A Message from Governor Lincoln Chafee, Chairman of the Board of the Economic Development Corporation [VIDEO]

STATE OF RHODE ISLAND PROVIDENCE, SC.		SUPERIOR COURT
RHODE ISLAND ECONOMIC DEVELOPMENT CORPORATION	:	
v.	:	C.A. NO.
WELLS FARGO SECURITIES, LLC; BARCLAYS CAPITAL, PLC; FIRST SOUTHWEST COMPANY; STARR INDEMNITY AND LIABILITY COMPANY; CURT SCHILLING; THOMAS ZACCAGNINO; RICHARD WESTER; JENNIFER MACLEAN; ROBERT I. STOLZMAN; ADLER POLLOCK & SHEEHAN, P.C.; MOSES AFONSO RYAN LTD.; ANTONIO AFONSO, JR.; KEITH STOKES; and J. MICHAEL SAUL	:	**JURY TRIAL DEMANDED**

COMPLAINT

Parties

1. The Rhode Island Economic Development Corporation ("EDC") is a quasi-public corporation created by R.I. Gen. Laws § 42-64-1 *et seq.* to promote certain economic policies of the State of Rhode Island.

2. The EDC's statutory purposes are, *inter alia*, "to retain existing industries and to induce, encourage, and attract new industries . . ." and "to promote a vigorous and growing economy, to prevent economic stagnation, and to encourage the creation of new job opportunities in order to ameliorate the hazards of unemployment and underemployment, reduce the level of public assistance, increase revenues to the state and its municipalities, and to achieve a stable diversified economy." R.I. Gen. Laws § 42-64-2(h)-(i).

3. By statute (R.I. Gen. Laws § 42-64-8), the powers of the EDC are vested in its board of directors (hereinafter the "EDC Board"), which consists of up to thirteen members, including the chairman. The Governor of the State of Rhode Island serves as chairman, *ex-officio*, voting only in the event of a tie. The remaining directors are appointed by the Governor with the advice and consent of the Rhode Island Senate.

4. Defendant Wells Fargo Securities, LLC ("Wells Fargo") is a Delaware limited liability company qualified to do business in Rhode Island with its principal place of business in Charlotte, North Carolina. Wells Fargo acted as placement agent for the EDC in connection with the EDC's issuance of bonds in 2010 ("the Bonds"). At all times relevant to this complaint, Mark C. Lamarre ("Lamarre") was an employee of Wells Fargo, acting within the scope of his employment, with the title of Managing Director and Vice Chairman and was an employee from Wells Fargo with responsibilities

regarding the EDC's loan to 38 Studios LLC and the issuance of the Bonds, which is the subject matter of this complaint.

5. Defendant Barclays Capital, PLC ("Barclays") is a foreign corporation not qualified to do business in Rhode Island with its principal office and place of business in London, England. Barclays also acted as placement agent for the EDC in connection with the EDC's issuance of the Bonds, along with Defendant Wells Fargo.

6. Defendant First Southwest Company ("First Southwest") is a Delaware corporation qualified to do business in Rhode Island with its principal place of business in Dallas, Texas. First Southwest has been the financial advisor to the State of Rhode Island since at least 2002. First Southwest acted as financial advisor to the EDC in connection with the EDC's loan to 38 Studios, LLC and the issuance of the Bonds, which is the subject matter of this complaint.

7. Defendant Starr Indemnity and Liability Company ("Starr") is an insurance company domiciled in Texas not qualified to do business in Rhode Island with an office and principal place of business in New York, New York. Starr issued a policy of insurance under which 38 Studios LLC (and its subsidiaries) are named insureds. Starr is a named Defendant pursuant to R.I. Gen. Laws § 27-7-2.4 (providing a direct action against the insurer upon the insured's filing for bankruptcy).

8. At all times relevant to this complaint, Defendant Curt Schilling ("Schilling") was a resident of Medfield, Massachusetts, and was majority stockholder and chairman of the board of directors of 38 Studios, LLC.

9. At all times relevant to this complaint, Defendant Thomas Zaccagnino ("Zaccagnino") was a resident of Weston, Massachusetts, and was a member of the board of directors of 38 Studios, LLC.

10. At all times relevant to this complaint, Defendant Jennifer MacLean ("MacLean") was a resident of Providence, Rhode Island, and the President and Chief Executive Officer of 38 Studios, LLC.

11. At all times relevant to this complaint, Defendant Richard Wester ("Wester") was a resident of Holliston, Massachusetts, and the Chief Financial Officer of 38 Studios, LLC.

12. Defendant Adler Pollock & Sheehan, P.C. ("Adler Pollock") is a Rhode Island corporation and law firm with its principal place of business in Providence, Rhode Island. Adler Pollock was general counsel to the EDC from 1991 through January of 2011. At all times relevant to this complaint, Defendant Robert I. Stolzman ("Stolzman") was a resident of Providence, Rhode Island, an employee of Adler Pollock acting within the scope of his employment with Adler Pollock, and was the attorney assigned by Adler Pollock to have primary responsibility for matters involving the EDC. In addition, at all times relevant to this complaint and through January 2011, he was the Secretary of the EDC and attended and took the minutes for all meetings of the EDC Board in his capacity as Secretary and general counsel.

13. Defendant Moses Afonso Ryan Ltd. ("Moses Afonso") is a Rhode Island corporation and law firm with its principal place of business in Providence, Rhode Island. Moses Afonso provided professional services to the EDC regarding the subject matter of this complaint. At all times relevant to this complaint, Defendant Antonio

Afonso, Jr. (“Afonso”) was a resident of Cumberland, Rhode Island, an employee of Moses Afonso acting within the scope of his employment with Moses Afonso, and the attorney assigned by Moses Afonso for matters involving the EDC. In addition, he attended several meetings of the EDC Board to provide advice concerning the transactions and legal requirements for issuance of the Bonds.

14. Defendant Keith Stokes (“Stokes”) at all relevant times was a resident of Newport, Rhode Island, and an officer and employee of the EDC with the title of Executive Director.

15. Defendant J. Michael Saul (“Saul”) at all relevant times was a resident of Barrington, Rhode Island, and an employee of the EDC with the title of Deputy Director.

Key Non-Parties

16. 38 Studios, LLC is a Delaware limited liability company in the business of developing video games. As of 2010, 38 Studios had not yet published a video game and was seeking additional financing or capital in order to do so. 38 Studios, LLC also had several subsidiary companies, including Mercury Project, LLC, 38 Studios Baltimore, LLC, and Precision Jobs, LLC (collectively these entities are referred to as "38 Studios"). On June 7, 2012, 38 Studios filed a petition for liquidation in the United States Bankruptcy Court for the District of Delaware. This bankruptcy proceeding is pending. On August 9, 2012, the Rhode Island Superior Court appointed a receiver to, *inter alia*, hold and dispose of such assets of 38 Studios as were released by the Trustee in Bankruptcy and the Bankruptcy Court.

17. Strategy Analytics Inc. ("Strategy Analytics") is a Massachusetts corporation with its principal place of business in Newton, Massachusetts.

18. Perimeter Partners LLC is a limited liability company with its principal place of business in Montreal, Quebec, Canada.

19. Donald Carcieri was the Governor of Rhode Island and Chairman*, ex officio,* of the EDC Board from January 2003 until January 2011.

20. The other members of the EDC Board at the time of the loan to 38 Studios and the sale of the Bonds which are the subject matter of this complaint were Alfred Verrecchia, Paul Choquette, Shivan Subramanian, Lynn Singleton, Donna Cupelo, Daniel Sullivan, Karl Wadensten, Cheryl Snead, Timothy Babineau, Stephen Lane, David Dooley, and George Nee.

Jurisdiction and Venue

21. The amount in controversy exceeds the jurisdictional minimum of this Court as set forth in R.I. Gen. Laws § 8-2-14. This is also an enforcement proceeding over which the Court has jurisdiction pursuant to R.I. Gen. Laws § 42-64-9.4. In addition, this Court has jurisdiction over Plaintiff's request for declaratory relief pursuant to R.I. Gen. Laws § 9-30-1. All Defendants have sufficient minimum contacts with Rhode Island and are subject to the personal jurisdiction of this Court.

22. Venue in Providence County is proper under R.I. Gen. Laws § 9-4-3.

I. FACTS

A. Overview

23. In 2010 the EDC Board was asked to consider and approve the issuance of $75 million in bonds to finance a loan to enable 38 Studios LLC to relocate to Rhode Island, complete production of a massive multiplayer online video game called Copernicus, and to capitalize the company's growth and expansion in Rhode Island. This was conduit financing, meaning that 38 Studios' repayment of the loan would be used by the EDC to repay the bondholders, along with certain reserve funds as is more fully described below. With the exception of the Governor, the EDC Board members are all unpaid volunteers. None of the board members were experts in law, lending, video gaming, or economic development. The EDC Board's understanding of the transactions was based upon information provided by a number of individuals and companies who acted as advisors (the "Advisors") to the EDC Board, as well as by Defendants Schilling, Zaccagnino, MacLean, and Wester of 38 Studios. That information led the EDC Board to conclude that the proposed transaction, although not without risk, had a reasonable

probability of bringing high quality jobs and creating a new industry in Rhode Island, with 38 Studios as the anchor tenant and a cluster of companies performing related activities.

24. These Advisors also undertook to advise the EDC Board of a number of risks that might result in failure. They informed the EDC Board that 38 Studios had no proven track record, and that 38 Studios' success depended upon Copernicus being completed on time and within budget according to 38 Studios' financial projections of its income and expenses. After consideration of the information it received from the Advisors, the EDC Board concluded that the merits and benefits of the transaction were sufficient in the judgment of the Board to justify running those risks, and approved the loan and issuance of the Bonds, subject to certain terms and conditions.

25. 38 Studios failed in May of 2012. If that failure had resulted from the risks that these Advisors had disclosed to the EDC Board, there would be little or no cause for this complaint. In fact, 38 Studios failed because of risks that had not been disclosed to the EDC Board, but were or should have been known by all of these Advisors, and by 38 Studios, and Defendants Schilling, Zaccagnino, Wester, and MacLean.

26. These Advisors are all named Defendants herein and include the EDC's Executive Director (Stokes) and Deputy Director (Saul), the EDC's lawyers (Stolzman and his firm Adler Pollock, and Afonso and his firm Moses Afonso), the EDC's financial advisor (First Southwest), and two investment banks that acted as the EDC's placement agents (Wells Fargo and Barclays).

27. The undisclosed risks included the express admission, made by 38 Studios' directors and chief executives directly to these Advisors, and by 38 Studios' own financial projections that were disclosed to the Advisors, that, even with the loan from the EDC, 38 Studios was undercapitalized by many millions of dollars and would not have nearly enough money to relocate to Rhode Island and complete Copernicus, and that, as a result of this cash shortfall, 38 Studios was likely to run out of money in 2012. The EDC Board understood that 38 Studios' capital requirements to complete Copernicus were approximately $75 million, and that the net proceeds to be lent to 38 Studios would be less than $75 million. Nevertheless, the EDC Board was also told that the net proceeds 38 Studios would receive, along with other sources of funds set forth in 38 Studios' financial projections, "would provide necessary financing to relocate 38 Studios to Rhode Island, complete production of Copernicus, and capitalize the company's growth and expansion in Rhode Island." In fact, the Advisors knew or should have known that this was untrue, and that even if all of 38 Studios' financial projections proved true, the net proceeds would not be sufficient to fund 38 Studios' relocation to Rhode Island and completion of Copernicus.

28. Not only was the fact of the known shortfall kept from the EDC Board, but the EDC Board was also induced to issue a formal finding required by statute, that adequate provision has been made or will be made for payment of the construction of the project, that was false because of the known shortfall. At this time Plaintiff cannot identify a single member of the EDC Board who was not so misled by the Advisors. Should discovery disclose otherwise, however, and reveal that any member of the EDC Board was aware of the shortfall, any such members or members of the EDC Board

would have knowingly violated the law and acted in bad faith, and would be responsible along with the Advisors for permitting the loan to 38 Studios to go forward in violation of the statutory prohibition against the EDC funding projects for which the capitalization is known to be insufficient to complete construction of the project.

29. These undisclosed risks also included the fact that IBM, upon whom the EDC Board relied to assess 38 Studios' budget and timetable prior to closing, worked for 38 Studios, not for the EDC, and had no obligation to report to the EDC.

30. Up to the EDC Board's approval of the transactions on July 26, 2010, no expert, either independent or within the EDC, had assessed the ability of 38 Studios to complete Copernicus by September 2012, as 38 Studios projected, or within any particular budget whatsoever. The EDC Board was led to believe that an independent expert would make such assessment during the period between July 26, 29010 and the closing of the loan and issuance of the Bonds. No such assessment was done.

31. These undisclosed risks also included the fact that Wells Fargo was earning nearly $500,000 in hidden commissions from 38 Studios at the same time that Wells Fargo owed fiduciary duties to the EDC Board to disclose all negative material information concerning 38 Studios' business plan and financial projections, including the shortfall. Rather than disclosing this information, Wells Fargo secured its hidden commissions by concealing these facts from the EDC Board, notwithstanding that the undisclosed information showed that the loan was not in the interests of the EDC and probably would never be paid back.

32. This complaint pleads claims of intentional misconduct and negligent conduct, in the alternative, leaving it to the ultimate finder of fact to conclude based on

the evidence at trial whether Defendants intentionally harmed the EDC or were merely negligent. Plaintiff's claims of intentional misconduct include the allegations set forth in paragraph 218, *infra*, that the Advisors as well as Defendants Schilling, Zaccagnino, Wester and MacLean knowingly and intentionally participated in the following acts and practices:

a. allowing Defendant MacLean and 38 Studios to commit larceny, as set forth in paragraphs 274 & 275-278, *infra*;

b. causing the EDC Board to unwittingly violate R.I. Gen. Laws § 42-64-10 by adopting a false finding that adequate provision has been made or will be made for completion of the project;

c. arrogating to themselves the decision-making process concerning the terms under which the EDC would make the loan and issue the Bonds and treating the EDC Board as an obstacle to be overcome and manipulated, in violation of state law that the powers of the EDC are vested in the EDC Board;

d. permitting 38 Studios to utilize financial projections that were based on known false assumptions and failed to include known expenses;

e. suppression of the EDC's usual and customary method of evaluating potential loans through preparation of thorough internal credit memoranda;

f. structuring presentations to the EDC Board that failed to address the core merits of the 38 Studios' transaction and contained material misrepresentations and omissions;

g. keeping the EDC Board from hearing the contrary opinions of Raimondo, Chafee, or Caprio;

h. falsifying the Authorizing Resolution and the Term Sheet to conceal the shortfall;

i. manipulating the agenda for EDC Board meetings to keep the EDC Board from exercising their right to reconsider their approval before the Closings on November 2, 2010;

j. falsely stating to the EDC Board that the EDC by August 2010 was legally required to complete the transactions;

k. having the EDC issue press releases which falsely stated that the EDC had performed exhaustive due diligence in connection with the transactions;

l. depriving the EDC of independent third party assessment of the transaction prior to the Closings or ever; and

m. securing adoption of the Authorizing Resolution by mollifying the EDC Board with assurances regarding third party monitoring and then not reporting to and concealing from the EDC Board the absence of meaningful third party monitoring.

