

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

RHODE ISLAND ECONOMIC
DEVELOPMENT CORPORATION,

Plaintiff,

v.

WELLS FARGO SECURITIES, LLC, et al.,

Defendants.

C.A. No. PB-12-5616

J. MICHAEL SAUL,

Plaintiff,

v.

MOSES AFONSO RYAN, LTD., et al.,

Defendants.

C.A. No. PC 14-3346

**DEFENDANTS ADLER POLLOCK & SHEEHAN P.C. AND ROBERT I
STOLZMAN'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
COMPEL**

Defendants Adler Pollock & Sheehan P.C. ("Adler Pollock") and Robert I. Stolzman ("Mr. Stolzman") move to compel Karl Wadensten to testify concerning certain communications attached hereto as Exhibits A and B, and for a ruling that Exhibits A and B are not protected by the attorney-client privilege.

I. INTRODUCTION

On July 17, 2014, counsel for the movants re-convened the continued deposition of Karl Wadensten. Karl Wadensten was a member of the board of directors for the Rhode Island Economic Development Corporation (the "EDC") during the time that the EDC considered financing 38 Studios, LLC, and has remained a member of the EDC (or the Rhode Island Commerce Corporation) at all times since. Plaintiff's counsel instructed the witness not to answer a number of questions posed by movants' counsel concerning certain exhibits. One such e-mail is attached hereto as Exhibit B and purports to be from Karl Wadensten to EDC attorney David Gilden, members of the EDC Board, and certain other parties (the "Wadensten E-mail"). The Wadensten E-mail was sent on May 22, 2012. In it, Mr. Wadensten notes that the EDC Board held several lengthy emergency meetings to consider 38 Studios, and expressed displeasure with the Governor's strategy concerning the company. Counsel for the EDC instructed Mr. Wadensten not to answer questions concerning this exhibit because it was protected by the attorney-client privilege. However, counsel for the EDC posed no objection when Governor Chafee's reply to the Wadensten E-mail was introduced and discussed. (Exhibit C, "Gov. Chafee's Reply.").

II. ARGUMENT

If it delivered its decisions orally, the Rhode Island Supreme Court would grow hoarse from holding that the attorney-client privilege must be narrowly construed because it limits the full disclosure of the truth.¹ The party advancing the privilege—here, the EDC—has the burden of establishing the many elements of the privilege:

- 1) The asserted holder of the privilege is or sought to become a client;
- 2) The person to whom the communication was made was a member of the bar of a court or his subordinate, and in connection with the communication is acting as a lawyer;
- 3) The communication relates to a fact of which the attorney was informed
 - a. by his client
 - b. without the presence of strangers
 - c. for the purpose of securing primarily either
 - i. an opinion on law; or
 - ii. legal services; or
 - iii. assistance in some legal proceeding, and not
 - d. for the purpose of committing a crime or tort;
- 4) The privilege has been claimed and not waived by the client.

See, e.g., State v. von Bulow, 475 A.2d 995, 1005 (R.I. 1984).

A. The Wadensten E-mail is not privileged.

There are a number of reasons why the Wadensten E-mail is not privileged. First among these is that the Wadensten E-mail does not request legal advice. While the salutation of the e-mail refers to EDC attorney David Gilden, the e-mail concerns business. It requests leadership. Specifically, Wadensten acknowledged “38 Studios’ request for additional funding,” and requested that someone “set a course of action immediately” so critical employees don’t leave and assets don’t deteriorate. The e-mail relates Karl Wadensten’s opinion that the Governor’s

¹ *See, e.g., Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159-160 (2000) (“This Court has consistently held that the attorney-client privilege ‘must be narrowly construed because it limits the full disclosure of the truth.’ ”) (citations omitted).

approach is hurting Rhode Island's position in the long run. These are statements and opinions of a non-legal nature.² The fact that Mr. Gilden evidently did not reply to the Wadensten E-mail supports the textual argument that the communication was not intended as a request for legal advice.

Corporate communications involving in-house counsel require special scrutiny to determine whether the requirements of privilege were met. *Research Inst. for Med. & Chemistry, Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 676 (W.D. Wis. 1987) (“[C]areful scrutiny is required ... when [corporate counsel] steps out of his role as legal advisor there is no privilege.”); *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703, 705 (N.Y. 1989) (“[S]taff attorneys may serve as company officers, with mixed business-legal responsibility ... the need to apply [privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.”) (citations omitted). Communications that aren't primarily related to legal matters are not privileged. *See, e.g., Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D. N.Y. 1988) (“Where a lawyer mixes legal and business advice the communication is not privileged unless ‘the communication is designed to

² If the EDC argues that that the Wadensten E-mail did seek Mr. Gilden's legal advice, then the legal advice would be placed “at issue.” *See Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 160 (2000). (The “appropriate test for determining whether an implicit waiver of the attorney-client privilege has been made ... turns on whether the actual content of the attorney-client communication has been placed in issue such that the information is actually required for the truthful resolution of the issues raised in the controversy.”) Although Rhode Island takes a parsimonious approach to the “at issue” waiver of attorney-client privilege, *see id.*, the EDC claims that the Defendants are responsible for damages that the EDC suffered, including the loss of “the \$75 million [the EDC] loaned to 38 Studios ... instead [the EDC] will receive at most a small fraction thereof from the bankruptcy and receivership proceedings” Amended Complaint ¶ 219(a). The amount of damages, if any, suffered by EDC is a function, in part, of whether it undertook reasonable efforts prior to 38 Studios' collapse to mitigate any such damages. Colloquy in May 2012 between EDC Board members is therefore in issue.

meet problems which can fairly be characterized as *predominantly legal*,') (emphasis supplied) (quoting 2 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE, p 503(a)(1)(01) at 503-22.)); *United States v. Chevron Corp.*, C-94-1885 SBA, 1996 WL 264769 (N.D. Cal. Mar. 13, 1996) amended, C 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996) ("A party seeking to withhold discovery based upon the attorney-client privilege must prove that all of the communications it seeks to protect were made primarily for the purpose of generating legal advice. ... No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice.")

To the extent that any privilege did exist, the EDC waived it when it posed no objection to the introduction of and questioning concerning Governor Chafee's response ("Gov. Chafee's Response, attached as Exhibit C.). Gov. Chafee refers to Wadensten's E-mail extensively. He quotes Mr. Wadensten's references to the "public trust" and "inaction" and purports to address Mr. Wadensten's concerns. Of course, a document's privilege can be waived if an attorney puts related communications at issue. The EDC's counsel discussed this principle moments before he allowed the introduction and discussion of Gov. Chafee's Response.³ As the Rhode Island Supreme Court has held, "[i]t is not necessary that actual privileged communications or documents reflecting such communications be disclosed to effect a waiver of the privilege. [A] disclosure of, or even merely an assertion about, the communication may effect

³ Mr. Wistow: Your refusal to stipulate indicates to me there is a likelihood what you're going to do is say if you answer as to these documents, there is a further waiver for other documents. Deposition transcript of Karl Wadensten, July 17, 2014 ("Wadensten Depo. Tr."), Pages 317-318, Exhibit D.

a waiver of privilege not only as to that communication, but also as to other communications made during the same consultation and communications made at other times about the same subject." *State v. von Bulow*, 475 A.2d 995, 1007 (1984) (internal quotations and citations omitted). Here, as in *von Bulow*, "the facts ... are a classic example of the impermissible selective use of privileged information." *Id.* The EDC's attorney allowed the introduction of and questioning regarding Gov. Chafee's Response defending the Governor's choices. There can be no question that fairness requires that Wadensten's E-mail also be introduced. *See Herbert v. Lando*, 73 F.R.D. 387, 400, 22 Fed. R. Serv. 2d 1063 (S.D. N.Y. 1977) ("[V]oluntary disclosure of privileged matter to a third party waives the privilege, at least with respect to the particular subject matter involved in the disclosure.").

