STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: June 22, 2016]

RHODE ISLAND ECONOMIC DEVELOPMENT CORPORATION, Plaintiff,	:	
v.	:	**C.A. No. PB 12-5616**
WELLS FARGO SECURITIES, LLC, et als. Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision are separate motions seeking permission to supplement the existing and extensive summary judgment record brought by Defendants Wells Fargo Securities, LLC (Wells Fargo), First Southwest Company (First Southwest), and Barclays Capital, Inc. (Barclays) (the motions to supplement) and a renewed motion seeking to strike from the summary judgment record all or portions of the affidavit of J. Michael Saul (the motion for reconsideration). Essentially, each of said Defendants seek to supplement the summary judgment record—which has been extensively briefed and essentially fully argued—utilizing material derived from an investigation by the United States Securities and Exchange Commission (SEC) identified as "In the matter of: 38 Studios, LLC," File No. B-02766-A. That investigation has led to litigation brought by the SEC against, inter alia, Plaintiff here (the EDC, now known as the Rhode Island Commerce Corporation) and one of the Defendants here, Wells Fargo.[1] That litigation, pending in the United States District Court for the District of Rhode

[1] Other Defendants in that litigation include J. Michael Saul whose testimony via affidavit, deposition, and/or to SEC investigators to a great extent forms the basis for the motions which

Island was the basis for recent motion practice before this Court seeking a stay of these proceedings pending final resolution of the SEC federal litigation. By decision herein dated June 1, 2016, the Defendants' request for a stay was denied. Plaintiff here objects to the several requests to supplement the record.

The Motions to Supplement

Plaintiff argues against the request to supplement the record in the manner sought by Defendants predicated upon three objections: (a) inexcusable neglect; (b) the evidence which Defendants ask be made part of the record is cumulative of already existing record evidence; and (c) the evidence which Defendants ask be made part of the record is inadmissible.

Plaintiff's inexcusable neglect argument is based on the provisions of Rule 6(b)(2) of the Rules of Civil Procedure which reads as follows:

> "When by these rules . . . or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:
>
> (1) . . .
>
> (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . .
>
> (3) . . . .

Plaintiff raises the specter of lack of excusable neglect; to wit, inexcusable neglect by the moving Defendants, by reason of the fact that the evidence which Defendants seek to have added to the record (claimed to be newly discovered evidence) consists of transcripts of sworn testimony by various witnesses questioned by SEC investigators during the referenced SEC investigation as well as notes taken by SEC investigators of apparently unsworn telephonic

---

are the subject of this Decision. That litigation is pending in the United States District Court for the District of Rhode Island and is docketed there as civil action number 1.16-cd-00107-JJM.

conversations with representatives of purchasers of the 38 Studios bonds, so-called. In addition to such evidence, each of the moving Defendants seek permission to file further brief memoranda in which they would comment on the "newly discovered evidence."

Plaintiff notes, inter alia, that both First Southwest and Wells Fargo as well as Barclays have long been aware of the SEC investigations; in fact, employees of Wells Fargo and of First Southwest were questioned under oath by SEC investigators as part of the investigation. The Court is told by Wells Fargo's lead counsel that federal regulations mandate that witnesses who so testify are entitled to copies of transcripts of their testimony and that in any event, the notes of counsel for former Deputy Director Saul (a former employee of Plaintiff and a Defendant originally sued herein by Plaintiff) of Saul's testimony to the SEC investigators was made available to Defendants some time ago. The Court further has been made aware of the existence of a so-called joint defense agreement among the Defendants herein—although during argument on the motions which are the subject of this Decision—counsel for Wells Fargo indicated that all defense counsel had been "tight lipped" during this matter. Plaintiff argues with telling force that the fact of the SEC investigation was known to the parties who as to their own employees and/or representatives could have had access to the transcripts of their testimony and who probably under the provisions of the joint defense agreement could have had access to the transcripts of testimony of co-Defendants' employees at a time prior to when summary judgment motions were to be filed.

Plaintiff further argues that based on the matters sought to be added to the summary judgment record by the several Defendants, such evidence is (except as hereinafter otherwise provided) simply cumulative of evidence already of record and all of it goes to matters which constitute disputed facts. During summary judgment proceedings, of course, the Court does not

weigh the evidence. Accordingly, the summary judgment process is not advanced by expanding the record as here requested by the moving parties.