B. Defendants Knew or Should Have Known, But Failed to Inform the EDC Board, That 38 Studios was Destined to Fail According to 38 Studios' Own Financial Projections

33. On March 6, 2010, then Governor Carcieri attended a fundraiser at Curt Schilling's residence in Massachusetts. At that time, Schilling told Carcieri that 38 Studios was interested in relocating to Rhode Island in exchange for economic incentives.

34. As of March 2010, 38 Studios, LLC was focused on developing Project Copernicus ("Copernicus"), a massive multiplayer online video game ("MMOG"). Its subsidiary 38 Studios Baltimore, LLC (d/b/a Big Huge Games) focused on developing *Kingdoms of Amalur: Reckoning*, a single-player action role-playing game ("RPG"). From 2006-2010, 38 Studios, LLC was located in Maynard, Massachusetts.

35. Within a few days after meeting Schilling, Governor Carcieri informed Defendant Stolzman and the EDC's executive director, Defendant Stokes, of 38 Studios' interest, and instructed them to employ the EDC to accomplish the relocation of 38 Studios to Rhode Island. Defendants Stolzman and Stokes in turn informed Defendants Moses Afonso, Afonso, Saul, and Maureen Gurghigian ("Gurghigian"), who was a Managing Director of First Southwest, of the Governor's instruction to use the EDC to accomplish relocation of 38 Studios to Rhode Island.

36. In March 2010, Defendant Stolzman and the EDC staff, including Defendants Stokes and Saul, began considering possible methods to provide financing to 38 Studios, including the issuance by EDC of "moral obligation" bonds under a proposed program whose authorization was being considered by the Rhode Island General Assembly.

37. Early on in the discussions, representatives of 38 Studios, including Schilling, Zaccagnino, Wester, and MacLean, informed Defendants Stolzman, Stokes, and Saul that 38 Studios needed to receive the net sum of $75 million to enable them to relocate to Rhode Island and complete Copernicus. Stolzman incorporated that requirement into a draft "Term Sheet" on March 31, 2010 with the following language:

> We understand your capital needs to bring your project Copernicus to MMO completion to be $75,000,000. Based on our understanding to date of your financial projections, the EDC would either guarantee the repayment annual debt service of up to $75M of the company's borrowing or issue $75M of revenue bonds, the proceeds of either of which would provide the necessary financing to complete production on Copernicus and begin relocating 38 Studios to Rhode Island.

As used herein, and by the parties themselves, "Term Sheet" refers to the document that contained the most important terms and conditions for the EDC's loan to 38

Studios, and represents the guidelines for the parties' counsel to prepare the final contract documents.

38. At all times relevant to this complaint, Defendants Stolzman, Afonso, Saul, Stokes, First Southwest, and Wells Fargo knew or should have known that the bonds to be issued by the EDC would not be general obligations of the State of Rhode Island or the EDC; that, in the event that 38 Studios defaulted in its payments to the EDC, the Rhode Island General Assembly would have to decide whether or not to appropriate funds to pay the bondholders; and that each such appropriation process could take up to a year. Said Defendants also knew or should have known, therefore, that a debt service reserve fund in the amount of the EDC's projected maximum liability for interest and principal in any year while the bonds were outstanding would have to be set aside from the loan proceeds, and retained until the final year any of the bonds would be outstanding. The purpose was that investors could be assured that in the event of a default by 38 Studios, the debt service reserve fund would pay the bondholders while giving the General Assembly sufficient time to decide before the next ensuing payment came due whether or not to appropriate funds to enable the EDC to make the scheduled payments to the bondholders.

39. 38 Studios and Defendants Wells Fargo, Schilling, Zaccagnino, Wester, and MacLean learned of the need for a debt service reserve fund no later than May 1, 2010.

40. From the outset of their involvement in the discussions between the EDC and 38 Studios, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, and Wells Fargo knew or should have known that the State of

Rhode Island and various agencies thereof, including the EDC, historically have relied upon their ability to raise funds through bonds that are not the general obligations of the State or of said agencies, and that the refusal of the Rhode Island General Assembly to appropriate funds to pay the Bonds if 38 Studios were unable to do so would adversely affect the credit of the EDC and make any such bonds to be issued in the future unsalable or at least increase the cost of such borrowing. Said Defendants also knew or should have known that any such appropriations by the General Assembly would be advances to the EDC for which the EDC was liable to make repayment out of the EDC's operating revenues. Therefore, all of said Defendants knew or should have known that the default of 38 Studios would severely affect the EDC's statutory mandate and finances, whether or not the General Assembly appropriated funds to pay the bondholders.

41. 38 Studios' need for at least $75 million in net financing was expressly incorporated into financial projections prepared by 38 Studios dated April 1, 2010 and bearing the legend "38 Studio 6 Year Plan – In-State Loan View – DRAFT – 04.01.10 xlsx" (the "April 1 Projections") and given by 38 Studios to EDC staff. The April 1 Projections, including the assumption that 38 Studios would receive net loan proceeds from the EDC of $75 million, were utilized unchanged until the issuance of the bonds ("the Bonds") and the closing of the loan transaction on November 2, 2010 (collectively "the Closings") and are part of the bond documents included in the bond closing binder. Defendants Schilling, Zaccagnino, Wester, and MacLean read and understood the April 1 Projections from the outset.

42. On April 2, 2010, Defendant Stolzman spent several hours at the premises of 38 Studios in Maynard "with financial personnel from 38 Studios . . ." to discuss 38 Studios' business plan and financial projections.

43. On April 5, 2010 Defendants Stolzman, Adler Pollock and Saul received a copy of the April 1 Projections by email from a representative of 38 Studios.

44. Defendant First Southwest received a copy of the April 1 Projections on April 8, 2010 when they were sent to Gurghigian by email.

45. Defendant Wells Fargo received a copy of the April 1 Projections on or before April 12, 2010. In the same email on April 12, 2010, Wells Fargo received from 38 Studios other financial projections that Defendant Wells Fargo then incorporated in an equity private placement memorandum ("the Equity PPM"), that Wells Fargo prepared and sent to potential investors to seek funds for 38 Studios while the loan from the EDC was under consideration. Defendant Wells Fargo gave the Equity PPM to Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, and First Southwest in May 2010. The Equity PPM failed to attract any investors.

46. Defendants Saul, Stolzman, Afonso, Gurghigian of First Southwest, Zaccagnino, and Wester initially discussed "grossing up" the amount of the loan to $85 million or more, to account for this reserve fund and any closing costs, so that 38 Studios would actually receive the net sum of $75 million. However, said Defendants concluded that such an increase in the gross amount of the Bonds was not feasible. They informed Defendants Zaccagnino and Wester that the EDC loan would be a gross amount of $75 million, and could not be "grossed up." Defendants Zaccagnino and Wester relayed that information to Defendants Schilling and MacLean.

47. At all times after May 10, 2010, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Gurghigian of First Southwest, Wells Fargo, Schilling, Zaccagnino, Wester, and MacLean knew or should have known that 38 Studios needed to receive the net sum of $75 million from the EDC in order to have sufficient capital to relocate to Rhode Island and complete Copernicus, that 38 Studios would receive substantially less than that amount, and that, therefore, the April 1 Projections were based on false assumptions and would not justify the loan.

48. At all times after Defendant Wells Fargo distributed the Equity PPM to Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, and First Southwest in May 2010, they along with Defendant Wells Fargo knew or should have known that the April 1 Projections do not take into account the expenses of 38 Studios relocating to Rhode Island, since the projections contained in the Equity PPM (which did not contemplate 38 Studios relocating anywhere) estimate the exact same amount of expenses in 2010 and 2011 as the April 1 Projections. Thus, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Gurghigian of First Southwest, and Wells Fargo also knew or should have known that in addition to containing the false assumption that 38 Studios would receive the net sum of $75 million, the April 1 Projections did not include any of the expenses associated with the relocation of 38 Studios from Maynard, Massachusetts to Rhode Island (a sum which ultimately exceeded $10 million), notwithstanding that the undertaking to relocate to Rhode Island was a requirement for and condition of 38 Studios receiving the loan from the EDC. 38 Studios and Defendants Schilling, Zaccagnino, Wester, and MacLean personally were aware of this

omission from the time that the April 1 Projections were given to the EDC on April 5, 2010.

49. From April 12, 2010, Defendant Wells Fargo was fully familiar with 38 Studios' business plan, including the April 1 Projections. 38 Studios provided Defendant Wells Fargo with the initial draft it received and all subsequent Term Sheets, since Wells Fargo was working very closely with 38 Studios and required this information to evaluate 38 Studios' need for financing.

50. Defendants Moses Afonso, Afonso, Saul, Stokes, and Gurghigian of First Southwest also were provided with all of the draft Term Sheets.

51. The draft Term Sheet that Defendant Stolzman forwarded on March 31, 2010, referred to in paragraph 37, *supra*, and all subsequent revisions and the final version thereof, provided that 38 Studios would pay the EDC a guaranty fee of $375,000 out of the proceeds of the Bonds, and $1,125,000 on each anniversary date of the Closings.

52. By May 2010, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, and First Southwest knew or should have known that the April 1 Projections did not include those guaranty fees and, therefore, overstated 38 Studios' projected cash flows by those amounts. Defendants Wells Fargo, Schilling, Zaccagnino, Wester, and MacLean were aware of this omission from the time that the April 1 Projections were given to the EDC on April 5, 2010.

53. The total shortfall between 38 Studios' projected net proceeds of $75 million and the actual net proceeds it ultimately received from the EDC, plus these guaranty fees, totaled $17,221,912 as of 2012, as set forth in the calculation attached

hereto as Exhibit 1. This shortfall does not include 38 Studios' expenses to relocate to Rhode Island that ultimately exceeded $10 million. If 38 Studios' moving expenses had been conservatively estimated as merely $5 million (less than half of the actual expense), the projected shortfall by 2012 would have been $22,221,912.

54. The April 1 Projections projected that 38 Studios' cash flow in 2012 would be a positive $13,340,925, assuming that 38 Studios received net proceeds of $75 million, and without any deduction for guaranty fees payable to the EDC or estimated relocation expenses. Thus, to the extent that 38 Studios' actual net proceeds and cash in hand in 2012 were decreased from that estimate by $22,221,912, 38 Studios' own financial projections showed that the company would run out of cash in 2012 and actually have a negative cash flow in 2012 of $8,868,987. Even excluding relocation expenses, that cash flow would be negative $3,868,987 in 2012.

55. Although the precise amount of net proceeds that 38 Studios would receive from the EDC was not determined until shortly before the Closings, from the time Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Stokes, and Saul received the April 1 Projections in April 2010 and the Equity PPM, they all knew or should have known that the amount of the debt service reserve fee, 38 Studios' expenses to relocate to Rhode Island, and the guaranty fees payable to the EDC, taken together, would exhaust all of 38 Studios' positive cash flow by 2012, even if all of 38 Studios' other projected revenues and expenses proved true, making it likely that 38 Studios would run out of cash and go out of business by 2012. Defendants Wells Fargo, Schilling, Zaccagnino, Wester, and MacLean were aware of this probability from the time that the April 1 Projections were given to the EDC on April 5, 2010 and no

later than May 2010 when they were informed of the necessity for the debt service reserve fund.

56. Prior to and since the 38 Studios transaction, the custom and practice at the EDC was and is that the EDC staff would analyze a loan applicant's financial projections, eventually adjust them once the actual net loan proceeds the applicant would receive from the EDC were determined, and prepare an "internal credit memorandum" setting forth this analysis. The principal purpose of the analysis was and is to identify and analyze the risks that the applicant might default because of inability to repay the proposed loan. If the analyst needed more information from the applicant in order to properly complete this analysis, the applicant's submission of such additional information was a prerequisite for the EDC considering the application. This was done whether the proposed loan was for $10,000 or many millions of dollars, and whether or not EDC staff had any special expertise in the business of the applicant. The purpose of the analysis was to identify and analyze the risks that the applicant might default because of inability to repay the proposed loan.

57. Defendants Stolzman, Adler Pollock, Stokes, Saul, and First Southwest knew or should have known that the custom and practice was that EDC staff would prepare an internal credit memorandum and otherwise analyze a proposed loan as summarized above.

58. In connection with the 38 Studios transaction, Saul initially assigned Sean Esten, an EDC employee with the title of Financial Portfolio Manager, to prepare this internal credit memorandum for this transaction. That analyst met with 38 Studios personnel on several occasions in April and May 2010, in the company of Stolzman.

During those meetings, Defendants Zaccagnino, Wester, MacLean, and other representatives of 38 Studios were informed that the analyst would be analyzing the proposed loan to 38 Studios as described above. This analyst also met with Stolzman and Saul to discuss the credit analysis he would provide.

59. In late May 2010, Saul and Stolzman decided that the EDC Board would receive its first official notification and opportunity to consider the 38 Studios transaction at a special meeting of the EDC Board on June 9, 2010.

60. The EDC analyst was requested to put together his internal credit memorandum for submission to the EDC Board at the meeting on June 9, 2010. In anticipation of that, on May 28, 2010, the analyst sent Saul an email that was later copied to Stolzman, which contained the following statement:

> We have some issues here if we are going to get 38 Studios ready to present by the 9th. Have you read the Wells Document? It does a nice job of summarizing the company, the industry and the talent, but it tells me nothing about the opportunity itself. There is no financial information discussed at all and no analysis on the ability of the company to perform. The only numbers I have seen to date are the hard copy of what they presented in the various meetings. To be honest, I have more information on the typical $10k micro loan than I have on a $75 million request. This is a problem.

61. The analyst began reviewing 38 Studios' financial projections and prepared two lists, the first itemizing extensive additional information that was needed from 38 Studios, including information necessary to understand and evaluate the basic assumptions upon which those projections were based, and the second listing certain risks involved in the proposed loan.

62. On May 31, 2010, the EDC analyst gave Saul his current thoughts on the 38 Studios' credit analysis and transaction as follows:

> Mike,
>
> The preliminary list of needed items is attached. I am in the process of organizing my thoughts on this, here is where I am currently:
>
> The 'worst case scenario' as presented by the company involves a new, commercially successful RPG [role playing game] title every two years. Is this realistic? Big Huge Games had their last release (that I can find) in 2006, at least two games have been cancelled since then. The plan does not include anything addressing cancelled games and the associated expenses nor any possibility of delays or that a game is not successful. The plan shows each game being more successful than its predecessor. No one bats 1000, especially not in this industry. Without the RPG release every two years, the cash flow does not work to support the debt. The more I look at this, the less comfortable I become with the credit.
>
> This credit aside, I believe there is an opportunity to create an industry cluster around the assets we have in place (RISD, etc.), however **I don't think I can support a $75 million guarantee to any single company in this industry due to the wide volatility in commercial success of game releases.** One success does not guarantee another, however the repayment of debt relies upon continued success. Perhaps we should develop a toolbox of incentives (including loan guarantees) to attract companies into a cluster and not rely on a single company to build the cluster around.
>
> Let me know your thoughts.
>
> [emphasis supplied].

63. On June 4, 2010, 38 Studios received the analyst's list of risks presented by the proposed loan and his list of information needed from 38 Studios in order to evaluate the loan, with copy to Stolzman.