B. The Kates E-mail is not privileged.

Another exhibit that was introduced at the deposition is attached hereto as Exhibit A and purports to be an e-mail from Henry Kates to Karl Wadensten (the "Kates E-mail"). It was sent on May 22, 2012, and the subject line is "Letter to David Gilden." The contents of the e-mail appear to be a draft of what was shortly thereafter sent as the Wadensten E-mail. Accordingly, most of the preceding arguments concerning the Wadensten E-mail apply here. The conclusion that the communication is not privileged is even clearer in the case of the Kates E-mail, however:

Q. Next I want to show you, Mr. Wadensten, what I've had marked as Exhibit 536 which is a copy -- appears to be copy of an e-mail from you to Henry Kates; do you see that, sir?

A. Uh-huh.

Q. Who is Henry Kates?

A. A friend.

Q. And for what purposes were you writing to Mr. Kates?

A. For grammar and context.

MR. WISTOW: Were you asking him for legal advice?

THE WITNESS: No. Just to check my grammar and context and correctness.

Wadensten Depo. Tr., Pages 305-306, Exhibit D. Despite Mr. Wadensten's sworn testimony that he was not communication with an attorney for the purpose of securing legal advice, counsel for the EDC instructed Mr. Wadensten not to answer questions concerning the Kates E-mail. See Wadensten Depo Tr., Pages 311-314, Exhibit D. The law does not support his reserve.

C. The December 13, 2013 Stipulation executed by counsel is irrelevant.

The EDC has informed the undersigned that it believes that the terms of a stipulation executed by counsel on December 13, 2013 and attached as Exhibit E (the "Stipulation") controls questioning concerning the disputed Exhibits. It does not. The Stipulation⁴ concerned the production of certain documents that were produced *after* the Stipulation was executed on December 13, 2013. The Wadensten E-mail and the Kates E-mail were produced on November 3, 2013, more than a month before the Stipulation was executed. Furthermore, the Stipulation only referred to certain documents that the EDC had earlier claimed as privileged (or had prevented third-parties from producing on its own claim of privilege) but nonetheless agreed to produce. The Wadensten E-mail, the Kates E-mail, and Gov. Chafee's Response were not listed on the EDC's 128-page privilege log of January 7, 2013, certain pages of which are attached hereto. See Exhibit F. To the knowledge of the undersigned, the EDC (which represented Mr. Wadensten at his deposition and may or may not have handled his production) never withheld these documents

⁴ On November 7, 2013 counsel for the Defendants in this lawsuit sent a letter to the EDC objecting to the EDC's withholding of various documents on the grounds of privilege. The EDC responded and argued that all of the documents were properly withheld, but agreed to produce the documents so long as the production of those documents did not affect the EDC's claims of privilege with respect to any other documents. A stipulation was entered to this effect on December 13, 2013.

on claim of privilege. Further, even if the Stipulation applied, it expressly allows for Defense counsel to argue that the introduction of exhibits at depositions and testimony at depositions has waived privilege: "Defendants are not hereby foreclosing their right to argue that other actions of the EDC constitute a waiver of privilege as to any withheld documents or of any privilege that might apply ... such as ... other productions of documents ... the introduction of documents at depositions, and the testimony at depositions." Stipulation at 2, Exhibit E.

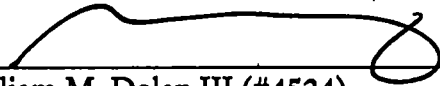
In sum, the Stipulation applies to a wholly different set of documents and would not even foreclose the arguments made in this Motion if it did apply. The Wadensten E-mail and the Kates E-Mail are clearly not privileged and no stipulation need or should apply to questioning concerning those documents.

III. CONCLUSION

For the foregoing reasons, Adler Pollock & Sheehan P.C. and Robert I. Stolzman request that this Court order that (1) the communications attached hereto as Exhibits A and B are not protected by the attorney-client privilege (or that if they were, the privilege was waived), and (2) that Mr. Wadensten answer questions concerning the same exhibits.

**ADLER POLLOCK & SHEEHAN P.C. and
ROBERT I. STOLZMAN,**

By their Attorneys,



William M. Dolan III (#4524)
William K. Wray, Jr. (#9022)
DONOGHUE BARRETT & SINGAL, P.C.
155 South Main Street, Suite 102
Providence, RI 02903
(401) 454-0400
(401) 454-0404 Fax
wdolan@dbslawfirm.com
wwray@dbslawfirm.com

Date: July 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of July 2014, I served a true copy of the within document, by electronic mail and first class mail, postage prepaid, upon:

Max Wistow, Esq.
Stephen P. Sheehan, Esq.
Benjamin Ledsham, Esq.
Wistow, Barylick, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903
mw@wistbar.com
bledsham@wistbar.com
mail@wistbar.com

Thomas F. Holt, Jr., Esq.
John Blessington, Esq.
Christopher J. Valente, Esq.
Timothy J. Grimes, Esq.
K&L Gates
State Street Financial Center
One Lincoln Street
Boston, MA 02111
Thomas.holt@klgates.com
John.blessington@klgates.com
Christopher.valente@klgates.com
Timothy.grimes@klgates.com

Gerald J. Petros, Esq.
Mitchell R. Edwards, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903
gpetros@haslaw.com
medwards@haslaw.com

Bruce W. Gladstone, Esq.
Cameron & Mittleman LLP
301 Promenade Street
Providence, RI 02908
bgladstone@cm-law.com

Jonathan Bell, Esq.
Mark A. Berthiaume, Esq.
Timothy E. Maguire, Esq.
Greenberg Traurig
One International Place, 20th floor
Boston, MA 02110
bellj@gtlaw.com
berthiaumeM@gtlaw.com
maguireset@gtlaw.com

Jeffrey C. Schreck, Esq.
99 Wayland Avenue, Suite 200
Providence, RI 02906
jschreck@msn.com

Brooks R. Magratten, Esq.
Pierce Atwood LLP
72 Pine Street, 5th floor
Providence, RI 02903
bmagratten@pierceatwood.com

David A. Grossbaum, Esq.
Samuel C. Bodurtha, Esq.
Matthew R. Watson, Esq.
Hinshaw & Culbertson LLP
321 So. Main Street, Suite 301
Providence, RI 02903
dgrossbaum@hinshawlaw.com
sbodurtha@hinshawlaw.com
mwatson@hinshawlaw.com