This Court is satisfied that the record before it amply demonstrates that the Defendants' knowledge of the investigation is such that the Defendants (First Southwest and Wells Fargo) knew or should or could have known of the fact that various of their employees had been questioned by SEC investigators and that this knowledge was available to Defendants long before the date by which their summary judgment filings were due pursuant to this Court's Order. Having found that those Defendants knew but failed to take action to obtain copies or belatedly sought this Court's assistance in obtaining copies or had obtained such copies but failed within the appropriate timeframe to file, as part of their summary judgment filings, copies of the documents which they presently seek to make part of the record, the Court determines that it is satisfied that the Defendants failed to comply with the provisions of Rule 6(b)(2) as set forth above. That is to say, the Court finds that those Defendants' failure to identify and obtain and file what they now seek to supplement the record with has not been demonstrated by them to have come to their attention only now for reasons that amount to excusable neglect. The Court, having found that the Defendants did not satisfy the provisions of the Rule, finds that the objection of Plaintiff to Defendants' motions should be and hereby is sustained. The Court also finds that with respect to certain aspects of the matters sought to be added to the summary judgment record, such evidence appears to the Court to be simply cumulative of evidence already before it in connection with the summary judgment motions. During summary judgment proceedings, of course, the Court does not weigh the evidence. Accordingly, the summary judgment process is not advanced by expanding the record as here requested by the moving parties. Further, Plaintiff also argues and the Court agrees that in order to be taken into account

in connection with summary judgment proceedings tendered evidence must be admissible. Accordingly, while the Court has determined that the SEC investigators' notes of their telephone conversations with bond buyers constitutes impermissible hearsay and thus is inadmissible, it also now holds that hypothetical testimony by witness Esten as to what he would have done if certain facts had been known to him also constitutes inadmissible testimony (See SEC Esten Tr. 144:16-25, Apr. 7, 2014). Because Esten at the time of his deposition was not the employee of any party, the comments above as to the reason for not permitting the SEC transcripts to be introduced into the summary judgment record do not pertain to the transcript of Esten's testimony. The Court will permit Defendant First Southwest to add that transcript to the record redacted as to the hypothetical testimony indicated above and Defendants each may on or before June 29, 2016 file a supplemental memo of not more than ten pages limited to any issues arising out of Esten's testimony as redacted in accordance with the Court's comments above with respect to inadmissible evidence. Plaintiff may respond with up to ten pages per Defendant's memos received at or before the close of business on July 7, 2016. No further briefing will be permitted with respect to the issues herein referred to.

Barclays' *In Pari Delecto* Claim

Barclays, which already has argued its summary judgment motion, now seeks leave to supplement its argument so as to add the legal defense of *in pari delecto*. It tells the Court the fact that the SEC has named Plaintiff here as a defendant in the future litigation as a result of the SEC investigation caused Barclays to take the position that ". . . if the SEC is going to call a spade a spade on that issue (EDC as a culpable party) so are we. And, we think the Court ought to consider it." (See Tr. 27:11-13, June 8, 2016). Barclays candidly advised the Court during argument on June 8, 2016 that it had (prior to the SEC suit) made a decision to defer raising *in*

pari delecto in connection with its summary judgment motion at that time. While the Court appreciates Barclays' candor, in view of the present posture of this case, and particularly in view of the fact that Barclays already has argued its summary judgment motion and that Plaintiff has yet to argue its position, it has filed a substantial written objection without reference to *in pari delecto*, must decline at this time to permit Barclays to add a new dimension to the pending summary judgment matters. In a recent Decision by this Court[2], this Court held that due to the characteristics of *in pari delecto*, the issue is best suited for determination by the fact finder, the jury.

The Motions for Reconsideration

Also before the Court at this time is the further request of Wells Fargo that the Court reconsider its earlier Decision wherein it declined to strike the affidavit of J. Michael Saul provided by Saul in support of his motion for summary judgment against certain Defendants, including Wells Fargo. The Court did strike certain provisions of Saul's affidavit which was dated February 26, 2015 but essentially struck those provisions because they contained inadmissible evidence. Defendants had sought to have the entire affidavit stricken pursuant to the so-called "Sham Affidavit Rule." The Court declined to rule as requested by Defendants. Predicated now on the sworn testimony of Saul to the investigators in the SEC investigation, Wells Fargo asks the Court to reconsider its earlier ruling—specifically, Wells Fargo asks that the affidavit be stricken either because of (1) newly discovered evidence (i.e., Saul's SEC under oath interview) or (2) fraud upon the Court. Plaintiff's objections to various summary judgment motions, which presently pend before the Court, rely heavily on certain provisions of Saul's affidavit.