64. After 38 Studios received these two lists, Saul told the analyst not to prepare an internal credit memorandum. Saul then excluded the analyst from further analysis of the 38 Studios transaction. The analyst was never told the amount of net proceeds that 38 Studios would receive from the EDC. No internal credit memorandum was prepared or submitted to the EDC Board. Stolzman knew that no internal credit memorandum was submitted to the EDC Board. Although Stolzman knew that this analyst initially had been assigned to prepare the initial credit memorandum on the 38 Studios transaction, Stolzman never questioned the analyst regarding the absence of the internal credit memorandum or the analyst's opinions regarding the 38 Studios transaction, or whether the information requested in the two lists had been provided by 38 Studios to the EDC.

65. Defendant Saul then prepared a PowerPoint presentation and circulated it to Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, and First Southwest for their review and comment, and informed them that it would be presented to the EDC Board on June 9, 2010. Said PowerPoint contained a slide setting forth what Saul called the "Due Diligence Process." That slide misinformed the EDC Board that EDC staff had "completed normal credit due diligence." Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, and First Southwest asserted no objection to this misrepresentation. They never informed the EDC Board that the EDC staff had never completed any meaningful analysis of 38 Studios' projections or the loan transaction.

66. During the executive session of the EDC Board on June 9, 2010, Saul made the PowerPoint presentation to the EDC Board that had been reviewed by Defendants Stolzman, Afonso, and Gurghigian of First Southwest. It also contained a

table purportedly showing excerpts from 38 Studios' financial projections, captioned "Company's 'Most Likely' Projections." The slide he presented contained the express conclusion that 38 Studios' "most likely" projections for revenue showed adequate funds to repay a $75 million loan from EDC. These projections did not reveal that 38 Studios had told Defendants that it needed to receive net proceeds of $75 million to finance the relocation to Rhode Island and completion of Copernicus.

67. The PowerPoint also contained a separate table captioned "Company 'Worst Case' Projections." The PowerPoint contained the statement that even 38 Studios' "worst case" projected revenue "reflects full repayment." Saul did not disclose the EDC analyst's opinion that even the "worst case scenario" assumed a "new commercially successful RPG title every two years . . ."

68. Defendants Stolzman, Adler Pollock, Moses Afonso, Saul, Stokes, and First Southwest knew or should have known that 38 Studios would not be able to repay under either its "worst case" or even its "most likely" revenue projections. Such information was required to be given the EDC Board in order to make Saul's affirmative representations concerning "worst case" or "most likely" projections not misleading.

69. At the meeting in executive session on June 9, 2010, one of the members of the EDC Board asked Saul what 38 Studios' plans were for future financing. Saul stated in response that 38 Studios' long-range plans included an "IPO [initial public offering] after a few years." Disclosure of 38 Studios' projected negative cash flow in two years (2012) was necessary to make this reference to 38 Studios' planned IPO "after a few years" not misleading, because 38 Studios' plans for an IPO were based on the assumption that 38 Studios would still be in business at the time of the IPO and

would have completed Copernicus, an assumption that the shortfall would totally invalidate. Said Defendants failed to supply this information to the EDC Board, or to in any way correct the false impression created by that presentation.

70. Although the EDC Board ultimately was informed that 38 Studios would receive net proceeds of less than $75 million, without specifying the exact amount, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, and Saul did not, either then or ever, inform the EDC Board that such net proceeds would not be sufficient to complete Copernicus according to 38 Studios' own financial projections.

71. Prior to the meeting of the EDC Board on June 9, 2010, Defendant Saul met with representatives of Wells Fargo, and informed Defendants Stolzman and Stokes by email of the role Defendant Wells Fargo understood it would play at the EDC Board meeting:

> Wells will present at the board meeting & we will firm up their presentation over the next couple of weeks**. Wells understands they will need to convince the EDC board that 38 Studios' business model & projections are what will sell the bond** vs. the credit enhancement. **EDC board will need a high confidence moral obligation will never be called.**
>
> [emphasis supplied].

72. During the meeting of the Board on June 9, 2010, Saul "explained [to the EDC Board] the meaning of the due diligence process, including tasks being performed by Wells Fargo, Strategy Analytics and the EDC." His slide stated that EDC staff had "discussed with Wells' [referring to Wells Fargo] Capital Market team their due diligence process and conclusions."

73. On June 11, 2010, the Rhode Island General Assembly enacted Public Laws 026/029 authorizing the EDC to establish the Jobs Creation Guaranty Program,

and granting the EDC authority to issue bonds or guaranties under said program in an amount not exceeding $125,000,000 extant at any time.

74. Said Public Laws expressly state in pertinent part as follows:

> RESOLVED, That the Rhode Island Economic Development Corporation (the "corporation") is hereby empowered and authorized . . . to create the corporation's Job Creation Guaranty Program (the "program"). Under the program, the corporation may from time to time issue its bonds, guaranty debt service thereon or on bonds issued by the Rhode Island industrial facilities corporation, or guaranty the debt service of another provided that the principal amount of bonds or other obligations guaranteed pursuant to the program shall not at any time exceed one hundred twenty-five million dollars ($125,000,000) . . .
>
> RESOLVED, That guaranties or bonds issued by the corporation shall be approved by its board of directors, or a committee of the board as so designated by the board, and shall be executed by its executive director or any authorized officer of the corporation as authorized in a resolution approved by the board of directors of the corporation from time to time in a form the corporation may prescribe.

75. On June 14, 2010, the EDC Board held a special public meeting and executive session to discuss establishing the potential bond financing deal with 38 Studios under the Jobs Creation Guaranty Program.

76. The EDC Board on June 14, 2010 received a spoken and PowerPoint presentation from Lamarre on behalf of Defendant Wells Fargo discussing the video game industry generally, the MMO industry more specifically, and 38 Studios in particular.

77. At that time, Defendant Wells Fargo was soliciting the EDC to be appointed as the EDC’s placement agent, which involved putting together the factual disclosure of the risks of the transaction in an offering document such as a private placement memorandum, and selling the Bonds on behalf and for the account of the

EDC. Plaintiff's trust and confidence in and reliance on Defendant Wells Fargo was greater than is typical for the relationship between an issuer and placement agent, since typically the issuer of a privately (or publically) placed bond or other security intends to use the capital in the issuer's own enterprise and, therefore, the issuer is uniquely familiar with the activity to be financed by the bonds or other security offering and the source of repayment thereof and does not depend upon the placement agent for information concerning that activity, including the viability of that activity and of the issuer's enterprise in general. In this case, however, the Bonds were conduit bonds, in that although Plaintiff was the issuer of the Bonds, the financing was for 38 Studios and the likelihood of the bondholders being paid by the EDC depended on 38 Studios' business plans and projections, not on Plaintiff's plans or projections.

78. Defendants Saul and Wells Fargo also solicited and received the EDC Board's trust, confidence, reliance, and approval for Defendant Wells Fargo, and Wells Fargo's appointment as the EDC's placement agent, by representing to the EDC Board that Wells Fargo had superior knowledge and experience concerning the video game industry in general, and of 38 Studios in particular, arising out of Wells Fargo's due diligence investigations in connection with its prior preparation of the Equity PPM seeking capital for 38 Studios to complete Copernicus. As such, Defendant Wells Fargo and Lamarre had a duty to provide the EDC Board with any material negative information concerning 38 Studios of which they were aware, including but not limited to information concerning 38 Studios' business plan and financial projections. Accordingly, by at least June 14, 2010, Defendant Wells Fargo was a fiduciary who

owed fiduciary duties to the EDC and the EDC Board, including the duty to disclose all negative information concerning 38 Studios' business plan and financial projections.

79. For many of the same reasons, the EDC Board placed special trust and reliance on their attorneys and financial advisor, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, and First Southwest. As noted in paragraph 23, *supra*, with the exception of the Governor, the EDC Board members are all unpaid volunteers, and no members of the EDC Board were experts in law, lending, video gaming, or economic development. These Defendants solicited the EDC Board's dependence upon them, and they all knowingly accepted and benefited from the EDC's trust, confidence, and reliance upon them, and, therefore, were fiduciaries who owed fiduciary duties to the EDC and to the EDC Board.

80. By June 14, 2010, Defendant Wells Fargo knew or should have known that 38 Studios' net proceeds from the EDC would be insufficient and that it was likely that 38 Studios would become insolvent and go out of business in 2012. In that presentation to the EDC Board, however, Wells Fargo's slides stated that 38 Studios' "revenue projections" and "subscriber growth projections" were "in line with U.S. MMO Industry." Defendant Wells Fargo knew or should have known but did not inform the EDC Board that 38 Studios' projections as a whole showed 38 Studios running out of money and failing in 2012. This omitted information was required in order to make the information that Defendant Wells Fargo presented to the EDC Board concerning 38 Studios' "revenue projections" and "subscriber growth projections" not misleading. If the EDC Board had received that information, it would not, and could not within the

constraints of state law, have approved the loan to 38 Studios, or allowed the Closings to take place.

81. In this presentation, Wells Fargo also presented a slide showing a table listing dates for development milestones for Copernicus obtained from 38 Studios, including milestones already met, future interim milestones, and the final completion of Copernicus that was projected for September 2012. Of course, such projections by 38 Studios were known to Defendant Wells Fargo to be predicated on the assumption that 38 Studios would have the funds to relocate to Rhode Island and complete Copernicus in 2012, an assumption that Defendant Wells Fargo knew or should have known was without any factual support, if not false, but failed to disclose that to the EDC Board. Disclosure of the falsity of this assumption was required in order to make the table of development milestones for Copernicus that Defendant Wells Fargo presented to the EDC Board not misleading.

82. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, Wells Fargo, and Gurghigian of First Southwest were present at one or more of the EDC Board meetings when the 38 Studios transaction was discussed, on June 9, 2010, June 14, 2010, July 15, 2010, and July 26, 2010. At any time that said Defendants were present but failed to correct misstatements or omissions by others to the EDC Board, they had a fiduciary duty to so inform the EDC Board, and their failure to do so breached that duty and was itself a failure to disclose a material fact necessary in order to make the statements they made to the EDC Board during such meetings, in the light of the circumstances under which they were made, not misleading.

83. At the end of the meeting on June 14, 2010, the EDC Board voted to adopt an "Inducement Resolution," so called, establishing the Jobs Creation Guaranty Program as an EDC program and granting preliminary approval for the issuance of bonds in an aggregate principal amount not to exceed $75 million to finance a loan to 38 Studios, "subject to . . . receipt and satisfactory review of Project budget, specifications, plans, and essential contracts."

84. On June 15, 2010, Defendant Zaccagnino sent an email to Saul (with copy to Stolzman) that stated: "We have been open book about our risks and requirements from the beginning. Specifically, we were upfront about the requirement to be fully capitalized with the 75MM at closing." Zaccagnino also stated that "providing full funding of the 75MM at closing" was a "clearly articulated and understood requirement from day one." That same day Saul, by email to Stolzman, acknowledged 38 Studios' need to receive $75 million at closing, stating: "EDC understood this, was committed to work toward it but never promised it."

85. On June 17, 2010, Stolzman circulated a draft Term Sheet by attachment to an email to Afonso, Saul, and Gurghigian. In the email, Stolzman excused Zaccagnino's complaint that 38 Studios was not receiving net proceeds of $75 million, stating:

> I make one observation that mitigates their [38 Studios'] complaining about the $75M not being net. All along they represented that they needed $75M to complete the MMO. That is in the letter.

The "letter" referred to was the then current version of the Term Sheet.

86. On June 21, 2010, Lamarre of Defendant Wells Fargo sent an email to Defendant MacLean of 38 Studios that discussed various options for 38 Studios to

pursue to make up the shortfall of funds to complete Copernicus. The email notes the "[o]bvious but important conclusion is that completing the EDC low-cost financing adds material value to current shareholders [primarily Schilling] . . . ." Lamarre was thereby recommending that 38 Studios accept the loan from the EDC even with the shortfall. Lamarre's email also states that "[w]e have discussed with you the benefits of 'safety' in raising equity near-term versus not doing so." Lamarre was referring to the fact that trying to raise equity in the near term was safer than waiting until the funds received from the EDC were exhausted before raising additional funds. Defendant Wells Fargo and Lamarre never disclosed the information to the EDC Board. Such information was necessary in order to make Defendant Wells Fargo's presentation to the EDC Board not misleading, since it made irrelevant the positive information they conveyed to the EDC Board.

87. On June 22, 2010, a meeting was held at the offices of the EDC, attended by representatives from the various entities involved in the proposed 38 Studios' bond issuance and loan transaction, but not by any members of the EDC Board. These representatives included: Stolzman of Adler Pollock, Afonso of Moses Afonso, Saul of the EDC, Aaron Topp of Wells Fargo, Craig Hrinkevich of Wells Fargo, Peter M. Cannava of Wells Fargo, Bernard Jackvony (of Pannone, Lopes & Devereaux, P.C., who were counsel to Wells Fargo and Barclays), Defendants Wester and Zaccagnino of 38 Studios, William Fazioli of First Southwest, and Maureen Gurghigian of First Southwest.

88. All of these participants at this meeting discussed the shortfall in EDC financing and whether, in light of that shortfall, 38 Studios' business plan for Copernicus

could still work. At this meeting, Defendants Zaccagnino and Wester confirmed that the business plan for relocation to Rhode Island and completion of Copernicus would not work without additional capital, over and above the capital that was anticipated in the April 1 Projections.

89. Aaron Topp from Defendant Wells Fargo informed the other participants in the meeting that Wells Fargo was "considering" trying to obtain such capital through equity financing for 38 Studios, which if achieved might make up the shortfall needed for 38 Studios to relocate to Rhode Island and complete Copernicus according to its own projections. This equity financing that Topp stated Wells Fargo was "considering" trying to obtain for 38 Studios was not referred to in any way in the April 1 Projections.

90. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, and First Southwest never thereafter requested or obtained any details of 38 Studios' and Wells Fargo's efforts to secure additional funds and were never informed or led to believe that such additional funds had been secured or were even likely. Defendants Wells Fargo, MacLean, Zaccagnino, Wester, and Schilling had actual knowledge that such additional funds were never obtained or even committed. None of this information was disclosed to the EDC Board. Disclosure of such information was necessary to make the statements by said Defendants to the EDC Board not misleading.

91. The April 1 Projections that 38 Studios gave to the EDC staff projected that 38 Studios would raise $20 million in equity financing in 2012, after Copernicus was completed, and in order to have sufficient capital to launch Copernicus. Even with this $20 million, however, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, MacLean, Schilling, Wester, Zaccagnino, First Southwest, and Wells

Fargo knew or should have known that 38 Studios would have negative cash flow in excess of $3.8 million (or $8.8 million if relocation expenses were $5 million) and run out of money in 2012. Without this $20 million, 38 Studios' negative cash flow in 2012 would be an additional $20 million.

92. On June 24, 2010, Stolzman circulated a revised Term Sheet to be signed by the EDC and 38 Studios. This revision of the Term Sheet added, *inter alia,* the word "net" and stated in pertinent part as follows:

> We understand your capital needs to bring project Copernicus to completion to be approximately $75,000,000. Based on our understanding to date of your financial projections, subject to the terms and conditions set forth herein and required legal procedures, the RIEDC is willing to issue $75M of revenue bonds pursuant to its newly created Jobs Creation Guaranty Program, **the net proceeds of which would provide the necessary financing to relocate 38 Studios to Rhode Island, complete production of Copernicus, and capitalize the company's growth and expansion in Rhode Island.**
>
> [emphasis added]

93. Thus, at a time when it was clear to all (except the EDC Board) that 38 Studios' "net proceeds" would be insufficient to enable 38 Studios to relocate to Rhode Island and complete production of Copernicus, Stolzman revised the Term Sheet to state the opposite. Defendant Stolzman knew or should have known that the statement that such "net proceeds" would be sufficient was false.