Michael F. Connolly, Esq.
Joseph P. Curtin, Esq.
A.W. (Chip) Phinney, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
One Financial Center
Boston, MA 02111
mfconnolly@mintz.com
jpcurtin@mintz.com
awphinney@mintz.com

Michael P. Duffy, Esq.
Frederick E. Connelly, Jr., Esq.
Christopher Conroy, Esq.
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210-2261
mduffy@peabodyarnold.com
cconroy@peabodyarnold.com
fconnelly@peabodyarnold.com


Robert M. Duffy, Esq.
Duffy & Sweeney, Ltd.
1800 Financial Plaza
Providence, RI 02903
rduffy@duffysweeney.com

David P. Martland, Esq.
Silva, Thomas, Martland & Offenberg, Ltd.
1100 Aquidneck Avenue
Middletown, RI 02842
dmartland@silvalawgroup.com

James E. Brandt, Esq.
Admitted Pro Hac Vice
Craig A. Batchelor, Esq.
Admitted Pro Hac Vice
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
Ecraig.batchelor@lw.com
(Co-Counsel to Barclays Capital Inc.)

Carl E. Metzger, Esq.
Sarah Heaton Concannon, Esq.
Josh L. Launer, Esq.
Thomas E. Duncombe, Esq.
Goodwin Procter LLP
One Exchange Place
Boston, MA 02109
cmetzger@goodwinprocter.com
sconcannon@goodwinprocter.com
jlauner@goodwinprocter.com
tduncombe@goodwinprocter.com

Russell H. Falconer, Esq.
Admitted Pro Hac Vice
Brian E. Robison, Esq.
Admitted Pro Hac Vice
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
brobison@gibsondunn.com
rfalconer@gibsondunn.com
(Co-Counsel to First Southwest Company)



William K. Wray Jr.

EXHIBIT A

Karl Wadensten

From: Henry Kates [hkates@rc-legal.com]
Sent: Tuesday, May 22, 2012 11:51 AM
To: Karl Wadensten; Karl Wadensten
Subject: Letter to David Gliden
Importance: High
How is this? See below:

Dear David:

We have held several lengthy emergency meetings of the EDC Board to consider 38 Studios' request for additional funding. The Governor is apparently taking a "wait and see approach." I believe this is a mistake.

A clear consensus has emerged from within the EDC Board that that the Governor must set a course of action immediately for the Board to act upon. Every day that goes by without a plan means further deterioration of 38 Studios' value and higher risk of the loss of critical employees, which only hurts the State's position in the long run. Any plan must include a full audit of 38 Studios use of State funds and tax credit. The audit and investigation needs to be undertaken immediately.

In times of crisis, the public has the right to demand decisiveness and leadership from those charged with the responsibility to lead. Inaction further erodes public trust, credibility and confidence in our institutions.

There is no question we have a serious issue before us. We need action now.

Sincerely,

Karl Wadensten

5/22/2012

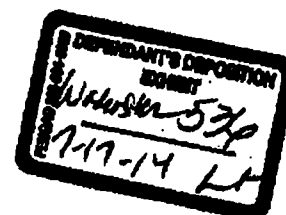


EXHIBIT B

From: Karl Wadensten <KWadensten@vibco.com>
Sent: Tuesday, May 22, 2012 12:21 PM
To: Gilden, David <DMG@PSH.com>; lori.lee@governor.ri.gov; laingleton@ppacri.org; jca17@cornell.edu; ttabineau@lifespan.org; hbfoulkes@cvs.com; davedooley@uri.edu; slane@ximedica.com; riafcio@aol.com; c_snead@banneker.com; dsullivan@collettevacations.com; jtemplin@gmail.com; sweiss@stanleyweiss.com
Cc: Parsons, Bill <bparsons@riedc.com>; Zainyeh, George (GOVERNOR) <George.Zainyeh@governor.ri.gov>; Chong, Judy <jchong@riedc.com>
Subject: RE: Braver Report
Attach: image286443.JPG

Dear David:

We have held several lengthy emergency meetings of the EDC Board to consider 38 Studios' request for additional funding. The Governor is apparently taking a "wait and see approach." I believe this is a mistake.

A clear consensus has emerged from within the EDC Board that that the Governor must set a course of action immediately for the Board to act upon. Every day that goes by without a plan means further deterioration of 38 Studios' value and higher risk of the loss of critical employees, which only hurts the State's position in the long run. Any plan must include a full audit of 38 Studios use of State funds and tax credit. The audit and investigation needs to be undertaken immediately.

In times of crisis, the public has the right to demand decisiveness and leadership from those charged with the responsibility to lead. Inaction further erodes public trust, credibility and confidence in our institutions.

There is no question we have a serious issue before us. We need action now. And be a partner.

Sincerely,

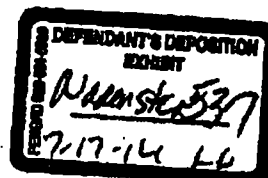
Karl Wadensten

Karl Wadensten
VIBCO, Inc.

From: Gilden, David [mailto:DMG@PSH.com]
Sent: Monday, May 21, 2012 1:34 PM
To: 'lori.lee@governor.ri.gov'; 'laingleton@ppacri.org'; 'jca17@cornell.edu'; 'ttabineau@lifespan.org'; 'hbfoulkes@cvs.com'; 'davedooley@uri.edu'; 'slane@ximedica.com'; 'riafcio@aol.com'; 'c_snead@banneker.com'; 'dsullivan@collettevacations.com'; 'jtemplin@gmail.com'; Karl Wadensten; 'sweiss@stanleyweiss.com'
Cc: Parsons, Bill; Zainyeh, George (GOVERNOR); Chong, Judy
Subject: Braver Report

Good afternoon. In anticipation of this afternoon's EDC Board meeting, and release of the attached audit report to the media, I have attached a copy of the report by EDC's auditor, Braver PC, confirming the expenditure by 38 Studios, LLC of the full amount of the bond proceeds disbursed to 38. The purpose of confirming this expenditure of funds is to confirm that 38 Studios' has satisfied a condition to being entitled to apply for State tax credits.

CONFIDENTIAL



PSH-0006513

Please let me know if you have any questions.

David

David M. Gliden, Esq.
Managing Partner



180 South Main Street
Providence, RI 02903
t: 401-861-8230 • f: 401-861-8210
dmg@psl.com • www.psl.com

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PSH-0006514

EXHIBIT D

In The Matter Of:
Rhode Island Economic Development Corporation vs
Wells Fargo Securities, LLC

Karl Wadensten
Vol. II
July 17, 2014



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1 action. Sentiment is pretty strong for some
2 deliberativeness among all boards members."
3 That's what you wrote, right?

4 MR. WISTOW: Don't answer.

5 (SO NOTED)

6 Q. You were expressing your concern, were you not,
7 about the way in which the governor was handling
8 the crisis?

9 A. I have no answer.

10 MR. WISTOW: I want to make it clear
11 for the record, I'm not trying to waste time. I
12 have no problem whatever letting him answer fully
13 and completely as to this document, if it's agreed
14 that by so doing there's no waiver of
15 attorney/client privilege beyond this that's all.