[2] Rhode Island Resource Recovery Corporation v. Restivo Monacelli, LLP, PB 10-4502, Decision 27-32, Feb. 23, 2015.

Wells Fargo tells the Court that the affidavit in question is offensive to it and that the Court also should be offended by the affidavit which Wells Fargo claims factually is substantially at odds with what Saul's testimony to the SEC investigators showed. Plaintiff, on the other hand, argues that there is support in Saul's SEC testimony consistent with various statements made by Saul in his affidavit. Wells responds to the comments by Plaintiff that under such circumstances, they should agree that the affidavit be stricken and that the supporting information contained in the sworn testimony before the SEC be relied upon by Plaintiff rather than the facts set forth in the Saul affidavit.

Essentially, Wells Fargo asks this Court to strike the affidavit on the grounds of its credibility (or in fact its lack of credibility). The summary judgment process is structured under our jurisprudence so that determinations as to credibility of witnesses and the weight to be given to their admissible evidence are reserved to the trier of fact (here, the jury). The role of a justice of this Court is to determine, predicated on the matters properly called to his attention, whether there are material facts in dispute—if so, then summary judgment should be denied and the determination of disputed facts is left to the jury. Of course, the jury will be instructed with respect to issues of credibility and weight to be assigned to evidence and testimony before it. Some courts have spoken of a tension that exists in the summary judgment process when courts are asked to deal with the credibility and/or weight of testimony or evidence before it in such proceedings. It is clear to this Court the whole structure of the summary judgment process is to alleviate that tension which is accomplished by leaving credibility and weight issues to the fact finder rather than the judge. While an exception has been engrafted into the process with respect to strict sham affidavits, here the Court has found that the sham affidavit exception is not applicable.

Accordingly, the Court declines the invitation to strike the Saul affidavit or any further parts thereof.

Conclusion

Based on the discussion above, the various motions to supplement the record all are denied excepting only that First Southwest may file Esten's redacted SEC transcript and Defendants each may file supplemental memoranda limited to not more than ten (10) pages to which the EDC will be permitted to respond with a memo of not more than ten (10) pages to each memo filed by a Defendant. The motions for reconsideration of the Court rulings with respect to the Saul affidavit are denied. No further oral argument with respect to the summary judgment motions in this case are contemplated except as the Court may order sua sponte and except that the existing Barclays' summary judgment oral argument shall continue on June 27, 2016.

Orders shall enter consistent with the foregoing.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al.
CASE NO:	PB 12-5616
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 22, 2016
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	SEE ATTACHED LIST
For Defendant:	SEE ATTACHED LIST

Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et als.
C.A. No. PB 12-5616

CERTIFICATION LIST

Max Wistow, Esq.
Wistow & Barylick
61 Weybosset Street
Providence, RI 02903-2824
Telephone: (401) 831-2700
Facsimile: (401) 272-9752
mw@wistbar.com
Counsel for Plaintiff

Stephen P. Sheehan, Esq.
Wistow & Barylick
61 Weybosset Street
Providence, RI 02903-2824
Telephone: (401) 831-2700
Facsimile: (401) 272-9752
spsheehan@wistbar.com
Counsel for Plaintiff

Benjamin G. Ledsham, Esq.
Wistow & Barylick
61 Weybosset Street
Providence, RI 02903-2824
Telephone: (401) 831-2700
Facsimile: (401) 272-9752
bledsham@wistbar.com
Counsel for Plaintiff

Robert M. Duffy, Esq.
Duffy & Sweeney, Ltd.
1800 Financial Plaza
Providence, RI 02903
Telephone: (401) 455-0700
Facsimile: (401) 455-0701
rduffy@duffysweeney.com
Counsel for Defendant Wells Fargo Securities, LLC

