q. Okay. And you told him you'd like to do a 5% cash fee at the closing of the bonds; yes? A. Yes."); Id. (MacLean depo. at 95:4-19) ("Q. Okay. So you got a response from Schilling, and what did he say about your proposal at 5% and the 2% total warrants? MS. CONCANNON: Objection. A. He said, 'Ok, I can swallow these numbers as the top end max. So if you go back to them with this, or I do, you need to make sure this is as far as I will go, no higher on either end at all.' Q. And did you respond to him? A. I did. Q. What did you say? A. Got it. Q. And do you remember sending that message? A. No, I don't. Q. But you accept you sent it? A. Yes.").

¹¹ Exhibit 9 (Wester depo. at 38:13-21) ("Q. Okay. So you described Corso at that time as a broker; yes? A. Yes. Q. Okay. And you said, 'I would give him a success fee payable in cash.' Did you say that? A. Yes. Q. And the "success" being what? A. I would imagine representing our interests in Rhode Island."); Id. (Wester depo. at 40:13-18) ("Q. And you say, 'Mike's acting as a broker.' We're talking about Mike Corso; correct? A. Correct. Q. That's your view, he was acting as a broker; correct? A. That was my view, yes.").

¹² Exhibit 10 (MacLean depo. at 49:10-15) ("Q. Was he working -- was he working -- was Corso working in May of 2010 to attempt to get financing for 38 Studios from the EDC; yes or no? A. Yes. Q. Is the answer yes? A. Yes."); Id. (MacLean depo. at 58:3-14) ("Q. Okay. Let's do them one at a time. Before the closing, did you have a discussion with Corso, either in writing or orally, about a fee for helping with the financing of the EDC deal; yes or no? A. Yes. Q. You did,

4. Mr. Corso and Defendants Schilling,¹⁴ Zaccagnino, Wester, and MacLean subsequently disagreed whether Mr. Corso's commission should be based upon the full \$75 million amount of the EDC's loan, in which event the fee would be \$3,750,000, or merely on the net proceeds of approximately \$49 million that 38 Studios received, in which event it would be approximately \$2,450,000.¹⁵ 38 Studios ultimately paid Mr. Corso \$2,414,892.00¹⁶ and postponed paying an additional invoice of \$77,600 due to

okay. Did you have a discussion before the closing with Corso about getting warrants as part of the compensation? A. Yes. Q. And that's before the closing, yes? A. Yes.")

¹³ Exhibit 11 (MacLean depo. at 135:2-17) ("Q. Okay. And let's just go with this. 'I am great with Monday. Rick and I have concerns this is becoming a disclosable event because of the financial and equity magnitude. If it is not disclosable we can discuss anytime next week.' And that e-mail purports to be directed to you. Do you remember having a discussion about a disclosable even [sic] in October, early October? A. Yes. Q. Okay. And was that with reference to the Corso deal? A. Yes. Q. And who was that discussion with? A. We had a number of discussions. I remember discussing it with Bill Thomas, Rick Wester and Tom Zaccagnino.")

¹⁴ Exhibit 12 (Wester depo. at 73:19-25) ("Q. Do you recognize the document? A. I see it's an e-mail sent to me. Q. Do you accept that you received it? A. I do. Q. Okay. Now, Schilling says, 'We gave Mike our word.' Do you see that? A. Correct, yes.")

¹⁵ Exhibit 13 (MacLean depo. at 127:1-16) ("Q. Forgive me, forgive me. I misspoke. Let's go back. You wrote and said, 'Mike wants 5% of the gross, I want to pay 5% on the net'; right? A. That's what I wrote. Q. What did you want to pay 5% of -- the net of what did you want to pay 5% on? The net of what? A. I wanted to pay 5% of the net, on net of the proceeds that we received from the Rhode Island bond transaction. Q. Okay. Fair enough. And Corso was saying he wanted 5% of the gross, 75 million; correct? A. That's correct. Q. And, then, Zaccagnino, who you wrote to says, 'It's the industry standard to always pay on the gross.' He said that? A. He did."); Exhibit 14 (Wester depo. at 68:4-18) ("Q. So your proposal at that point was pay him 5 percent of 50 million, or 2.5 and change; correct? A. Correct. That's what it says. Q. So it was a little bit up in the air as to whether the commission to be paid to Corso was on the gross or the net; correct? A. I -- yeah. I assume we're still in negotiation here. But, yeah, I'm trying to get it down, yes. Q. There was no doubt it was 5 percent of something. A. That's what it says. Q. So you're agreeing with me there's no doubt; yes? MR. CONNOLLY: Objection. A. Based on this e-mail, yes, I'd say there's no doubt.")

¹⁶ Exhibit 15 (Wester depo. at 104:5-19) ("Q. Right. On May 3rd, 2011, she [MacLean] wants to know what you've paid Corso; right? A. Correct. Q. And what you did was you got together the

lack of cash in the months prior to 38 Studios' bankruptcy.¹⁷ These payments plus this unpaid invoice total \$2,492,492, which is 5.09% of \$49 million.

5. On Saturday, March 6, 2010, Curt Schilling held a reception at his home to raise funds for a PBS Foundation project for documentaries of veterans of World War II.¹⁸ Governor Carcieri was invited and attended.¹⁹ Governor Carcieri and Curt Schilling had a brief conversation concerning 38 Studios.²⁰ Governor Carcieri was unaware of any prior contacts between 38 Studios and Rhode Island politicians.²¹

three sets of payments that you had made: one to Corso personally, one to Orb Development, and one to Kingston Capital. A. Correct, three contracts -- I'm sorry. Q. And you considered all three of those to be in response to her request, how much have we paid Corso; correct? A. Correct. Q. Okay. And that came to, at that point in time as of May 3rd, \$2,032,092; correct? A. Correct."); Id. (Wester depo. at 115:14-116:6) ("Q. No, no, no. Start from the beginning. On March 30th, 2012, Valentine writes to Schilling and Thomas, copy to you, and he says -- I'll read it -- "Curt/Bill, Can you please approve or decline the following payments? Thanks, Eric." \$53,102 to MoveTrek Mobility for the Telschow home sale, and \$310,400 to Michael Corso; right? A. Correct. Q. And that 310,400 is the two invoices in Exhibit 310; correct? A. It would -- I would assume so. It seems like they add up to that number. Q. Well, you're a CPA. Why don't you add up 232,800 and 77,600 and see if it comes to 310,400. A. I'll take your word for it, Max. Q. All right. And Schilling approves the payments on March 30th; yes? A. He did, yes.").

¹⁷ Exhibit 15 (Wester depo. at 116:7-14) ("Q. Well, you're a CPA. Why don't you add up 232,800 and 77,600 and see if it comes to 310,400. A. I'll take your word for it, Max. Q. All right. And Schilling approves the payments on March 30th; yes? A. He did, yes. Q. And then Eric wrote back to Schilling, Thomas, and a copy to you, and he says he's revised the payment plan to pay one of Corso's two invoices and pay NPD Group in the second invoice's place, can you approve or decline the updated planned payments. Now, do you understand what he's referring to there? A. Yes.")

¹⁸ Exhibit 16 (Carcieri depo. at 59-60).

¹⁹ Exhibit 16 (Carcieri depo. at 59-64).

²⁰ Exhibit 16 (Carcieri depo at 70-71).

²¹ Exhibit 16 (Carcieri depo. at 59, 66-67).