16 MR. DOLAN: Let's have 46, Wil.

17 (DEFENDANTS' EXHIBIT 536

18 MARKED FOR IDENTIFICATION)

19 Q. Next I want to show you, Mr. Wadensten, what I've
20 had marked as Exhibit 536 which is a copy --
21 appears to be copy of an e-mail from you to Henry
22 Kates; do you see that, sir?

23 A. Uh-huh.

24 Q. Who is Henry Kates?

25 A. A friend.

1 Q. And for what purposes were you writing to
2 Mr. Kates?

3 A. For grammar and context.

4 MR. WISTOW: Were you asking him for
5 legal advice?

6 THE WITNESS: No. Just to check my
7 grammar and context and correctness.

8 MR. WISTOW: Hold on. Let me mark
9 this and let me just read it.

10 THE WITNESS: Go ahead.

11 (PAUSE)

12 MR. WISTOW: I'm going to let him
13 answer the question. I can't do it with 535
14 unless you agree I'm not waiving something. I'm
15 talking about 535, the Gilden e-mail. I would
16 ask -- I'm going to allow him to answer completely
17 on 535, but I just ask you not to use that as the
18 basis for saying there is a further waiver of
19 attorney/client privilege.

20 MR. DOLAN: I'll tell you what --
21 can we go off the record for a second?

22 (OFF THE RECORD)

23 (COUNSEL LEFT ROOM AND RETURNED)

24 MR. DOLAN: Back on. Mr. Wistow,
25 we'll agree that if you permit Mr. Wadensten to

1 answer questions about Exhibit 535 and any related
2 communications, that it won't affect a waiver of
3 the attorney/client privilege that EDC can assert,
4 to the extent one exists, as long as you concede
5 that by agreeing to the stipulation we're not
6 agreeing to the efficacy of the privilege.

7 MR. WISTOW: No. And I'm free later
8 to move to strike the question and answer if
9 privilege, in fact, is held to apply.

10 MR. DOLAN: And we're free to oppose
11 that.

12 MR. WISTOW: Of course.

13 MR. PETROS: I'm uncomfortable saying
14 and related communications. Let's be specific,
15 I'm okay with 535.

16 MR. DOLAN: You want to limit it to
17 that. And if it comes up again, we'll deal with
18 it?

19 MR. PETROS: Yes.

20 Q. Okay. Back on 535, Mr. Wadensten. You respond to
21 Mr. Gilden's message and you write, "What do you
22 mean first call? Stating our position as a board
23 that we would like to help and have some idea of
24 the governor's strategy and get clarity, or we
25 will drive him to a clear strategic course of

1 action. Sentiment is pretty strong for some
2 deliberativeness among all board members"?

3 A. Yes.

4 Q. Do you remember this communication with Mr.
5 Gilden?

6 A. No, but --

7 Q. You have no reason to doubt it occurred?

8 A. No. That's my e-mail address.

9 Q. You're reacting to his statement that Helena
10 Foulkes is going to make the first call, right?

11 A. Yup.

12 Q. You didn't like that?

13 A. No. I didn't know what the first call was.
14 I asked, "What do you mean first call?" I had no
15 idea what he was talking about.

16 Q. What about the phrase when you state, "Stating our
17 position as a board that we would like to help and
18 have some idea of the governor's strategy and get
19 clarity." What were you referring to there?

20 A. Well, this is on the morning of the 22nd,
21 after the meeting of the 21st, and we had no idea
22 what we were doing. The meeting disbanded and
23 there was no clear direction what we were going to
24 do or not do.

25 Q. You were concerned about that?

1 A. I was concerned. I had no idea.

2 Q. You wanted to try to develop a strategy, didn't
3 you?

4 A. Some kind of strategy, positive, negative,
5 neutral, whatever it was.

6 Q. You wanted to have some idea what the governor's
7 strategy was, is that right?

8 A. We were a board. He was chair of the board.
9 We were a board. Together, some idea what are we
10 doing.

11 Q. And you didn't have any idea what you were doing
12 after the May 21 meeting, did you?

13 A. No. --

14 MR. WISTOW: Immediately after?

15 A. Immediately, yes.

16 Q. So, you were expressing your concern about the
17 lack of direction, is that right?

18 A. The lack of strategy and clarity from the --

19 Q. The governor was leader of the board?

20 MR. WISTOW: Objection.

21 A. Yes.

22 Q. You expected, did you not, that he would provide
23 some direction on how to proceed?

24 A. It would be my assumption.

25 Q. That's a fair assumption, that a chairman of a

1 public board would provide some direction to the
2 board as to how to proceed from a strategic
3 standpoint?

4 A. I think so.

5 Q. And he hadn't done that, at least as of the May 21
6 meeting?

7 A. To me. Maybe to other board members, but not
8 to me.

9 Q. Okay. You expressed -- you say in the last
10 sentence of the e-mail, "Sentiment is pretty
11 strong for some deliberativeness among all board
12 members." Do you see that?

13 A. Yes.

14 Q. So this concern that you had was shared by others?

15 A. No. I was just expressing what my views and
16 opinions were, that everybody wanted to seem to
17 have some type of idea what we were or were not
18 going to do.

19 Q. I take it by this statement other board members
20 had expressed the same sentiment to you, sir, is
21 that fair?

22 A. No. If you read -- anybody could read the
23 minute notes and see the discussions, that there
24 were many different discussions going on on
25 clarity for what was going on.

- 1 MR. DOLAN: I understand that.
- 2 A. We all wanted to, you know, mitigate 75-plus
- 3 million dollars to 110 million and due to the
- 4 severity of that and consequences of that to the
- 5 state.
- 6 Q. You, as a result of participating in the meeting,
- 7 observed that other board members shared the same
- 8 sentiments that you did for a need for
- 9 deliberativeness, right?
- 10 A. Well, the deliberativeness is just, you know,
- 11 I had my opinions and assumptions that I got out
- 12 of dialogue from Mr. Schilling, Mr. Stokes, from
- 13 Mr. Gilden, and other board members had theirs,
- 14 and I'm sure the governor had his as well.
- 15 Q. You characterize here that sentiment of other
- 16 board members is pretty strong for some
- 17 deliberativeness, right?
- 18 A. Yes.
- 19 Q. And you got that from what, listening to the other
- 20 board members?
- 21 A. Yeah, I also said that I had tons of
- 22 documentation back from our beginning questioning,
- 23 so, you know, I was expressing a point.
- 24 Q. Let's look at 536, sir.
- 25 A. Yes.

1 Q. This is what I was asking you before. This is
2 your e-mail to Mr. Henry Kates who you described
3 as a friend?

4 A. Yes.

5 MR. WISTOW: I'm going to say the
6 same thing, ask for the same stipulation. Even if
7 he was just a friend, Mr. Wadensten had no right,
8 if indeed this was privileged, to share it with
9 anybody else. And if he did, it would be
10 completely confidential.