94. This false statement was not a forward-looking statement that ultimately proved to be inaccurate. On the contrary, 38 Studios was thereby misrepresenting its current financial projections, and failing to disclose that Defendants MacLean, Zaccagnino, Wester, and Schilling actually believed the exact opposite. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, and

Wells Fargo knew or should have known what 38 Studios and these executives and directors from 38 Studios actually believed, since they all had received the April 1 Projections, and were present at the meeting on June 22, 2010 and other occasions when representatives of 38 Studios reiterated that the net proceeds would not be sufficient for 38 Studios to finance relocation to Rhode Island and completion of Copernicus, even if all other items in the financial projections proved true. All of said Defendants, therefore, knew or should have known of this statement in the Term Sheet was both a misrepresentation and contained an omission.

95. On July 1, 2010, Defendant Saul sent Jennifer MacLean the revised Term Sheet referred to in paragraph 92, *supra*, which, as noted, now contained the word "net." That Term Sheet specifically identified 38 Studios' financial projections by the legend "38 Studio 6 Year Plan – In-State Loan View – DRAFT – 04.01.10," *i.e.* the April 1 Projections, that falsely showed that 38 Studios would receive net proceeds of $75 million from the EDC. This email informed MacLean that upon her agreement, this version of the Term Sheet would be presented to the EDC Board for them to "review, discuss and hopefully approve:"

> We have scheduled a Special RIEDC board meeting for July 15, 2010 from 10-12:00 at RIEDC offices. The Special board meeting agenda is to have the board review, discuss and hopefully approve the final negotiated Term Sheet between the company and RIEDC. If approved we would then prepare the Final Authorizing Resolutions for the sale of bonds for approval by the board at the July 26, 2010 RIEDC board meeting.

Defendants MacLean, Zaccagnino, and Wester reviewed the Term Sheet carefully and knew or should have known that it contained the false representation that the net

proceeds would be sufficient and omitted to state the converse that the net proceeds would not be sufficient.

96. As Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, MacLean, Zaccagnino, Wester, and First Southwest had agreed or been told, this version of the Term Sheet was sent to the EDC Board members, on July 13, 2010.

97. On July 15, 2010, the EDC Board met both in public session and in executive session to hear presentations concerning the 38 Studios' deal from Stokes, Saul, and First Southwest, and to review the Term Sheet. Stolzman attended the meeting and took the minutes as Secretary to the EDC. Saul discussed the business terms and First Southwest reviewed the risks associated with the transaction, but no one informed the EDC Board of the inevitable shortfall, or acknowledged that the Term Sheet incorrectly stated that the net proceeds would provide sufficient financing to enable 38 Studios to relocate to Rhode Island and complete production of Copernicus, let alone "capitalize the Company's growth and expansion in Rhode Island." At the close of the meeting, the EDC Board authorized the EDC staff and counsel to continue negotiations towards an authorizing resolution.

98. First Southwest received, reviewed, and suggested changes to virtually all of the various revisions to the Term Sheet, including the final several versions that contained the representation that it was understood that the "net" proceeds "would provide the necessary financing to . . . relocate 38 Studios to Rhode Island and complete Copernicus . . . ." As noted in paragraph 140, *infra*, First Southwest agreed to be the EDC's "financial advisor" in the 38 Studios transaction, and First Southwest's duties to the EDC Board included "assistance in the development and analysis of the

Term Sheet." The EDC Board also was relying on First Southwest and Gurghigian for the "development and analysis of the business points and borrower benchmarks." This false assertion—that the net proceeds 38 Studios would receive from the EDC loan were adequate to finance relocation to Rhode Island and completion of Copernicus—was both a "business point" and a "borrower benchmark." Rather than "analyzing" this statement and informing the EDC Board of its falsity, Defendant First Southwest allowed the EDC Board to be deceived.

99. First Southwest knew or should have known that not only was that representation false, but also that the EDC Board would rely upon it to justify the statutorily required finding set forth in paragraph 100, *infra*.

100. On July 22, 2010, Afonso sent an email to Defendants Stolzman, Saul, First Southwest, Wells Fargo, MacLean, Zaccagnino, and Wester, attaching his draft of the resolution ("the Authorizing Resolution") by which the EDC Board would give final approval to the loan to 38 Studios and issuance of the bonds. It contained the following finding, which was required pursuant to R.I. Gen. Laws § 42-64-10:

> NOW, THEREFORE, be it resolved by the Rhode Island Economic Development Corporation as follows:
>
> Section 1. It has been found and determined that:
>
> * * *
>
> (b) That adequate provision has been made or will be made for the payment of the cost of the construction, rehabilitation, operation and maintenance and upkeep of the Project;

This proposed Authorizing Resolution expressly incorporated the Term Sheet (which thereupon became an integral part thereof) and required counsel to prepare closing documents that were "substantially in conformity" with the Term Sheet.

101. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Saul, Stokes, MacLean, Zaccagnino, Wester, and Wells Fargo, as well as 38 Studios, knew or should have known that the purpose of R.I. Gen. Laws § 42-64-10 is to prevent and prohibit the EDC from funding a project with a known financing shortfall, and without demonstrated adequate provision to complete the project, as was the case here.

102. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, MacLean, Zaccagnino, Wester, First Southwest, and Wells Fargo knew or should have known that the finding "[t]hat adequate provision has been made or will be made for the payment of the cost of the construction, rehabilitation, operation and maintenance and upkeep of the Project" was false because 38 Studios was not receiving from the EDC (or anyone else according to 38 Studios' own financial projections) sufficient funds to relocate to Rhode Island and complete production of Copernicus.

103. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, MacLean, Zaccagnino, Wester, Schilling, and Wells Fargo knew or should have known that they were procuring the issuance of the Bonds and the loan to 38 Studios in violation of state law.

104. Said Defendants knew or should have known that even if any or all of the members of the EDC Board had been informed of the shortfall and nevertheless chose to approve issuance of the Bonds and the loan to 38 Studios, the EDC Board did not have the right or power to violate state law. In such circumstances, said Defendants knew or should have known that at the very least they would be required to obtain express confirmation that the EDC Board was aware that they were violating the law, to

formally protest such conduct, and to refrain from assisting the EDC Board in such conduct.

105. The actions of Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, Wells Fargo, and Barclays, to bypass the EDC Board and secure issuance of the Bonds in violation of state law, were based on misrepresentations, and were adverse to the interests of the EDC. Accordingly, it was unreasonable for any Defendants to assume that the EDC Board had knowledge of the facts that were the subject of their misrepresentations, or that their actions or the actions of their fellow Defendants were authorized by the EDC Board with knowledge of those facts, particularly since Defendants withheld the critical facts from the EDC Board. Thus, said Defendants' actions and knowledge in connection therewith are not imputed to Plaintiff for purposes of Plaintiff's claims against said Defendants.

106. On July 23, 2010, Stolzman directed a staff person at the EDC to put the Term Sheet onto the EDC's letterhead and forward it to Afonso, First Southwest, and Defendant MacLean, with the request that MacLean sign it on behalf of 38 Studios and that Stokes sign it on behalf of the EDC, to be held until the EDC Board approved the Term Sheet at its scheduled meeting on July 26, 2010. Thus, Stolzman procured MacLean's and Stokes' signatures on the Term Sheet containing the false representation that the net proceeds from the EDC would finance completion of Copernicus. At that time Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, MacLean, Zaccagnino, Wester, Schilling, and First Southwest knew or should have known that the Term Sheet would be relied upon by the EDC Board, and became an integral part of the Authorizing Resolution.

107. On July 26, 2010, with Defendant Schilling in attendance, and while a majority if not all of the EDC Board was still in the dark about the financing shortfall, and about other problems with the 38 Studios' project that are identified at paragraphs 160 - 169, *infra*, the EDC Board convened and adopted the Authorizing Resolution prepared by Defendants Afonso and Stolzman and reviewed by Defendants Wells Fargo and Gurghigian of First Southwest, authorizing the issuance and sale of the Bonds. The Authorizing Resolution contained the false finding quoted in paragraph 100, *supra,* and incorporated the Term Sheet with the false statement that 38 Studios believed that the net proceeds would be sufficient, when in fact its belief was to the contrary.

108. At this meeting, Defendant Afonso "provided details" on the Authorizing Resolution to the EDC Board. These "details," however, omitted the projected shortfall. Disclosure to the EDC Board of that omission was necessary to make the presentations of Afonso and Stolzman not misleading.

109. The EDC Board adopted the Authorizing Resolution, including the false finding, and by that resolution empowered and authorized the EDC staff and counsel to prepare documents and issue $75 million in bonds, borrow $75 million from the purchasers of the Bonds, and enter into the loan to 38 Studios, provided the loan and bond documents are "substantially in conformity with the provisions of Exhibit A," the Term Sheet of the same date, which was expressly incorporated by reference in the Authorizing Resolution and thereby became an integral part thereof.

110. Thus, the EDC Board's adoption of the Authorizing Resolution and the Term Sheet was secured by false representations to the EDC Board. This was known or should have been known on July 26, 2010 by Defendants Stolzman, Adler Pollock,

Moses Afonso, Afonso, Stokes, Saul, Schilling, Zaccagnino, Wester, MacLean, First Southwest, and Wells Fargo, as well as 38 Studios. Said Defendants also knew or should have known that these representations remained false at the time of the Closings on November 2, 2010.

111. As noted in paragraph 49, *supra*, Defendant Wells Fargo received all versions of the Term Sheet from 38 Studios, and used this information to evaluate 38 Studios' need for financing. In any event, by July 27, 2010, Defendant First Southwest sent the Term Sheet to Wells Fargo. Thus, Defendant Wells Fargo knew or should have known at least by July 27, 2010 that the final Term Sheet contained the misrepresentation that the net proceeds would provide the necessary financing to enable 38 Studios to relocate to Rhode Island and complete Copernicus. Notwithstanding this knowledge, Defendant Wells Fargo never informed the EDC Board of the falsehood. Instead, Defendant Wells Fargo successfully solicited the EDC for authority to have Wells Fargo act as the EDC's fiduciary and agent to sell the bonds, and accepted that authority and that role through the Closings on November 2, 2010.

C. Defendants' Continued Concealment of the Shortfall

112. Immediately upon the EDC Board's adoption of the Authorizing Resolution, Defendants Saul, Stokes, and Stolzman caused the EDC to issue a press release stating that "our extensive due diligence revealed that while 38 Studios could raise venture equity and stay in its current location . . . the RIEDC Board determined that enhancing this company's debt is a calculated risk well worth taking." Said Defendants knew or should have known that the references to "extensive due diligence" and that "38 Studios could raise venture equity" were false. The same press release

provided a link to Defendant Wells Fargo's presentation to the EDC Board on June 14, 2010. Said Defendants knew or should have known that, as noted in paragraphs 80-81, *supra*, this presentation was materially misleading.

113. The EDC Board's July 26, 2010 bond authorization authorized the distribution of a "Private Placement Memorandum" "substantially in conformity with" the Term Sheet.

114. In fact, counsel for Wells Fargo had circulated an initial draft of that private placement memorandum (the "Bond PPM"), even prior to the EDC Board's adoption of the Authorizing Resolution.

115. Defendant Wells Fargo accepted this agency responsibility, including*, inter alia*, the responsibility to prepare the Bond PPM and assist the EDC to sell the Bonds, on its own behalf and on behalf of Defendant Barclays, with Barclays' knowledge and agreement. Thus, Defendant Wells Fargo's knowledge, actions, and duties are imputed to Barclays, and Barclays is also a fiduciary and owed fiduciary duties to the EDC and the EDC Board.

116. As noted in paragraph 45, *supra*, prior to acting as the EDC's agent to sell the bonds, Defendant Wells Fargo had been retained by 38 Studios to assist 38 Studios in obtaining private equity investment totaling $25 million, had prepared the Equity PPM, and had given the Equity PPM to Defendants Stolzman, Afonso, and First Southwest. The Equity PPM contained the following warning to investors:

> H. Need for Additional Funds
>
> The Company will require additional capital in order to complete the development and marketing of the two games in development.
>
> * * *

> There can be no assurance that additional capital from any source will be available when needed or on terms acceptable to the Company. The availability of additional financing may be dependent on the relative success and progress of the Company and may be offered on more favorable terms than offered herein.

117. The Equity PPM also expressly informed prospective investors that even upon receipt of the equity solicited by the Equity PPM, 38 Studios "expects that it will need additional funds in 12 to 14 months."

118. When Defendant Wells Fargo initiated and thereafter participated in revisions of the Bond PPM, Wells Fargo knew that even upon receipt of the loan proceeds, 38 Studios would need additional funds, just as it had when Wells Fargo had prepared the Equity PPM and made the disclosure that "[t]here can be no assurance that additional capital from any source will be available when needed or on terms acceptable to" 38 Studios. However, the Bond PPM does not contain that warning. The Bond PPM does not even disclose that the net proceeds that 38 Studios would receive from the EDC were not sufficient for 38 Studios to relocate to Rhode Island and complete Copernicus, or that, as a result, 38 Studios would run out of cash in 2012 even if all of its revenue projections proved true. That omission went directly to the ability of the EDC to pay the bondholders, and greatly increased (if not made certain) the risk that the EDC would either default on the Bonds or have to apply to the Rhode Island General Assembly for funds to pay the bondholders.

119. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, and Wells Fargo (through their legal counsel) forwarded drafts and revisions of the Bond PPM to prospective investors.

120. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, and Wells Fargo all knew or should have known that this information concerning the shortfall was not disclosed in the Bond PPM, that if the shortfall were disclosed, it would come to the attention of the EDC Board even prior to the Closings, and that such disclosure would likely be fatal to the entire transaction. They withheld the information.

121. The process of marketing the EDC's bonds included obtaining credit ratings from Standard & Poor's and Moody's Investor Services (collectively "the Rating Agencies"). First Southwest accepted primary responsibility for direct dealings with the Rating Agencies, and kept Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, and Wells Fargo informed of all of its dealings.

122. In the first half of September 2010, the Rating Agencies requested that First Southwest provide them with 38 Studios' financial projections. First Southwest relayed that request to Stolzman, who in turn informed 38 Studios. In response, Wester of 38 Studios sent Stolzman a two-page document bearing the legend "38 Studios Six Year Financial Plan to Moody's.doc – Confidential." Stolzman sent that document to Defendants Afonso and First Southwest on September 16, 2010 and directed First Southwest to forward it to the Rating Agencies. Upon information and belief, First Southwest did as requested and sent the document to the Rating Agencies without explanation, and the Ratings Agencies relied upon them in rating the Bonds.

123. The document was only two out of the twelve pages that comprised the April 1 Projections. It did not include the page of the April 1 Projections that revealed that 38 Studios' cash flow projections were based upon the assumption that it would

receive net proceeds of $75 million from the EDC. The two-page document did, however, project that 38 Studios' "cash" at the close of 2012 would be $13,340,925, as did the April 1 Projections, as noted in paragraph 54, *supra*. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Wester, MacLean, Zaccagnino, and Wells Fargo therefore knew or should have known that this figure was the product of and was based on the false assumption that 38 Studios would receive $75 million in net proceeds from the EDC, and made no deductions for 38 Studios' expenses in relocating to Rhode Island or payment of guaranty fees to the EDC. Accordingly, they knew or should have known that the two-page document was misleading, if not simply false.