11 MR. PETROS: No.

12 MR. DOLAN: Wait a second, He said on
13 the record --

14 MR. WISTOW: He's a friend.

15 MR. DOLAN: He also said he wasn't
16 seeking legal advice.

17 MR. WISTOW: Whether he sought legal
18 advice or not, he's disclosing stuff he told
19 Gilden. That was in confidence. I'm not going to
20 let him answer -- it doesn't matter what you say.
21 I'm not going to let him answer unless we have the
22 same stipulation.

23 MR. DOLAN: This is not an e-mail to
24 Gilden.

25 MR. PETROS: What's the basis?

1 MR. WISTOW: Same privilege I alerted
2 with regard to Gilden. He's now disclosing to a
3 third party stuff that's privileged. What was
4 disclosed to him in privilege. That's my
5 position. If you don't like it, file a motion.
6 If you make the same --

7 MR. PETROS: It's not a good faith
8 statement of a privilege.

9 MR. WISTOW: Don't tell me what's
10 good faith -- I have a white hat, and I'm saying
11 it in good faith. You want to say I'm wrong, say
12 I'm wrong. But don't say, Gerry, it's not in good
13 faith. Because I don't think your comments are in
14 good faith. I want to move this along. I'm not
15 going to let him answer unless we have the same
16 stipulation.

17 MR. PETROS: Call the judge.

18 MR. WISTOW: Call the judge. Call
19 the judge if you want.

20 MR. DOLAN: Let's mark 31.

21 MR. WISTOW: I'll say one more time.
22 I have no problem getting into this. I don't want
23 the use of 536 to be argued as a waiver of the
24 attorney/client privilege. That's all I'm asking.
25 That's all I'm asking.

1 MR. PETROS: You're claiming a
2 privilege. There is no basis for it --

3 MR. DOLAN: Understood.

4 MR. PETROS: -- that's what you're
5 doing.

6 MR. WISTOW: I'm asking you to say
7 that if there's a privilege here, I haven't waived
8 it. If there's not, there's not, you're going to
9 get an answer, anyway. I think you're wasting
10 everybody's time.

11 MR. PETROS: You're wasting
12 everybody's time.

13 (DEFENDANTS' EXHIBIT 537
14 MARKED FOR IDENTIFICATION)

15 Q. Why don't I let you take a look at that.

16 MR. WISTOW: I'm going to say the
17 same thing again. I have no problem getting into
18 this, you can ask whatever you want. I contend
19 that it may well be attorney/client privilege, and
20 I don't want the argument that I've waived it
21 where it goes beyond this. That's all I'm saying.

22 MR. DOLAN: I'm going to confer with
23 counsel for a minute.

24 (COUNSEL LEFT ROOM AND RETURNED)

25 MR. WISTOW: Apropos, Benjamin

1 reminds me -- doesn't remind me, because I have no
2 recollection, but he believes these documents were
3 produced pursuant to stipulation that there was no
4 waiver of the attorney/client privilege. Does
5 anybody remember any of this stuff?

6 MR. DOLAN: Partridge, Snow & Hahn,
7 I don't think Partridge, Snow & Hahn, but I could
8 be wrong.

9 MR. WRAY: It's a matter of record.
10 Let's move on.

11 MR. WISTOW: Now I don't want to
12 disturb the stipulation by saying -- allowing
13 questioning on it, we've waived it. I don't know
14 what to say. I'll let you go into this
15 completely, but I'm just saying if it's not
16 privileged, it's not privileged. If it is
17 privileged, it is. And you know something, all I
18 want to make sure it's not used as a basis for
19 going beyond. If you don't want to do that, I
20 just stand where I stand.

21 MR. DOLAN: I understand. I
22 appreciate the offer. We're going to decline it.
23 I'm going to ask the witness and you can give
24 whatever instruction you think is appropriate,
25 recognizing that if a motion to compel is granted,

1 he's going to have to come back and answer those
2 questions again.

3 Q. Mr. Wadensten, let me show you what I've had
4 marked as exhibit --

5 THE WITNESS: Am I talking to him or
6 not?

7 MR. WISTOW: Listen to what I say,
8 that's all.

9 Q. Mr. Wadensten, I'm showing you --

10 MR. PETROS: I think he has been.

11 MR. DOLAN: He has been doing a great
12 job of that.

13 Q. I'm showing you what the court reporter has marked
14 as Exhibit 537. Do you know what that is, sir?

15 A. It's an e-mail.

16 Q. From whom?

17 A. From me, Karl Wadensten.

18 Q. To whom?

19 A. To David Gilden, Lori Lee, Lynn Singleton, I
20 don't know who jca17 is. Tim Babineau, Helena
21 Foulkes, Dave Dooley. I don't know S. Lane --
22 Stephen Lane, George Nee, Cheryl Snead, Dan
23 Sullivan, Jack Templin, Stanley Weiss, Bill
24 Parsons, George Zainyah, Judy Chong, and that's
25 it.

1 Q. Why did you send the e-mail to Lori Lee at
2 governorri.gov?

3 A. Lori Lee. I don't know. That's the only way
4 I knew how to get a hold of the governor.

5 Q. How about Mr. Zainyeh, why are you copying
6 Mr. Zainyeh on the e-mail?

7 A. Because Mr. Zainyeh probably -- because he
8 was on the governor's staff, and he was attached
9 to him by the side.

10 Q. Okay. Why did you send this letter, Mr.
11 Wadensten?

12 THE WITNESS: Why did I send this
13 letter?

14 MR. WISTOW: Don't answer.

15 (SO NOTED)

16 MR. WISTOW: Again, I want to put on
17 the record there is no doubt whatever. I think
18 it's really a shame, all I'm asking is that we
19 agree that you can answer any questions relating
20 to this letter and that you will not use that
21 answer to claim that there's been waiver as to
22 anything else. I just can't, in good conscience,
23 allow him to answer it without -- because your
24 refusal to stipulate indicates to me there is a
25 likelihood what you're going to do is say if you

1 answer as to these documents, there is a further
2 waiver for other documents. I don't know how else
3 to term it. I implore you to reconsider rather
4 than waste time.

5 MR. DOLAN: I appreciate your
6 sentiment. There is no need for you to make
7 self-serving statements other than to instruct the
8 witness not to answer. We have a differing view
9 on this and the other documents.

10 MR. WISTOW: It's not self-serving.

11 MR. DOLAN: I'm not wasting time.

12 MR. WISTOW: I didn't say you're
13 wasting time. I said it would be a waste of time
14 to file a motion and try to get him to come back
15 here when you can get the answers to your
16 questions. I'm saying this for the record, not to
17 persuade you. It's to make it clear to the court.

18 MR. PETROS: Can I ask, on what basis
19 you instruct him not to answer?

20 MR. WISTOW: I think it's arguably
21 privileged.

22 MR. PETROS: How?

23 MR. WISTOW: Because it's referring
24 to an attorney/client privilege. That's what it
25 is.

1 MR. WRAY: Is it attorney/client
2 privilege or referring to one?

3 MR. WISTOW: It includes statements
4 he wants to make to Gilden -- he's making to
5 Gilden and to other people on the board and to the
6 governor's office. He's writing to his lawyer. I
7 don't know how else to say it.