124. Indeed, by the time this document was forwarded to the Rating Agencies, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, Wells Fargo, MacLean, Schilling, Zaccagnino, and Wester had already determined that the debt service reserve fund alone would be over $12.5 million, that there would be at least $1.5 million in closing costs, including the bond insurance premium and Wells Fargo's and Barclays' fee, and the guaranty fees to the EDC would be $2,625,000 by 2012. Accordingly, they knew or should have known that the shortfall would completely eliminate 38 Studios' projected cash surplus of $13,340,000 in 2012, and that 38 Studios would have a negative cash flow in 2012, even if all of 38 Studios' other projections proved true. Thus, they knew or should have known that the ratings pursuant to which the Bonds were sold were procured through misleading financial information concerning 38 Studios.

125. Said Defendants also all knew or should have known that if the Rating Agencies were informed of this shortfall, the Rating Agencies would either refuse to rate the Bonds or issue a low rating for the Bonds, and issue a report explaining their reasoning by referring to the shortfall. Said Defendants also knew or should have known that such disclosure would reveal the shortfall to the EDC Board. They did not disclose this shortfall to the Rating Agencies.

126. The marketing of the EDC's bonds was a joint effort participated in by Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, Schilling, Zaccagnino, Wester, MacLean, First Southwest, and Wells Fargo.

127. Defendant Wells Fargo accepted primary responsibility to market the sale of the EDC's bonds on behalf of the EDC to potential investors. On October 1, 2010, Matt Marrone ("Marrone") of Wells Fargo sent an email to Afonso, Stolzman, Saul, MacLean, Wester, Zaccagnino, Lamarre, and First Southwest, which "attached the first draft of the investor presentation."

128. The draft PowerPoint presentation that Marrone attached to his email informed prospective investors that the presentation was being provided by Defendant Wells Fargo. It did not disclose the shortfall. Moreover, on slide 23, it stated in pertinent part as follows:

> The net proceeds of the bonds will be used:
>
> i. To provide the necessary financing to relocate 38 Studios, LLC to Providence, Rhode Island
>
> ii. Complete production of Copernicus
>
> iii. Capitalize 38 Studios, LLC growth and expansion in Rhode Island

129. First Southwest received the draft and made certain changes that were forwarded to Defendants Wells Fargo, Afonso, and Stolzman. These changes included adding a line at the end of this list, as new subsection "iv," stating that loan proceeds would also be used to "Fund the Capital Reserve Fund (MADS)," referring to the debt service reserve fund. First Southwest did not suggest any correction to the assertion that the net proceeds will be used to "[c]omplete production of Copernicus," notwithstanding that one of the primary reasons why that statement was false was that the debt service reserve fund, *i.e.* the "Capital Reserve Fund (MADS)," alone reduced 38 Studios' net proceeds by over $12.5 million. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Zaccagnino, and Wester also reviewed but suggested no correction to this misrepresentation in the presentation prepared by Defendant Wells Fargo.

130. Defendant Wells Fargo sent invitations to the prospective investors and the presentation, including showing the PowerPoint, took place on October 6, 2010. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, Wells Fargo, and First Southwest participated in a conference call "dry run" rehearsal prior to the presentation. They, together with Defendant Schilling, acted in concert as joint presenters throughout the actual presentation. This presentation included the slide bearing the misrepresentation that the net proceeds would be used to "[c]omplete production of Copernicus" and that omitted any mention of the shortfall. Thus, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, Stokes, Saul, First Southwest, and Wells Fargo jointly made

misrepresentations to the purchasers of the Bonds in connection with the sale of the Bonds.

131. Said Defendants all knew or should have known that if the presentation to the prospective investors disclosed the shortfall, that fact would become public knowledge and ultimately reach the EDC Board and result in cancellation of the transaction. They concealed the shortfall through misrepresentations and omissions.

132. On October 22, 2010, Wells Fargo, the EDC, and 38 Studios executed a Bond Placement Agreement ("BPA"). It purported to set forth the terms under which Wells Fargo "agrees to use its best efforts to privately place, on behalf of the Issuer and the Company, all . . . of the $75,000,000 Rhode Island Economic Development Corporation Job Creation Guaranty Program Taxable Revenue Bonds . . . ."

133. The BPA sets forth a series of "Issuer Representations, Warranties and Covenants." These include the following:

> the Issuer is authorized under the laws of the State to adopt the Resolutions, to enter into this Contract of Purchase, to make the Continuing Disclosure Agreement (as defined in paragraph 5 hereof), to enter into the Trust Agreement, and to issue, sell and deliver the 2010 Bonds, and the Issuer has full power and authority to consummate the transactions contemplated by this Contract of Purchase, the Continuing Disclosure Agreement, the Trust Agreement, the Resolutions, the Preliminary Private Placement Memorandum and the Private Placement Memorandum (collectively the "Issuer Documents"), and as otherwise set forth herein, and the Issuer has complied or will have complied on and as of the Closing with all provisions of applicable law in all matters relating to such transactions;

134. The BPA was negotiated by Defendants Stolzman, Adler Pollock, Moses Afonso, and First Southwest on behalf of the EDC; Defendants Zaccagnino, Wester, and MacLean on behalf of 38 Studios; and counsel on behalf of Defendants Wells

Fargo and Barclays. Defendant MacLean signed it on behalf of 38 Studios. However, she and all of said Defendants knew or should have known that the EDC was not "authorized under the laws of the state to adopt the resolutions" because the resolution contained the false statutory finding that adequate provision had been made or will be made for 38 Studios' relocation to Rhode Island and completion of Copernicus, and because the Term Sheet that that was part of the Authorizing Resolution was based on the false representations that 38 Studios believed the net proceeds 38 Studios would receive from the EDC would be sufficient to relocate 38 Studios and complete Copernicus.

135. The BPA sets forth the following as an additional "Issuer's Representations, Warranties and Covenants":

> the acceptance, execution and delivery by the Issuer of the Issuer Documents, and the compliance with the provisions hereof and thereof, do not and will not violate or conflict with any provision of the Laws of the State, the Resolutions, the Act or the Issuer Act and do not and will not conflict with or violate or result in or constitute on the part of the Issuer a breach of or default under any indenture, mortgage, deed of trust, guaranty, lease agreement or other instrument to which the Issuer is a party or by which the Issuer or any of its property is bound, or conflict with or violate any provision of any law, administrative rule or regulation, or, to the knowledge of the Issuer, any judgment, order or decree to which the Issuer or any of its property is subject;

136. In fact, all of said Defendants knew or should have known the "execution . . . of the Issuer Documents" would "violate or conflict with" Rhode island statutes and the Authorizing Resolution, since these documents bound the EDC to a transaction that was not authorized by that resolution or by state law.

137. The BPA sets forth the following as an additional "Issuer's Representations, Warranties and Covenants":

> to the knowledge and belief of the Issuer's officers, the information with respect to the Issuer in the Preliminary Private Placement Memorandum and Private Placement Memorandum is true and correct in all material respects, and such information does not contain, and as of the Closing will not contain, any untrue statement of a material fact or omit to state any material fact which is necessary to make the statements therein, in light of the circumstances under which they were made, not misleading;

138. In fact, all of said Defendants knew or should have known that the Bond PPM omitted to state that 38 Studios would run out of cash in 2012 according to its own projections.

139. The BPA contains similar "representations, warranties, and covenants," by and on behalf of 38 Studios. All of said Defendants also knew or should have known these were false for the same reasons as those made on behalf of the EDC were false.

140. Notwithstanding that First Southwest had been retained by the EDC and actively engaged since March 2010, First Southwest on October 29, 2010, eight months later, sent an email to Saul attaching a proposed Engagement Letter, belatedly acknowledging the EDC's retention of First Southwest to advise the EDC in connection with the 38 Studios matter. Defendant First Southwest's duties to the EDC in connection with the subject matter of this complaint included, but were not limited to, the following:

a. Attendance at meetings concerning the issuance of Bonds, including any board meetings of the EDC;

b. Provision of quantitative analysis to the EDC with respect to projected debt service schedules, budget proposals, legislation and structure alternatives; and

c. Assistance in the development and analysis of the Term Sheet (as defined in paragraph 37, *supra*) and business points and borrower benchmarks.

141. The Engagement Letter further stated that First Southwest would receive $120,000 for its services to the EDC in connection with the 38 Studios transaction. These fees were contingent upon the Closings taking place.

142. The EDC on November 2, 2010 issued the Bonds totaling in the principal amount $75 million, and Wells Fargo and Barclays, acting as agents for the EDC, sold them to investors.

143. Issuance of the Bonds totaling $75 million reduced the bonding authority of the EDC under the Jobs Creation Guaranty Act from $125 million to $50 million, unless and until the Bonds were paid and retired by the EDC, at which point the EDC's bonding authority would be increased to the extent of such payment and retirement.

144. As predicted by its own financial projections and its statements to EDC staff and counsel, 38 Studios was unable to complete Copernicus and ran out of cash in 2012. As a result, 38 Studios defaulted on the loan from the EDC and filed for liquidation in bankruptcy.

D. Allocation of the Bond Proceeds and the Bonds

145. 38 Studios received net proceeds from the Closings totaling $49,481,832.91, which were paid in five separate payments over the twelve-month period from November 2, 2010 through November 8, 2011. The balance of $25,518,167.09 was allocated as follows:

a. Deposit to Debt Service Reserve Fund $12,749,912.50

b. Deposit to Prepaid Interest Account	$10,604,076.63[1]
c. Placement Agents' Discount	$ 634,065.00
d. Municipal Bond Insurance	$ 562,935.45
e. EDC Commitment Fee	$ 375,000.00
f. Other Fees Paid at Closing	$ 592,177.51[2]

146. The Bonds were issued as follows:

a. 2015 Term Bond
$23,685,000 6.000% Term Bonds due November 1, 2015;

b. 2016 Serial Bond
$8,860,000 6.750% Serial Bonds due November 1, 2016; and

c. 2020 Term Bond
$42,455,000 7.750% Term Bonds due November 1, 2020

147. Defendants were each paid fees out of bond proceeds as follows:

a.	Adler Pollock	$124,790.00
b.	Moses Afonso	$190,000.00
c.	First Southwest	$120,000.00
d.	Wells Fargo & Barclays	$634,065.00

Wells Fargo received an additional $50,000 from 38 Studios on November 17, 2010, which was disclosed to the EDC.

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[1] This sum was applied to 38 Studios' interest obligations to the EDC through 2012. Accordingly, it did not contribute to the shortfall.

[2] Adler, Pollock, & Sheehan P.C. -- EDC Counsel $124,790.00; First Southwest -- EDC Financial Advisor $120,620.00; Moses & Afonso -- EDC Counsel $190,000.00; Sheppard, Mullin, Richter -- EDC Counsel $58,324.44; Sheppard, Mullin, Richter -- Professional Services $5,594.10; Bernstein, Shur, Sawyer -- Trustee Counsel $2,500.00; Taft & McSally LLP -- EDC Counsel $36,990.00; Pannone Lopes Devereaux -- Placement Agents Legal Counsel $12,250.00; BNY Mellon -- Trustee Fee $175.00; Standard & Poor's -- EDC Analytical Services $16,320.00; Moody's Investors Service -- Professional Services $19,600.00; and Image Master, Inc. -- Printing Services $5,013.97.

E. Wells Fargo Secretly Received $473,912.19 from 38 Studios

148. On May 20, 2010, Defendant Wells Fargo and 38 Studios entered into a written agreement, under the legend "STRICTLY CONFIDENTIAL," signed by Lamarre on behalf of Defendant Wells Fargo and Wester on behalf of 38 Studios, whereby Defendant Wells Fargo agreed to assist 38 Studios in obtaining financing. This agreement notes Wells Fargo planned to seek equity investors for 38 Studios, and entitled Wells Fargo to a "Market Entrance Fee" of $50,000, to be earned on the date of the first distribution of the Equity PPM.

149. This agreement also describes the loan from the EDC as the "Alternative Financing Option," and entitled Wells Fargo to the following payments in reference to that loan:

a. A nonrefundable Consulting Fee of $25,000 earned on the day after the first meeting among Wells Fargo, 38 Studios and the EDC;

b. A nonrefundable Structuring Fee of $75,000 earned upon 38 Studios' decision to actively pursue the loan from the EDC; and

c. A nonrefundable Alternative Financing Option Fee of $300,000, "payable upon the closing" of the EDC loan.

150. In addition, this agreement provided that 38 Studios was required to use its best efforts to secure Wells Fargo's engagement by the EDC as the EDC's "sole-, lead-, and book-running agent or underwriter" in connection with the issuance of the Bonds.

151. On November 22, 2010, twenty days after the Closings, Defendant Wells Fargo sent 38 Studios an invoice seeking the following payments from 38 Studios, referencing the agreement of May 20, 2010:

- $ 50,000.00 – Market Entrance Fee (earned on or about May 24, 2010)
- $ 25,000.00 – Consulting Fee (earned on June 14, 2010)
- $ 75,000.00 – Structuring Fee (earned on or about June 14, 2010
- $300,000.00 – Alternative Financing Option Closing Fee (earned on or about November 2, 2010)
- $ 10,512.19 – Unreimbursed out-of-pocket expenses
- $ 13,000.00 – Miscellaneous expenses to be reimbursed

  _____

  $473,512.19 – Total fees and un-reimbursed expenses

152. 38 Studios paid the full amount by wire transfer to Defendant Wells Fargo on December 16, 2010. This was in addition to the amounts disclosed to the EDC and in the Bond PPM.

153. Neither Defendant Wells Fargo nor 38 Studios nor anyone else disclosed this agreement to Plaintiff, or disclosed that Defendant Wells Fargo was entitled to any payment from 38 Studios in connection with the Bonds or the loan.

154. This undisclosed total of nearly $500,000 further reduced the funds available to 38 Studios to relocate to Rhode Island and complete Copernicus and was not included in the estimated expenses set forth in the April 1, thereby decreasing projected cash flow in 2012 by that amount.

155. The Bond Placement Agreement entered into on October 22, 2010 states that Defendants Wells Fargo and Barclays will receive their “Placement Agent’s fee of $634,065.00” and that “Wells Fargo will be paid a disclosure fee of $50,000.00 in connection with their due diligence and analysis of the Company [38 Studios], which will be paid by the Company [38 Studios] out of project funds after the Closing Date.”

156. Defendant Wells Fargo knew or should have known that this statement was incomplete and misleading, and that disclosure of Defendant Wells Fargo's agreement with 38 Studios was necessary to make it not misleading.

157. The final paragraph of the Bond Placement Agreement states in pertinent part as follows:

> 18. Placement Agents Remuneration. The Placement Agent does not anticipate any remuneration with respect to the 2010 Bonds other than the Placement Agent's discount of $634,065.00 and the disclosure fee of $50,000.00.

Defendant Wells Fargo knew or should have known that this statement was false, since Wells Fargo fully "anticipated" and was entitled under its private agreement with 38 Studios to receive additional fees "with respect to the 2010 Bonds," as in fact Wells Fargo did.