8 Q. Mr. Wadensten, in this e-mail --

9 MR. WISTOW: Let me just put this on
10 the record. I could be wrong on the merits, I'm
11 willing to concede I could be wrong. I'm just
12 saying -- because I concede I might be wrong, I'm
13 saying go ahead and answer it, but so long as it
14 doesn't --

15 MR. DOLAN: We're going to move on.
16 I don't want to waste Mr. Wadensten's answer time
17 at all.

18 Q. Mr. Wadensten, why did you send this e-mail?

19 MR. WISTOW: Don't answer.

20 A. Don't know.

21 Q. The subject of the e-mail is your concern about
22 the way in which the governor is approaching the
23 crisis; isn't that right?

24 MR. WISTOW: Don't answer.

25 (SO NOTED)

1 Q. And you state, do you not, "We've held several
2 lengthy emergency meetings of the EDC board to
3 consider 38 Studios' request for additional
4 funding. The governor is apparently taking a,
5 'Wait and see approach.' I believe this is a
6 mistake." Don't you say that?

7 MR. WISTOW: Don't answer. I'm going
8 to say it another time in another way, I have no
9 problem. No problem --

10 MR. DOLAN: No, Max, you don't need
11 to do that, you said it

12 MR. WISTOW: It's a modification.

13 MR. PETROS: Save your arguments.

14 MR. WISTOW: It's a modification. I
15 know where this will ultimately end up if the
16 questions are asked and answered, where it will
17 end up, and it's not favorable to you. What I'm
18 saying is I cannot do this and run the risk of the
19 argument that it's going to encompass a further
20 waiver. That's the problem. I don't have a
21 problem with the substance. It's the idea that
22 it's going to burgeon out into a further waiver.
23 That's the problem.

24 Q. Mr. Wadensten, before you step away, I take it
25 you're going to follow your attorney's instruction

1 not to answer these questions?

2 A. 110 percent.

3 Q. Okay. You further write in this Exhibit 537,
4 quote, "A clear consensus has emerged within the
5 EDC board that the governor must set a course of
6 action immediately for the board to act upon.
7 Everyday that goes by without a plan means further
8 deterioration of 38 Studios value and higher risk
9 of the loss of critical employees, which only
10 hurts the state's position in the long run. Any
11 plan must include a full audit of 38 Studios use
12 of state funds and tax credit. The audit and
13 investigation needs to be undertaken immediately."
14 Is that what you wrote?

15 MR. WISTOW: Don't answer.

16 (SO NOTED)

17 Q. Why did you write that, sir?

18 MR. WISTOW: Don't answer.

19 (SO NOTED)

20 Q. Were you explaining concern in the way in which
21 the governor was responding to the 38 Studios
22 crisis?

23 MR. WISTOW: Don't answer.

24 (SO NOTED)

25 Q. You are going to follow these instructions, I take

1 it, Mr. Wadensten, and not answer these questions?

2 MR. WISTOW: You can answer that one.

3 A. I'm not answering.

4 Q. You say at the bottom of the third paragraph of
5 the e-mail, "In times of crisis the public has the
6 right to demand decisiveness and leadership from
7 those charged with the responsibility to lead.
8 Inaction further erodes public trust, credibility
9 and confidence in our discussions." You write
10 that?

11 MR. WISTOW: Don't answer.

12 (SO NOTED)

13 Q. You were there indicating, were you not, that you
14 felt that the governor was not acting decisively
15 and with leadership; isn't that correct, sir?

16 MR. WISTOW: Don't answer.

17 (SO NOTED)

18 Q. Okay. Did the governor respond to you when you
19 sent this letter to Mr. Gilden and others?

20 MR. WISTOW: You can answer that yes
21 or no.

22 A. Yes.

23 Q. What was his response, sir?

24 MR. WISTOW: I'd like to hear the
25 answer first.

1 MR. DOLAN: He said yes.

2 Q. What was his response?

3 MR. WISTOW: I want to hear the
4 answer first.

5 MR. DOLAN: What do you mean?

6 MR. WISTOW: Don't answer.

7 (SO NOTED)

8 Q. What was the governor's response?

9 MR. WISTOW: Don't answer.

10 (SO NOTED)

11 MR. DOLAN: What's the basis for that
12 instruction?

13 MR. WISTOW: What's the basis for
14 that instruction?

15 MR. DOLAN: For the governor's
16 response to Mr. Wadensten's e-mail. It's not
17 privileged, is it not?

18 MR. WISTOW: Hold on a second, let me
19 think. Don't get excited. I'm afraid you look so
20 florid, I'm afraid something is going to happen to
21 you.

22 MR. DOLAN: It's my natural verde
23 hue.

24 MR. WISTOW: It's not verde, verde
25 means green. Florid.

1 MR. DOLAN: Florid, yeah, right.

2 You need the time, don't you?

3 MR. WISTOW: That's right, slow down.

4 I need the time.

5 MR. DOLAN: That's all right, we'll
6 give you the time.

7 MR. WISTOW: Would you?

8 MR. DOLAN: Why don't you inform me
9 the basis for your instruction to your client to
10 not answer a question about what the governor said
11 to him?

12 MR. WISTOW: Let me think, maybe I
13 will.

14 (PAUSE)

15 MR. WISTOW: Maybe I will let him
16 answer.

17 (PAUSE)

18 MR. DOLAN: Let the record reflect
19 Mr. Wadensten is actually giving Mr. Wistow a
20 massage because he's so uptight about this.

21 THE WITNESS: He's not uptight.
22 I gave him a massage because he's my prizefighter.

23 MR. WISTOW: Let me just think about
24 it for a moment.

25 MR. DOLAN: Take your time, Max, by

1 all means. It can't be deliberative process
2 privilege, that's all blown to hell.

3 MR. WISTOW: No, it's not blown to
4 hell. It's blown to hell up until July 26, okay.
5 That's exactly what I was wondering about is the
6 deliberative process. I'm glad you put -- you're
7 the only one with creativity in the room; is that
8 right, Mr. Dolan? I'm going to step out of the
9 room with the client.

10 MR. DOLAN: During the middle of a
11 question?

12 MR. WISTOW: I understand that, but
13 it's a delicate question.

14 MR. WRAY: Is he going to tell you
15 about attorney/client privilege?

16 MR. WISTOW: He may tell me something
17 Mr. Gilden told the governor to relate. We're
18 going to go outside and find out.

19 (COUNSEL AND WITNESS LEFT ROOM)

20 (DEFENDANTS' EXHIBIT 538

21 MARKED FOR IDENTIFICATION)

22 MR. DOLAN: What's your pleasure?

23 MR. WISTOW: I'm going to let him
24 answer that.

25 MR. DOLAN: Do you have the question

1 in mind?