158. The Bond PPM states in pertinent part as follows:

PRIVATE PLACEMENT AGENT

> The 2010 Bonds are being privately placed by Wells Fargo Securities, LLC ("Wells Fargo") as representative of Wells Fargo and Barclays Capital in an aggregate purchase price for the 2010 Bonds of par less the Placement Agents' fee of $634,065.00. In addition, Wells Fargo will be paid $50,000 by the Company [38 Studios] in connection with their disclosure and due diligence of the Company [38 Studios] with respect to this transaction.

This statement is misleading if not simply false insofar as it purports to fully set forth Wells Fargo's and Barclays' compensation. Defendant Wells Fargo was required to disclose to the EDC its rights to fees from 38 Studios.

159. The failure of Defendant Wells Fargo to disclose either Wells Fargo's entitlement to additional fees or commissions, or 38 Studios' contractual obligation to use its "best efforts" to persuade the EDC to retain Wells Fargo as the EDC's agent or

underwriter with respect to the issuance of the Bonds, violated Wells Fargo's fiduciary duty of loyalty to the EDC and gave Wells Fargo an undisclosed reason to promote the issuance of the Bonds, regardless of, and, in this case, in conflict with the EDC's interests.

F. Defendant Adler Pollock's and Saul's Failure to Disclose to the EDC Board the Negative Opinion of Experts

160. On June 2, 2010, EDC staff and counsel including Saul and Stolzman participated in a meeting and telephone conference call from the EDC offices with representatives of Strategy Analytics and/or Perimeter Partners, who had been retained to advise the EDC concerning certain aspects of the potential loan to 38 Studios, and to eventually make a presentation to the EDC Board on those subjects.

161. The purpose of this meeting was for Strategy Analytics to give an advance presentation of its conclusions to Stolzman and Saul regarding the matters upon which the EDC was seeking guidance concerning the proposed loan to 38 Studios.

162. The substance of the opinions expressed by Strategy Analytics at the June 2, 2010 meeting and telephone conference call was negative. Representatives for Strategy Analytics and/or Perimeter Partners presented nine opinions, which Stolzman considered to be "takeaways," according to notes taken contemporaneously by Stolzman:

(1) video gaming was not an "anchor tenant";

(2) the "cluster strategy" would not be fulfilled by 38 Studios;

(3) video gaming was a knowledge industry but not a core research and development industry or transfer industry;

(4) projections for 38 Studios were not likely to be fulfilled;

(5) Strategy Analytics and/or Perimeter Partners would not put $75 million into 38 Studios if they were in the EDC's position;

(6) gaming industry jobs were plateauing or even declining;

(7) growth was in casual gaming and handheld gaming;

(8) no other states had a big loan guaranty program like the one Rhode Island was proposing; and

(9) the cluster strategy was a "roll of the dice."

163. Over the next week Stolzman and Saul had several conversations and other communications with representatives of Strategy Analytics. Then, on June 10, 2010, and despite their negative assessment delivered orally on June 2, 2010, Strategy Analytics issued a written report that omitted, understated, or obscured Strategy Analytics' negative opinions that Stolzman had considered "takeaways."

164. The Strategy Analytics' written report contradicted their prior negative oral presentation (which was never disclosed to the EDC Board) not only in spirit but also on concrete and material points, including but not limited to the following:

a. Whereas the June 2 oral presentation had indicated that video game company would not constitute a "anchor tenant", the written report stated that Rhode Island's interest in the video gaming industry was based on the "interest and potential to attract an anchor tenant to Rhode Island in the video game industry, such as 38 Studios."

b. Whereas the June 2 oral presentation by Strategy Analytics and/or Perimeter Partners had indicated that the "cluster strategy" would not be fulfilled by 38 Studios, the written report included projections

of “Estimated Gross Employment Impact of Gaming Cluster in RI with 38 Studios as an Anchor Tenant.”

These contradictions were not disclosed to the EDC Board by Stolzman or Saul, despite their duty to make that disclosure.

165. At the June 14, 2010 EDC Board meeting, the EDC Board heard a presentation from Harvey Cohen (President of Strategy Analytics) and Barry Gilbert of Strategy Analytics. Strategy Analytics’ forty-page, single-spaced written report also was formally presented to the Board of Directors in public session on June 14, 2010.

166. Harvey Cohen and Barry Gilbert also made a PowerPoint presentation to the EDC Board at the meeting on June 14, 2010 that identified 38 Studios as an anchor tenant and discussed how the cluster strategy could be fulfilled with 38 Studios, contrary to their oral representations to Stolzman and others on June 2, 2010. Once again, contrary to their duties, neither Stolzman nor Saul disclosed to the EDC Board that Strategy Analytics’ opinions expressed to the EDC Board were diametrically opposite to the opinions this consultant had orally expressed 12 days earlier.

167. During the June 2, 2010 oral presentation by Strategy Analytics to Stolzman and Saul, representatives from Strategy Analytics and/or Perimeter Partners had indicated that if they were in the EDC’s position, they would not be willing to go forward with the $75 million loan to 38 Studios. However, at the EDC Board meeting on June 14, 2010, a director asked a representative of Strategy Analytics if he would go forward with the proposed loan to 38 Studios if he were in the place of the EDC, and the representative responded affirmatively. Defendants Stolzman and Saul did not disclose to the EDC Board that the diametrically opposite opinion had been offered twelve days earlier.

168. On July 16, 2010, Gina Raimondo ("Raimondo"), then candidate for Rhode Island State Treasurer, sent an email to Stokes regarding the proposed 38 Studios transaction. Her email detailed her reservations and "significant concerns" over the EDC entering into the 38 Studios transaction, and offered to put the EDC in touch both with investors who had reviewed and rejected the 38 Studios transaction and her specifically named partner at their venture capital firm who was an expert in video gaming.

169. Raimondo met with both Stokes and Stolzman and was informed that her offer of assistance was declined. Neither Stolzman nor Stokes ever disclosed any information concerning these matters or Raimondo's offer to the EDC Board.

G. Defendants Adler Pollock and Stokes Improperly Denied the EDC Board the Opportunity to Reconsider

170. Throughout the summer of 2010, then gubernatorial candidate Lincoln Chafee ("Chafee") publicly questioned the wisdom of the 38 Studios transaction. On August 5, 2010, Chafee sent a letter to Defendant Stokes stating his objections to the 38 Studios transaction. Chafee noted his own "philosophical aversion to any risky deal for our taxpayers," and stated that his "overriding concern is about process – or, rather, in this case, the absence of process." Chafee concluded his letter as follows:

> . . . I am asking you to convene a special meeting of the RIEDC Board of directors at which time this matter can be reconsidered. I call on you and the Board to suspend the commitment to 38 Studios and to conduct a full, fair and far reaching RFP process to ensure that Rhode Island gets the best possible use of its new loan guarantee fund.

171. Stokes responded to Chafee by letter on August 9, 2010. Stokes' letter to Chafee, which was drafted by Stolzman, contained the following "reminder:"

> As a reminder, the RIEDC considered the market analysis performed by outside independent consultants and confirmed using sophisticated lending criteria . . . .
>
> * * *
>
> The RIEDC's review of this transaction was and continues to be thorough, deliberative, cautious and smart.

The statement that the EDC used "sophisticated lending criteria" was misleading if not downright false, considering that the EDC had not completed its customary internal credit memorandum or any lending analysis, or that the EDC customarily would "have more information on the typical $10K micro loan" than it had on this "$75 million request," as noted by the EDC analyst on May 28, 2010.

172. On August 16**,** 2010, at the suggestion of Stolzman and principally to prevent Chafee from presenting his objections to the EDC Board, the EDC Board members were notified by Stokes that the August meeting was cancelled. However, one of the directors objected, on the grounds that "these are difficult times and there are a number of issues to address," including "38 Studios."

173. Stokes then put the meeting back on the calendar. However, again at Stolzman's suggestion, the published agenda for the August meeting did not include discussion of 38 Studios. Stolzman and Stokes excluded it from the agenda intending to take advantage of the fact that the absence of 38 Studios on the published agenda precluded the EDC Board from taking any action concerning 38 Studios even if they wanted to.

174. In furtherance of this plan, 38 Studios did not again appear on the agenda for any EDC Board meeting until after the closing on November 2, 2010.

H. Stolzman Did Not Correct the False Legal Opinion That Stokes Gave to the EDC Board to Keep Them from Reconsidering the 38 Studios Transaction

175. In late August 2010, another gubernatorial candidate (and then Rhode Island State Treasurer) Frank Caprio ("Caprio"), who had originally supported the 38 Studios transaction, changed his position and now opposed the 38 Studios deal, and asked the EDC Board to reconsider. In addition, Caprio called upon Standard & Poor's and Moody's Investor Services, who were rating the Bonds, to suspend their review of the 38 Studios transaction.

176. Prompted by this pressure, on August 31, 2010 Stokes sent an email to each member of the EDC Board falsely informing them that the EDC was legally obligated to "move forward" to closing the loan with 38 Studios.

177. The EDC had no legal obligation to go forward with the 38 Studios transaction, because, *inter alia*, the EDC Board's Authorizing Resolution and agreement to the Term Sheet was procured through misrepresentations, and because the final contract documents had not yet been negotiated.

178. Although Stolzman immediately informed Stokes that the statement that Stokes had made to the EDC Board was incorrect, and that the EDC did not have a legal obligation to close, neither of them so informed the EDC Board.

179. Stolzman and Stokes thereby successfully preempted the members of the EDC Board from reconsidering the 38 Studios transaction, notwithstanding the opposition expressed by candidates Chafee, Caprio, and Raimondo, and many members of the general public.

I. Defendants Failed to Implement the EDC Board's Requirement for Third-Party Assessment and Monitoring

180. At the July 15, 2010 executive session of the EDC Board, attended by Stolzman, Afonso, and Gurghigian of First Southwest, the EDC Board required either that a completion bond be obtained for the Copernicus project, or, alternatively, that third-party assessment and monitoring be required.

181. Up to and including this meeting, the EDC Board had not been presented with an analysis of 38 Studios' budget and timetable for completing production of Copernicus prepared by any independent and qualified expert, to assess the likelihood that Copernicus would be completed on the schedule and within the budget as projected by 38 Studios (being on schedule and within budget were critical factors to 38 Studios' ability to repay the loan), and setting forth a means for ensuring 38 Studios adhered to its budget and timetable after the Closings and a mechanism for the EDC to withhold funds if 38 Studios did not.

182. A completion bond is an undertaking by a surety company to complete the project in the event the developer breaches its contractual obligation and fails to complete, such as by simply abandoning the task or going out of business. A completion bond had previously been obtained for 38 Studios' completion of production on the RPG, *Kingdoms of Amalur: Reckoning*, the production costs of which were less than a third of the EDC's loan to 38 Studios. The beneficiary of that bond had been the bank that had financed 38 Studios' development of *Amalur.* That bond was required to be in place prior to that bank's disbursement of any loan proceeds.

183. In a July 22, 2010 confidential memorandum to the EDC Board, prepared by Stolzman, signed by Stokes, and distributed to Afonso, Stokes told the EDC Board

that a completion bond was not available for an MMO project because of the project's size and insurance marketplace conditions. In fact, Stolzman, Afonso, and Stokes knew or should have known that a completion bond was out of the question, regardless of the project's size or insurance marketplace conditions, because no insurer would bond completion of a project that had a known shortfall in funding. Stolzman, Afonso, and Stokes did not inform the EDC Board of this much more broadly significant reason why a completion bond was out of the question.

184. In the memorandum that Stolzman drafted and Afonso reviewed, Stokes did inform the EDC Board, however, that the "benefits and safeguards of a completion bond" could be replicated by implementing a third-party assessment and monitoring system through one of a number of consultants available in the marketplace, such as International Film Guarantors, LLC ("IFG") who had provided the completion bond for *Kingdoms of Amalur: Reckoning*. The memorandum concluded as follows:

> With that in mind, we have modified the Term Letter reflecting that **the deal will not close unless and until we have reached a satisfactory agreement with 38 Studios and a third-party monitoring entity** on a cost and protocol for such monitoring. While we have not yet been able to outline the details of that monitoring, I am comfortable that we can develop something satisfactory in that regard, or, in the alternative, **I will not proceed to closing the transaction without consulting with you if such a mechanism cannot be achieved to our reasonable satisfaction.**
>
> [emphasis supplied].

185. Defendants Stolzman, Adler Pollock, Moses Afonso, and Afonso undertook to set forth the EDC Board's requirements for third party assessment and monitoring in the Term Sheet. They revised the Term Sheet to include the following provision:

> (c) The bond documents shall reflect the development and implementation of a third party monitoring, reporting and response process regarding the development schedule and budget for project Copernicus to assure that the company's development of project Copernicus remains on time and on budget pursuant to costs, terms and conditions satisfactory to the parties in their sole and absolute discretion.

This provision and the entire Term Sheet were incorporated in the Authorizing Resolution as Exhibit A, which was incorporated by reference and became an integral part thereof.

186. This language was drafted by Stolzman and approved by Afonso and First Southwest, and presented to the EDC Board as satisfying the EDC Board's determination reached at the July 15th meeting and reiterated at the July 26th meeting that the loan transaction must not close until EDC had received either a completion bond or an independent expert's validation of 38 Studios' timetable and financial projections for completing Project Copernicus on time and within the constraints of its budget. However, it does not expressly refer to an initial assessment, or state that such assessment was a condition of and would be due prior to the Closings.

187. Insofar as a completion bond was apparently not available, any "third party monitoring, reporting, and response process regarding the development schedule and budget," offered as a substitute for a completion bond necessarily required an initial assessment to determine whether the projected budget and timetable was feasible at the outset, and to establish criteria to monitor the progress. This was especially important since a large portion of the loan proceeds would be disbursed at the Closings but the EDC would not have a completion bond to fall back upon if 38 Studios thereafter failed to complete Copernicus.

188. Therefore, insofar as Defendants Stolzman, Adler Pollock, Moses Afonso, and First Southwest deliberately chose to omit any obligation for an initial assessment when they failed to expressly refer to the initial assessment in the Term Sheet, they violated their undertakings to the EDC Board. Insofar as the omission was merely negligent, they had the duty and obligation to correct it when they prepared the loan and trust documents. As discussed in paragraphs 195-198, *infra*, they failed to do that, either.

189. Staff and counsel for the EDC then attempted to negotiate a direct agreement between the EDC, 38 Studios, and a third-party monitor such as IFG. However, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, and First Southwest allowed 38 Studios to reject IFG and instead select International Business Machines ("IBM") as the third-party monitor.

190. Upon entering into negotiations, Defendants Saul, Stolzman, and Afonso learned that IBM expressly refused a) to enter into any agreement with the EDC, b) to work for the EDC, c) to have any obligations to the EDC, d) to permit 38 Studios to assign any of 38 Studios' rights to the EDC, or e) to permit the EDC to be a third-party beneficiary of IBM's obligations to 38 Studios.

191. Although IBM was willing to and eventually did enter into an agreement solely with 38 Studios, that agreement expressly prohibited either party from assigning its rights to a third party and limited IBM's liability for any breach of its agreement with 38 Studios to at most the amount of the fees that IBM would receive under that agreement in any twelve-month period, which at most would total approximately $262,000, and, therefore, would hardly provide adequate recourse if IBM's negligence

or breach of contract caused the EDC to go forward with the $75 million loan without the benefit of an accurate and independent initial assessment, or IBM subsequently breached its duty to monitor 38 Studios' performance.

192. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Saul, and Stokes knew or should have known that the authority granted by the EDC Board to them to close the transactions required a direct contract between the EDC and the third-party monitor. Indeed, Stolzman stated:

> We need IBM to commit to share this information directly with the EDC on a real time basis. **We cannot rely on 38 Studios providing us with this information and conform with the authority to enter into this transaction. Both this issue and the transparency of the public record go to the authority of the EDC to enter into the bonds.**
>
> [emphasis supplied].

193. Nevertheless, Defendant Stolzman decided and Defendants Saul, Stokes, and Afonso agreed that the EDC should enter into a Project Monitoring Agreement solely with 38 Studios that purported to assign to the EDC all of 38 Studios' rights against IBM. However, Defendants Stolzman, Afonso, Saul, and Stokes knew or should have known that the purported assignment was void, and that such an arrangement was totally ineffectual and would not and could not conform to the authority that Stokes and Stolzman had received from the EDC Board. They also knew or should have known that such an agreement violated Stokes' undertaking to the EDC Board that "I will not proceed to closing the transaction without consulting with you if such a mechanism cannot be achieved to our reasonable satisfaction." Nevertheless, on September 17, 2010 Stolzman and Afonso recommended and Stokes agreed to accept precisely that arrangement in the Project Monitoring Agreement.

194. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, and First Southwest never informed the EDC Board that they had not complied with the EDC Board's requirements for third-party assessment and monitoring and were closing or had closed a transaction not authorized by the EDC Board.

J. Defendants Negligently Drafted the Loan and Trust Agreement

195. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Stokes, and Saul negotiated the loan and trust agreement between the EDC and 38 Studios (the "Loan and Trust Agreement"), on behalf of the EDC.

196. They negligently failed to include in such Loan and Trust Agreement an clear provision that required an initial assessment, or that the initial assessment would be due prior to the Closings, or that, in the event that 38 Studios breached any of its obligations under the Project Monitoring Agreement, the EDC would have the right to withhold the unpaid balance of the loan proceeds.

197. Said Defendants also failed to include in the Loan and Trust Agreement a clear provision that gave the EDC the right to withhold payments if 38 Studios departed significantly from the time and budget it projected for the completion of Copernicus.

198. Without such rights, the Project Monitoring Agreement was totally ineffectual to protect the EDC, and did not conform to the intent of the EDC Board when it authorized the EDC to enter into transaction with 38 Studios. Defendants Stolzman, Adler Pollock, Afonso, Moses Afonso, First Southwest, Stokes, and Saul had the duty to either require such provisions in the Loan and Trust Agreement, or, if 38 Studios refused, to disclose that refusal to and receive instructions from the EDC Board prior to the EDC entering into the Loan and Trust Agreement.

K. Defendants' Concealment of Their Failure to Obtain Meaningful Third-Party Monitoring

199. As noted above, Wells Fargo prepared the initial draft of the Bond PPM and Defendants Wells Fargo, Stolzman, Adler Pollock, Moses Afonso, Afonso, and First Southwest participated in numerous revisions. By September 28, 2010, these revisions included adding the following paragraph:

> In connection with the Project and the issuance of the 2010 Bonds, the Issuer [EDC] and the Company executed a Project Monitoring Agreement to implement third-party monitoring, reporting and response processes regarding the development schedule and budget for *Copernicus*™ in order to assure the Company's development of C*opernicus*™ remains on time and on budget. The Issuer [EDC] entered into an agreement with International Business Machines Corporation ("IBM") on September 14, 2010 to provide these third-party monitoring services.

This language is included in the final Bond PPM that was distributed to potential investors, including the investors who purchased the bonds.

200. The Bond PPM defines "Issuer" as the EDC, the issuer of the bonds. In fact, from the time this revision was originally proposed up to the closing on November 2, 2010, there was no agreement between the EDC and IBM.

201. Indeed, as noted in paragraph 190, *supra*, there was never any agreement between the EDC and IBM.

202. Thus, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, and Wells Fargo all knew or should have known that the Bond PPM misrepresented that the EDC had entered into an agreement with IBM.

203. As noted above, the BPA sets forth the following additional "Issuer's Representations, Warranties and Covenants":

> to the knowledge and belief of the Issuer's officers [which includes Stolzman], the information with respect to the Issuer in the Preliminary Private Placement Memorandum and Private Placement Memorandum is true and correct in all material respects, and such information does not contain, and as of the Closing will not contain, any untrue statement of a material fact or omit to state any material fact which is necessary to make the statements therein, in light of the circumstances under which they were made, not misleading;

204. In fact, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, and Wells Fargo all knew or should have known that the Bond PPM incorrectly represented that the EDC had entered into an agreement with IBM while in fact IBM reported only to 38 Studios, and had no duties to the EDC.

205. On November 2, 2010, Defendants Moses Afonso and Afonso gave an opinion including certifications that the Loan and Trust Agreement and the bonds had been "duly authorized" by the EDC. When Moses Afonso and Afonso gave this opinion, they knew or should have known that the EDC Board had only authorized a bond transaction to proceed with appropriate third-party monitoring (including an initial assessment of the feasibility of 38 Studios' budget and timetable) which was absent, and therefore this opinion was wrong if not false.

206. On November 2, 2010, Defendants Stolzman and Adler Pollock gave an opinion including certifications that each of the Bond Documents had been "duly authorized" by the EDC. Defendants Stolzman and Adler Pollock gave this opinion even though they knew or should have known that the EDC Board had only authorized a bond transaction to proceed with appropriate third-party assessment and monitoring, which was absent.

207. On November 2, 2010, the Closings took place without an Initial Assessment in hand and without an adequate third-party monitoring system in place.

L. Defendants' Further Failure to Obtain the IBM Initial Assessment

208. Under the agreement between 38 Studios and IBM, IBM was to perform an Initial Assessment of Copernicus and subsequent quarterly reviews. IBM was to receive $189,750 for the Initial Assessment Services and $18,000 per quarterly review thereafter.

209. In its agreement with 38 Studios, dated September 14, 2010, IBM represented that its Initial Assessment of Copernicus' budget and timetable could be completed in five weeks. Thus Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Saul, Stokes, and Wells Fargo knew or should have known that IBM could have completed the Initial Assessment by early November 2010, and that if it were not finished by then, the Closings could have been postponed until it was.

210. The fees to all of these Defendants were to be paid from the bond proceeds at the time of the closing, and the fees of at least several of them were contingent upon the deal closing.

211. The Closings went ahead on November 2, 2010 without the EDC having received IBM's Initial Assessment, and without the EDC staff or counsel learning whether or not IBM or any independent expert agreed that 38 Studios had a viable plan to complete Copernicus on time and on budget.

212. In fact, IBM did not even begin its Initial Assessment until several months after the Closings. The agreed-upon scope of IBM's Initial Assessment was summarized in that report as follows:

ASSESSMENT OBJECTIVE

Determine the ability of 38 Studios to go live with an MMO [Copernicus] as measured by:

Cost
Schedule
Scope

IBM delivered its Initial Assessment to 38 Studios—but not the EDC—on March 11, 2011, but that Initial Assessment completely failed to even address the adequacy of 38 Studios' budget or timetable. IBM justified that failure on the grounds that 38 Studios had not even provided IBM with any financial information.

COUNT I
(Breach of Fiduciary Duty)

213. Plaintiff repeats and realleges paragraphs 1 through 212, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

214. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, First Southwest, Wells Fargo, and Barclays, and each of them, had a fiduciary or confidential relationship with the EDC Board, whom Defendants knew had exclusive authority to approve the EDC's transaction with 38 Studios.

215. It was therefore said Defendants' duty:

a. to exercise utmost good faith in their dealings with the EDC Board with due regard to the interests of the EDC;

b. to make full and truthful disclosure of all material facts to the EDC Board and not to omit any material facts that would be necessary to make the facts disclosed not misleading;

c. to refrain from abusing such confidence by obtaining any advantage for themselves or any third party at the expense of the EDC; and

d. to be loyal to the EDC.

216. The EDC Board, and thus the EDC, relied upon Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, First Southwest, Wells Fargo, and Barclays fulfilling their fiduciary duty when the EDC Board approved the 38 Studios' loan transaction and issuance of the bonds on July 26, 2010 and allowed the Closings to take place on November 2, 2010.

217. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, First Southwest, Wells Fargo, and Barclays breached said fiduciary duty, causing damage to the EDC.

218. The actions and omissions of Defendants include, *inter alia,* the following:

a. allowing Defendant MacLean and 38 Studios to commit larceny, as set forth in paragraphs 274 & 275-278, *infra*;

b. causing the EDC Board to unwittingly violate R.I. Gen. Laws § 42-64-10 by adopting a false finding that adequate provision has been made or will be made for completion of the project;

c. arrogating to themselves the decision-making process concerning the terms under which the EDC would make the loan and issue the Bonds and treating the EDC Board as an obstacle to be overcome and manipulated, in violation of state law that the powers of the EDC are vested in the EDC Board;

d. permitting 38 Studios to utilize financial projections that were based on known false assumptions and failed to include known expenses;

e. suppression of the EDC's usual and customary method of evaluating potential loans through preparation of thorough internal credit memoranda;

f. structuring presentations to the EDC Board that failed to address the core merits of the 38 Studios' transaction and contained material misrepresentations and omissions;

g. keeping the EDC Board from hearing the contrary opinions of Raimondo, Chafee, or Caprio;

h. falsifying the Authorizing Resolution and the Term Sheet to conceal the shortfall;

i. manipulating the agenda for EDC Board meetings to keep the EDC Board from exercising their right to reconsider their approval before the Closings on November 2, 2010;

j. falsely stating to the EDC Board that the EDC by August 2010 was legally required to complete the transactions;

k. having the EDC issue press releases which falsely stated that the EDC had performed exhaustive due diligence in connection with the transactions;

l. depriving the EDC of independent third party assessment of the transaction prior to the Closings or ever; and

m. securing adoption of the Authorizing Resolution by mollifying the EDC Board with assurances regarding third party monitoring and then not reporting to and concealing from the EDC Board the absence of meaningful third party monitoring.

219. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of compensatory and punitive damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., First Southwest Company, Keith Stokes, J. Michael Saul, Wells Fargo Securities, LLC, and Barclays Capital PLC, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT II
(Breach of Fiduciary Duty – Wells Fargo's Hidden Commissions)

220. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

221. Defendant Wells Fargo had a fiduciary or confidential relationship with the EDC Board, whom said Defendant knew had exclusive authority to approve the EDC's transaction with 38 Studios.

222. It was therefore said Defendant's duty:

a. to exercise utmost good faith in their dealings with the EDC Board with due regard to the interests of the EDC;

b. to make full and truthful disclosure of all material facts to the EDC Board and not to omit any material facts

that would be necessary to make the facts disclosed not misleading;

c. to refrain from abusing such confidence by obtaining any advantage for themselves or any third party at the expense of the EDC; and

d. to be loyal to the EDC.

223. The EDC Board relied upon Defendant Wells Fargo fulfilling their fiduciary duty when the EDC Board approved the 38 Studios' loan transaction and issuance of the bonds and allowed the Closings to take place on November 2, 2010.

224. Defendant Wells Fargo, through the agreement with 38 Studios to obtain hidden commissions and for 38 Studios to use best efforts to secure Wells Fargo's retention by the EDC, and its failure to disclose said agreement, breached said fiduciary duty, causing damage to the EDC.

225. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of compensatory and punitive damages against Defendant Wells Fargo Securities, LLC, plus interest, costs, and such other and further relief as may be just.

COUNT III
(Fraud)

226. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

227. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Schilling, Zaccagnino, MacLean, Saul, Stokes, First Southwest, and Wells Fargo, and each of them, intentionally defrauded the EDC Board and the EDC.

228. Plaintiff relied upon Defendants' acts, practices, and courses of business that operated as a fraud upon Plaintiff and would not have issued the Bonds but for those acts, practices and courses of conduct.

229. Plaintiff was defrauded thereby.

230. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Keith Stokes, J. Michael Saul, Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, First Southwest Company, and Wells Fargo Securities, LLC, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT IV
(Fraudulent Misrepresentations and Omissions)

231. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

232. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Saul, Stokes, First Southwest, and Wells Fargo, and each of them, made intentional misrepresentations to the EDC Board and intentionally omitted providing the EDC Board with material information under circumstances where said Defendants had a duty to speak.

233. Plaintiff relied upon Defendants' misrepresentations and omissions and would not have issued the Bonds but for those misrepresentations and omissions.

234. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Keith Stokes, J. Michael Saul, Jennifer MacLean, First Southwest Company, and Wells Fargo Securities, LLC, jointly and severally, plus interest, costs, and such other and further relief as may be just. .

COUNT V
(Negligent Misrepresentation)

235. Plaintiff repeats and realleges Paragraphs 1 through 212, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the phrase "should have known" substituted therefor.

236. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Stokes, Saul, First Southwest, Wells Fargo, and Barclays (through Wells Fargo), and 38 Studios, and each of them, made negligent misrepresentations to the EDC Board and negligently omitted to provide the EDC Board with information necessary to make their representations not misleading, intending that the EDC Board would rely upon them.

237. Plaintiff relied on these misrepresentations and omissions, to Plaintiff's detriment.

238. As a result of these misrepresentations, Plaintiff suffered damages.

239. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Jennifer MacLean, Keith Stokes, J. Michael Saul, First Southwest Company, Wells Fargo Securities, LLC, Barclays Capital PLC, and Starr Indemnity and Liability Company, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT VI
(Legal Malpractice)

240. Plaintiff repeats and realleges paragraphs 1 through 212, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the phrase "should have known" substituted therefor.

241. At all times relevant to this complaint, Defendants Stolzman, Adler Pollock, Moses Afonso, and Afonso owed Plaintiff the duty to exercise the degree of

skill and diligence of the average attorney specializing in their respective areas of practice.

242. Defendants Stolzman, Adler Pollock, Moses Afonso, and Afonso breached their duty, failed to exercise the degree of skill and diligence required of such attorneys, and were otherwise negligent in their representation of the EDC.

243. As a direct and proximate result of Defendants Stolzman, Adler Pollock, Moses Afonso, and Afonso, Plaintiff incurred damages.

244. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., and Antonio Afonso, Jr. jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT VII
(Negligence)

245. Plaintiff repeats and realleges paragraphs 1 through 212, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the phrase "should have known" substituted therefor.

246. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, First Southwest, Wells Fargo, and Barclays, and 38 Studios, and each of them, acted negligently, causing damages to Plaintiff.

247. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Keith Stokes, J. Michael Saul, First Southwest Company, Wells Fargo Securities, LLC, Barclays Capital PLC, and Starr Indemnity and Liability Company, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT VIII
(Breach of Implied Covenant of Good Faith and Fair Dealing)

248. Plaintiff repeats and realleges paragraphs 1 through 212.

249. The contracts between Plaintiff and Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, Wells Fargo, and Barclays, as well as 38 Studios, each contained an implied covenant of good faith and fair dealing.

250. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, Wells Fargo, Barclays, and 38 Studios, breached this covenant, causing damages to Plaintiff.

251. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., J. Michael Saul, Keith Stokes, First Southwest Company, Wells Fargo Securities, LLC, Barclays Capital PLC, and Starr Indemnity and Liability

Company, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT IX
(Damages under R.I. Gen. Laws § 42-64-9.3 (Criminal Penalties Including Damages for Violating R.I. Gen. Laws § 42-64-1 *et seq.*))

252. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

253. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, First Southwest, and MacLean violated R.I. Gen. Laws § 42-64-9.3 by knowingly making false statements and representations in documents filed or required to be maintained under R.I. Gen. Laws § 42-64-1, *et seq.*

254. To the extent that they did not directly violate said statute, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, First Southwest, and Wells Fargo, and each of them, aided and abetted violation of said statute by 38 Studios and each another, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-3.

255. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, First Southwest, and Wells Fargo, and each of them, combined and conspired to violate said statute, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-6.

256. Plaintiff's damages directly related to said violation include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction

thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, First Southwest Company, and Wells Fargo Securities, LLC, jointly and severally, plus reasonable attorney's fees, interest, costs, and such other and further relief as may be just.

COUNT X
(Mandatory Final Injunction Pursuant to EDC Enforcement Powers)

257. Plaintiff repeats and realleges paragraphs 1 through 212 and paragraphs 253 through 256.

258. Plaintiff brings this action to enforce the provisions of R.I. Gen. Laws § 42-64-1 *et seq.*, including but not limited to R.I. Gen. Laws § 42-64-9.3.

259. Plaintiff seeks injunctive relief.

260. Pursuant to R.I. Gen. Laws § 42-64-9.4(b), it "shall not be necessary for the [EDC] to establish that without the relief the injury, which will result will be irreparable or that the remedy at law is inadequate."

261. In any event, without this relief Plaintiff will suffer irreparable injury and the remedies at law are inadequate, insofar as they may not provide the EDC with sufficient funds to pay the bondholders.

262. Considering the balance of the hardships between Plaintiff and Defendants, an equitable remedy is warranted.

263. The public interest would not be disserved by the permanent injunction requested herein, ordering Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, MacLean, Wester, Schilling, Zaccagnino, First Southwest, Starr, Wells Fargo, and Barclays to pay into the registry of court a sum sufficient to pay the bondholders the interest and principal necessary to avoid a default on the Bonds, or, in the alternative, a sum sufficient to defease the Bonds.

WHEREFORE Plaintiffs demand a mandatory final injunction against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, Keith Stokes, J. Michael Saul, First Southwest Company, Starr Indemnity and Liability Company, Wells Fargo Securities, LLC, and Barclays Capital PLC, directing and ordering them to pay into the registry of court a sum sufficient to pay the bondholders the interest and principal necessary to avoid a default on the Bonds, or, in the alternative, a sum sufficient to defease the Bonds, plus reasonable attorney's fees.

COUNT XI
(Civil Damages under R.I. Gen. Laws § 9-1-2 Based upon Violations of R.I Gen. Laws §§ 11-18-1, 11-18-6, 11-18-7, 11-18-8, or 11-41-4)

264. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are a deleted and the word "knew" substituted therefor.

265. 38 Studios and Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, First Southwest, and Wells Fargo, each committed violations of R.I Gen. Laws §§ 42-64-9.3, 11-18-1, 11-18-6, 11-18-7, 11-18-8, or 11-41-4. Such violations included:

> a) violation of R.I. Gen. Laws § 42-64-9.3 by knowingly making false statements and representations in documents filed or required to be maintained under R.I. Gen. Laws § 42-64-1, *et seq.*;
>
> (b) violation of R.I. Gen. Laws § 11-18-1 by knowingly giving a document to an agent, employee, servant, or public official of the EDC in respect of which the EDC was interested, which contained a statement that was false or erroneous or defective in any important particular and which was knowingly intended to mislead the EDC;
>
> (c) violation of R.I. Gen. Laws § 11-18-6 by knowingly making or causing to be made, either directly or indirectly, or through any agency whatsoever, a false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of 38 Studios, for which Defendants were acting, for the purpose of procuring in any form whatsoever the payment of cash, the making of a loan or credit, the extension of a credit, or the making or acceptance a promissory note, for the benefit of either themselves or of 38 Studios;
>
> (d) violation of R.I. Gen. Laws § 11-18-7 by, knowing that a false statement in writing had been made respecting the financial condition or means or ability to pay of 38 Studios, for whom Defendants were acting, procuring, upon the faith of the statement, for the benefit either of themselves or 38 Studios, either or any of the things of benefit as provided in § 11-18-6;
>
> (e) violation of R.I. Gen. Laws § 11-18-8 by, knowing that a statement in writing had been made respecting the financial condition or means or ability to pay of himself or herself or the person, firm, or corporation, in which he or she is interested, or for whom he or she is acting, representing on a later day, either orally or in writing, that the statement previously made, if then again made on that day, would be

> then true, when in fact, that statement if then made would be false, and procure upon the faith of it, for the benefit either of himself or herself or of the person, firm, or corporation, either or any of the things of benefit as provided in § 11-18-6; and
>
> (f) violation of R.I. Gen. Laws § 11-41-4, by obtaining from another designedly, by any false pretense or pretenses, any money or other property, with intent to cheat or defraud.

266. To the extent that they did not directly violate said statutes, Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, First Southwest, and Wells Fargo, and each of them, aided and abetted violation of said statutes by 38 Studios and one another, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-3.

267. Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, First Southwest, and Wells Fargo, and each of them, combined and conspired to violate said statutes, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-6.

268. Said Defendants' violations of R.I Gen. Laws §§ 42-64-9.3, 11-1-3, 11-1-6, 11-18-1, 11-18-6, 11-18-7, 11-18-8, or 11-41-4, constituted commissions of crimes or offenses, causing injuries for which Defendants have civil liability under R.I. Gen. Laws § 9-1-2.

269. Plaintiff has been damaged as a result.

270. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, First Southwest Company, and Wells Fargo Securities, LLC, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT XII
(R.I. RICO (sub-section (a))

271**.** Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

272. Rhode Island's RICO statute, R.I. Gen. Laws § 7-15-1 *et seq.,* states in § 7-15-2(a) as follows:

> **§ 7-15-2 Prohibited activities. –** (a) It is unlawful for any person who has knowingly received any income derived directly or indirectly from a racketeering activity or through collection of an unlawful debt, to directly or indirectly use or invest any part of that income, or the proceeds of that income in the acquisition of an interest in, or the establishment or operation of any enterprise.

273. “Racketeering activity” under R.I. Gen. Laws § 7-15-1 includes any act involving larceny.

274. Defendant MacLean and 38 Studios obtained property from the EDC designedly, by false pretense or pretenses, with the intent to cheat or defraud the EDC, and, therefore, committed statutory larceny in violation of R.I. Gen. Laws § 11-41-4.

275. Defendant MacLean and 38 Studios’ obtaining money under false pretenses constitutes racketeering activity under R.I. Gen. Laws § 7-15-2(a).

276. Defendant MacLean and 38 Studios knowingly received income from a racketeering activity and directly or indirectly used or invested part of that income or the proceeds of that income in the operation of an enterprise, *i.e*. 38 Studios, in violation of R.I. Gen. Laws § 7-15-2(a).

277. Defendants Wells Fargo, Wester, Schilling, and Zaccagnino, and each of them, aided and abetted Defendant MacLean and 38 Studios to violate R.I. Gen. Laws § 11-41-4, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-3.

278. Defendants Wells Fargo, Wester, Schilling, and Zaccagnino, and each of them, combined and conspired with Defendant MacLean and 38 Studios to violate R.I. Gen. Laws § 11-41-4, and, therefore, are liable as principals pursuant to R.I. Gen. Laws § 11-1-6.

279. Defendants Wells Fargo, Wester, Schilling, and Zaccagnino therefore committed acts “involving” larceny that constitute racketeering activity under R.I. Gen. Laws § 7-15-2(a).

280. Plaintiff was injured in its business or property by reason of said Defendants’ violation of R.I. Gen. Laws § 7-15-2(a).

281. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of treble damages against Defendants Wells Fargo Securities, LLC, Jennifer MacLean, Curt Schilling, Thomas Zaccagnino, and Richard Wester, jointly and severally, plus interest, costs, attorneys' fees, and such other and further relief as may be just.

COUNT XIII
(R.I. RICO (sub-section (c))

282. Plaintiff repeats and realleges paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

283. R.I. Gen. Laws § 7-15-2(c) states as follows:

> (c) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt.

284. 38 Studios is an enterprise within the meaning of R.I. Gen. Laws § 7-15-2(c).

285. Defendant MacLean conducted or participated in the conduct of that enterprise through racketeering activity, in violation of R.I. Gen. Laws § 7-15-2(c).

286. Defendants Wells Fargo, Wester, Schilling, and Zaccagnino aided and abetted Defendant MacLean in violating R.I. Gen. Laws § 7-15-2(c) and therefore are liable as principals for violating R.I. Gen. Laws § 7-15-2(c).

287. Defendants Wells Fargo, Wester, Schilling, and Zaccagnino conspired with Defendant MacLean to violate R.I. Gen. Laws § 7-15-2(c) and therefore are liable as principals for violating R.I. Gen. Laws § 7-15-2(c).

288. Plaintiff was injured in its business or property by reason of said Defendants' violation of R.I. Gen. Laws § 7-15-2(c).

289. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of treble damages against Defendants Wells Fargo Securities, LLC, Curt Schilling, Thomas Zaccagnino, Richard Wester, and Jennifer MacLean, jointly and severally, plus interest, costs, attorneys' fees, and such other and further relief as may be just.

COUNT XIV
(Civil Conspiracy)

290. Plaintiff repeats and realleges Paragraphs 1 through 212, and paragraph 218, except that for purposes of this Count, all references therein to "knew or should have known" are deleted and the word "knew" substituted therefor.

291. Defendants Wells Fargo, MacLean, Wester, Schilling, and Zaccagnino conspired to procure the unlawful issuance of the Bonds and the loan to 38 Studios, and to conceal the financing shortfall from the EDC Board.

292. This conspiracy was a combination of two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose.

293. As a result of this conspiracy, Plaintiff was damaged.

294. The EDC's damages include but are not limited to the following:

a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;

b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;

c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and

d. Defendants' conduct injured the EDC's reputation and credit, and has exposed the EDC to potential liability to third parties.

WHEREFORE, Plaintiff demands a judgment of money damages against Defendants Wells Fargo Securities, LLC, Curt Schilling, Thomas Zaccagnino, Richard Wester, and Jennifer MacLean, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT XV
(Unjust Enrichment)

295. Plaintiff repeats and realleges Paragraphs 1 through 212.

296. Plaintiff conferred a benefit upon the Defendants.

297. Defendants accepted the benefit.

298. Defendants accepted the benefit under such circumstances that it would be inequitable for Defendants to retain the benefit without paying the value thereof.

WHEREFORE, Plaintiff demands restitution by judgment of money damages and constructive trusts against Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., J. Michael Saul, Keith Stokes, First Southwest Company, Wells Fargo Securities, LLC, and Barclays Capital PLC, jointly and severally, plus interest, costs, and such other and further relief as may be just.

COUNT XVI
(Declaratory Relief on Liability)

299. Plaintiff repeats and realleges Paragraphs 1 through 298.

300. There exists an actual and legal controversy between the EDC and Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester,

Schilling, Zaccagnino, Saul, Stokes, First Southwest, Starr, Wells Fargo, and Barclays, in which the EDC has an interest, concerning the causes of action asserted herein.

301. That controversy is ripe for determination, even if there are future contingencies that may determine the amount of the EDC's damages.

WHEREFORE Plaintiffs demand a declaratory judgment declaring that Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, Keith Stokes, J. Michael Saul, First Southwest Company, Starr Indemnity and Liability Company, Wells Fargo Securities, LLC, and Barclays Capital PLC are liable to Plaintiff on the causes of action set forth herein, even if the exact quantum of Plaintiff's damages cannot yet be determined due to these future contingencies.

COUNT XVII
(Declaratory Relief for Indemnity and Contribution)

302. Plaintiff repeats and realleges Paragraphs 1 through 212.

303. Although not actively at fault, Plaintiff may be held liable to one or more third parties as a result of the active fault and wrongful conduct of Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, MacLean, Wester, Schilling, Zaccagnino, First Southwest, Wells Fargo, Barclays, and 38 Studios.

304. Plaintiff as the entity passively at fault, through the doctrine of *respondeat superior* or other forms of vicarious liability is entitled to indemnity or contribution from said Defendants.

305. There exists an actual and legal controversy between the EDC and Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, MacLean, Wester, Schilling, Zaccagnino, Saul, Stokes, First Southwest, Starr, Wells Fargo, Barclays, and

38 Studios in which the EDC has an interest, concerning this right to indemnity or contribution.

306. That controversy is ripe for determination, even if there are future contingencies, such as the possibility that the EDC's liability to third parties cannot be precisely determined at this time.

WHEREFORE Plaintiffs demand a declaratory judgment declaring that Defendants Robert I. Stolzman, Adler Pollock & Sheehan, P.C., Moses Afonso Ryan Ltd., Antonio Afonso, Jr., Curt Schilling, Thomas Zaccagnino, Richard Wester, Jennifer MacLean, Keith Stokes, J. Michael Saul, First Southwest Company, Starr Indemnity and Liability Company, Wells Fargo Securities, LLC, and Barclays Capital PLC are liable for contribution or to indemnify Plaintiff for liability to third parties arising out of said Defendants' conduct as set forth herein.

Plaintiff,
Rhode Island Economic Development Corporation,
By Its Attorneys,

_____
Max Wistow, Esq. (#0330)

_____
Stephen P. Sheehan, Esq. (#4030)

_____
Benjamin Ledsham, Esq. (#7956)
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(401) 831-2700
(401) 272-9752 (fax)

JURY DEMAND

Plaintiff requests trial by jury on all issues.

Plaintiff
Rhode Island Economic Development Corporation
By Its Attorney,

_____

Max Wistow, Esq. (#0330)
Wistow & Barylick, Inc.
61 Weybosset Street
Providence, RI 02903
(401) 831-2700
(401) 272-9752 (fax)

Dated: November 1, 2012

Exhibit 1

Reconciliation of cash flow adjustments

Original 38 Studios cash balance 12/31/12			$ 13,340,925
Adjustments regarding EDC Loan Transaction			
1. Amounts withheld at closing			
	Capital Reserve Fund	$ 12,749,912	
	Capitalized Interest Account	$ 10,604,077	
	Cost to Issue the Bonds	$ 650,000	
	Placement Agents' Fee	$ 634,065	
	Municipal Bond Insurance	$ 562,935	
			$ (25,200,989)
2. Guarantee Fee to be paid to RIEDC			
	2010	$ 375,000	
	2011	$ 1,125,000	
	2012	$ 1,125,000	
			$ (2,625,000)
3. Amounts Released from Capitalized Interest Account			
	2010	$ 1,500,000	
	2011	$ 6,000,000	
	2012	$ 3,104,077	
			$ 10,604,077
Cash balance as adjusted for EDC Loan Transactions 12/31/12			$ (3,880,987)*

* This figure does not include deductions for relocation expenses or Wells Fargo's secret commissions, which, if included, would decrease the cash balance and make the deficit significantly greater.