2 THE WITNESS: Repeat the question.

3 Q. Did the governor respond?

4 A. Yes.

5 Q. What did he say?

6 A. He sent me an e-mail.

7 Q. Let me show you 538. What's 538, Mr. Wadensten?

8 A. An e-mail.

9 Q. From whom to whom to?

10 A. From the governor of the State of Rhode
11 Island, Lincoln Chafee.

12 Q. To you?

13 A. To me.

14 Q. Responding to your e-mail which was --

15 A. And cc'd to the other people from the
16 original e-mail.

17 Q. Responding to your e-mail, correct?

18 A. Yes.

19 Q. Your e-mail, 537?

20 A. I'm not going to answer.

21 Q. You're not answering the question that this
22 exhibit --

23 A. No, I'm not answering to 537.

24 Q. This exhibit in response, the one we're looking at
25 right now, 538, is in response to 537, is it not?

1 THE WITNESS: Max?

2 MR. WISTOW: Go ahead, answer that.

3 A. Yes.

4 Q. You got this e-mail, 538, from the governor,
5 right?

6 A. Yes.

7 Q. You read it?

8 THE WITNESS: Did I read it now?

9 Q. No. Did you read it when you got it?

10 A. Yes.

11 Q. And this document has handwriting all over it. Is
12 that your handwriting?

13 A. No.

14 Q. This is not your handwriting on the document?

15 A. No.

16 Q. Do you know whose handwriting it is?

17 A. My wife's.

18 MR. WISTOW: We got another privilege
19 here.

20 THE WITNESS: Spousal privilege.

21 MR. WISTOW: He knows more than I do.

22 This is your wife's handwriting?

23 THE WITNESS: Yes.

24 Q. Do you know when your wife put these handwritten
25 comments on the document?

EXHIBIT E

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

RHODE ISLAND ECONOMIC
DEVELOPMENT CORPORATION

v.

C.A. No. PB12-5816

WELLS FARGO SECURITIES, LLC, et al.

STIPULATION

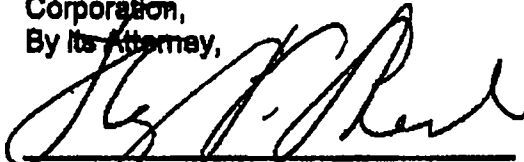
Whereas, all Defendants through the letter of Attorney Grossbaum dated November 7, 2013 have objected to Plaintiff's withholding documents under various claims of privilege pursuant to Plaintiff's privilege log; and

Whereas, as set forth in Attorney Wistow's letter dated November 25, 2013, Plaintiff contends that it was entitled to withhold all of said documents, but is willing to produce certain of said documents provided that Defendants agree that Plaintiff's production of those documents does not constitute a waiver of, or in any way affect, Plaintiff's claims of privilege with respect to any other documents or communications.

Now, therefore, Plaintiff and Defendants by their undersigned counsel hereby stipulate and agree that Plaintiff's production pursuant to this Stipulation of documents previously withheld and listed on Plaintiff's privilege log does and shall not constitute a waiver of Plaintiff's claims of privilege with respect to any other documents or communications. Plaintiff and Defendants further agree that Plaintiff will review the documents that have been withheld by third parties based upon Plaintiff's claims of privilege, and may permit said third parties to produce certain of those documents, and that Plaintiff's permission shall not constitute a waiver of Plaintiff's claims of privilege with respect to any other documents or communications. Defendants are not hereby

foreclosing their right to argue that other actions of the EDC constitute a waiver of privilege as to any withheld documents or of any privilege that might apply to the subject matters referred to in them, such as, without limitation, other productions of documents (including, but not limited to the production of the Saul and Stokes documents on or about November 11, 2013), the introduction of documents at depositions, and the testimony at depositions.

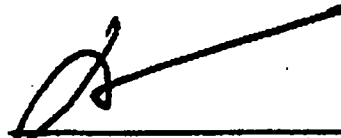
Plaintiff,
Rhode Island Economic Development
Corporation,
By its Attorney,



Stephen P. Sheehan, Esq. (#4030)
Wistow, Baryllick, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903
(401) 831-2700 (tel)
(401) 272-9752 (fax)

Dated: 12/13/13

All Defendants,
By their Attorney-in-Fact,



David A. Grossbaum, Esq.
Hinshaw & Culbertson, LLP
321 So. Main Street, Suite 301
Providence, RI 02903
(401) 751-0842 (tel)

Dated: 12/12/13

CERTIFICATION

I hereby certify that an exact copy of the within document was mailed and/or served by electronic means on this 13 day of December, 2013 to the following individuals:

Jonathan Bell, Esq.
Mark A. Berthiaume, Esq.
Timothy E. Maguire, Esq.
Greenberg Traurig
One International Place
Boston, MA 02110
bellj@gtlaw.com
berthiaumem@gtlaw.com
maguiret@gtlaw.com

David A. Grossbaum, Esq.
Samuel R. Bodurtha, Esq.
Matthew R. Watson, Esq.
Hinshaw & Culbertson LLP
321 So. Main Street, Suite 301
Providence, RI 02903
dgrossbaum@hinshawlaw.com
sbodurtha@hinshawlaw.com
mwatson@hinshawlaw.com

James E. Brandt, Esq.
Craig Batchelor, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
james.brandt@lw.com
craig.batchelor@lw.com

Michael F. Connolly, Esq.
Joseph P. Curtin, Esq.
Allison W. Phinney, Esq.
Emily B. Kanstroom, Esq.
Mintz Levin Cohn Ferris
Glovsky and Popeo PC
One Financial Center
Boston, MA 02111
mconnolly@mintz.com
jcurtin@mintz.com
awphinney@mintz.com
ebkanstroom@mintz.com

William M. Dolan, III, Esq.
Brown Rudnick LLP
10 Memorial Boulevard, 10th Floor
Providence, RI 02903
wdolan@brownrudnick.com

Michael P. Duffy, Esq.
Frederick E. Connelly, Jr., Esq.
Christopher Conroy, Esq.
Peabody & Arnold LLP
Federal Reserve Plaza
800 Atlantic Avenue
Boston, MA 02210-2261
mduffy@peabodyarnold.com
cconroy@peabodyarnold.com

Robert M. Duffy, Esq.
Byron L. McMasters, Esq.
Duffy & Sweeney, Ltd.
1800 Financial Plaza
Providence, RI 02903
rduffy@duffysweeney.com
bmcmasters@duffysweeney.com

Thomas F. Holt, Jr., Esq.
Christopher J. Valente, Esq.
John Blessington, Esq.
K&L Gates LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111-2950
thomas.holt@klgates.com
christopher.valente@klgates.com
john.blessington@klgates.com

Brooks R. Magratten, Esq.
Pierce Atwood LLP
10 Weybosset Street, Suite 400
Providence, RI 02903
bmagratten@pierceanwood.com

David P. Martland, Esq.
Silva, Thomas, Martland & Offenber, Ltd.
1100 Aquidneck Avenue
Middletown, RI 02842
dmartland@silvalawgroup.com

Carl E. Metzger, Esq.
Sarah Heaton Concannon, Esq.
Josh L. Launer, Esq.
Thomas E. Duncombe, Esq.
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
cmetzger@goodwinprocter.com
sconcannon@goodwinprocter.com
jlauner@goodwinprocter.com
tduncombe@goodwinprocter.com

Gerald J. Petros, Esq.
Mitchell R. Edwards, Esq.
Hinckley Allen Snyder, LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903
gpetros@haslaw.com
mredwards@haslaw.com

Bruce W. Gladstone, Esq.
Cameron & Mittleman LLP
301 Promenade Street
Providence, RI 02908
bgladstone@cm-law.com

Brian E. Robison, Esq.
Russell H. Falconer, Esq.
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-8912
brobison@gibsondunn.com
rfalconer@gibsondunn.com

Jeffrey C. Schreck, Esq.
99 Wayland Avenue, Suite 200
Providence, RI 02908
jschreck@mcn.com

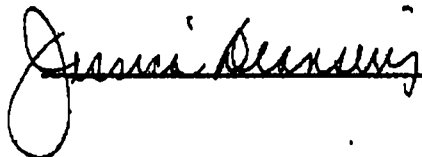
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EXHIBIT F

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

RHODE ISLAND ECONOMIC
DEVELOPMENT CORPORATION

v.

C.A. No. P.B. 12-5616

WELLS FARGO SECURITIES, LLC, et al.

**PLAINTIFF'S PRIVILEGE LOG IN RESPONSE TO DEFENDANTS
ROBERT I. STOLZMAN AND ADLER POLLOCK & SHEEHAN,
P.C.'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

	DATE	DESCRIPTION	BASIS FOR PRIVILEGE
1.	03/23/10	Email From: Meaghan Wims <MWims@DUFFYSHANLEY.COM> To: Stokes, Keith <kstokes@riedc.com>; Hashway, Fred <fhashway@riedc.com>; Chambers, Melissa <mchambers@riedc.com>; Amy Kempe <akempe@gov.state.ri.us> CC: Jon Duffy <JonDuffy@DUFFYSHANLEY.COM> Subject: Schilling story just posted online	Executive privilege
2.	05/17/10	Email From: Stokes, Keith To: Jamla McDonald' <JMcDonald@gov.state.ri.us> CC: Penta, Sharon <spenta@riedc.com> Subject: RE: Meeting with Governor	Executive privilege
3.	05/17/10	Email From: Stokes, Keith <kstokes@riedc.com> To: Jamla McDonald' <JMcDonald@gov.state.ri.us> CC: Penta, Sharon <spenta@riedc.com> Subject: RE: Meeting with Governor	Executive privilege

		Correspondence	
503.	05/21/12	RIEDC Board Meeting May 21, 2012 Executive Session agenda drafts	Work product Deliberation privilege
504.	05/21/12	Email From: Parsons, Bill To: Chong, Judy CC: Subject: FW: FW: RIEDC Board Meeting May 21, 2012.DOCX	Attorney-client communications Work product Executive privilege Deliberation privilege
505.	05/21/12	Email From: Gilden, David <DMG@PSH.com> To: lorilee@governor.ri.gov; Zainyah, George (GOVERNOR) <George.Zainyah@governor.ri.gov> CC: Subject: IBM Agreements	Executive privilege
506.	05/21/12	Email From: Gallogly, Brian P. <bpg@PSH.com> To: Gilden, David <DMG@PSH.com> CC: Subject: Draft IBM Letter	Attorney-client communications
507.	05/21/12	Email From: Blazek, Michael To: Ernie Gaines <egaines@braveriver.com> CC: dmg@psh.com; Gallogly, Brian P. <bpg@PSH.com>; Pezzello, Alexandra W. <awp@PSH.com>; Chong, Judy <jchong@riedc.com>; Chambers, Melissa <mchambers@riedc.com> Subject: Compiling EDC E-mail Records	Attorney-client communications Work product
508.	05/21/12	Email From: Blazek, Michael <mblazek@riedc.com> To: Ernie Gaines <egaines@braveriver.com> CC: dmg@psh.com; Gallogly, Brian P. <bpg@PSH.com>; Pezzello, Alexandra W. <awp@PSH.com>; Chong, Judy <jchong@riedc.com>; Chambers, Melissa <mchambers@riedc.com> Subject: Compiling EDC E-mail Records	Attorney-client communications Work product
509.	05/22/12	Email From: Gilden, David To: Zainyah, George (GOVERNOR);	Attorney-client communications Executive privilege

		McDonald, Jamia (GOVERNOR) CC: Gallogly, Brian P. Subject: Update	
510.	05/22/12	Email From: Pezzello, Alexandra W. To: Chong, Judy CC: Gallogly, Brian P.; Gilden, David Subject: IBM Agreement- Modification and Waiver	Attorney-client communications
511.	05/22/12	Email From: Gallogly, Brian P. To: Gilden, David CC: Pezzello, Alexandra W. Subject: UCC Search Results	Work product
512.	05/22/12	Email From: Gilden, David To: 'Parsons, Bill' CC: Gallogly, Brian P. Subject: UCC search	Attorney-client communications Work product
513.	05/22/12	Email From: McDonald, Jamia (GOVERNOR) To: Gilden, David CC: Zainyeh, George (GOVERNOR); Richards, Claire (GOVERNOR) Subject: FW: Silverman McGovern Staffing	Attorney-client communications Executive privilege
514.	05/22/12	Email From: Dominguez, Michael To: Dominguez, Michael CC: Gilden, David Subject: RE: Eric Goldberg - Video Games Industry Consultant	Attorney-client communications Executive privilege
515.	05/22/12	Email From: Gilden, David To: Lincoln Chafee (Personal) CC: Zainyeh, George (GOVERNOR); McDonald, Jamia (GOVERNOR) Subject: FW: Eric Goldberg - Video Games Industry Consultant	Attorney-client communications Executive privilege
516.	05/22/12	Email From: Gallogly, Brian P. <bpg@PSH.com> To: Gilden, David <DMG@PSH.com> CC: Pezzello, Alexandra W. <awp@PSH.com> Subject: UCC Search Results	Attorney-client communications

517.	05/22/12	Email From: Gliden, David <DMG@PSH.com> To: Parsons, Bill <bparsons@rieda.com> CC: Gallogly, Brian P. <bpg@PSH.com> Subject: UCC search	Attorney-client communications
518.	05/22/12	Email From: Penta, Sharon <spenta@rieda.com> To: Chong, Judy <jchong@rieda.com> CC: Subject:	Attorney-client communications
519.	05/22/12	Email From: Penta, Sharon To: Chong, Judy <jchong@rieda.com> CC: Subject:	Attorney-client communications
520.	05/23/12	Email From: McDonald, Jamie (GOVERNOR) To: Gliden, David; Richards, Claire (GOVERNOR); Zelnys, George (GOVERNOR) CC: Subject: Fw: 38 Accounts Due	Attorney-client communications Executive privilege
521.	05/23/12	Email From: McDonald, Jamie (GOVERNOR) To: Gliden, David; Zelnys, George (GOVERNOR); Richards, Claire (GOVERNOR) CC: Subject: Fw: 38 Studios	Attorney-client communications Executive privilege
522.	05/23/12	Email From: Holmes, Elizabeth Geesey To: Gliden, David; Purcell, Jim CC: Bent, Jeanne J.; Perreault, Charlene A. Subject: ProJo articles on Curt Schilling and 38 Studios from March-May 22 2012	Work product
523.	05/23/12	Email From: Gallogly, Brian P. To: Gliden, David CC: Subject: Draft AUP report	Work product
524.	05/23/12	Email	Attorney-client communications