Thomas F. Holt, Jr., Esq.
K & L Gates, LLP
State Street Financial Center
One Lincoln Center
Boston, MA 02111-2950
Telephone: (617) 261-3100
Facsimile: (617) 261-3175
Thomas.holt@klgates.com
Counsel for Defendant Wells Fargo Securities, LLC

Gerald J. Petros, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903
Telephone: (401) 274-2000
Facsimile: (401) 277-9700
GPetros@haslaw.com
Counsel for First Southwest Company

Mitchell R. Edwards, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903
Telephone: (401) 274-2000
Facsimile: (401) 277-9600
medwards@haslaw.com
Counsel for First Southwest Company

Brian E. Robison, Esq.
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900
brobison@gibsondunn.com
Counsel for Defendant First Southwest Company

Russell H. Falconer, Esq.
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900
rfalconer@gibsondunn.com
Counsel for Defendant First Southwest Company

William M. Dolan, III, Esq.
Donoghue Barrett & Singal
155 South Main Street, Ste. 102
Providence, RI 02903
Telephone: (401) 454-0400
Facsimile: (401) 454-0404
wdolan@dbslawfirm.com
Counsel for Defendants Robert Stolzman and Adler, Pollock & Sheehan, P.C.

David P. Martland, Esq.
Silva, Thomas, Martland & Offenberg, Ltd.
1100 Aquidneck Avenue
Middletown, RI 02842
Telephone: (401) 849-6200
Facsimile: (401) 849-1820
dmartland@silvalawgroup.com
Counsel for Defendant Keith Stokes

David A. Grossbaum, Esq.
Hinshaw & Culbertson LLP
321 South Main Street
Providence, RI 02903
Telephone: (401) 751-0842
Facsimile: (401) 751-0072
dgrossbaum@hinshawlaw.com
Counsel for Defendants Antonio Afonso, Jr. and Moses Afonso Ryan, Ltd.

Samuel C. Bodurtha, Esq.
Hinshaw & Culbertson LLP
321 South Main Street
Providence, RI 02903
Telephone: (401) 751-0842
Facsimile: (401) 751-0072
sbodurtha@hinshawlaw.com
Counsel for Defendants Antonio Afonso, Jr. and Moses Afonso Ryan, Ltd.

Matthew R. Watson, Esq.
Hinshaw & Culbertson LLP
321 South Main Street
Providence, RI 02903
Telephone: (401) 751-0842
Facsimile: (401) 751-0072
mwatson@hinshawlaw.com
Counsel for Defendants Antonio Afonso, Jr. and Moses Afonso Ryan, Ltd.

Brooks R. Magratten, Esq.
Pierce Atwood LLP
10 Weybosset Street, Suite 400
Providence, RI 02903
Telephone: (401) 588-5113
Facsimile: (401) 588-5166
bmagratten@pierceatwood.com
Counsel for Defendant Barclays Capital, Inc.

James E. Brandt, Esq.
Tyler U. Nims, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022-4834
Telephone: (212) 906-1278
James.brandt@lw.com
Tyler.nims@lw.com
Counsel for Defendant Barclays Capital, Inc.

Jeffrey C. Schreck, Esq.
99 Wayland Avenue, Suite 200
Providence, RI 02906
Telephone: (401) 421-9600
Facsimile: (866) 587-1527
JSchreck@msn.com
Counsel for Defendants Richard Wester, Thomas Zaccagnino, Curt Schilling, and Jennifer MacLean

Michael F. Connolly, Esq.
Emily B. Kanstroom, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
Telephone: (617) 542-6000
Facsimile: (617) 542-2241
mfconnolly@mintz.com
ebkanstroom@mintz.com
Counsel for Defendants Richard Wester and Thomas Zaccagnino

Michael P. Duffy, Esq.
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210-2261
Telephone: (617) 951-2100
Facsimile: (617) 951-2125
mduffy@peabodyarnold.com
Counsel for Defendant Starr Indemnity and Liability Co.

Frederick E. Connelly, Jr., Esq.
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210-2261
Telephone: (617) 951-2100
Facsimile: (617) 951-2125
fconnelly@peabodyarnold.com
Counsel for Defendant Starr Indemnity and Liability Co.

Bruce W. Gladstone, Esq.
Cameron & Mittleman LLP
301 Promenade Street
Providence, RI 02908
Telephone: (401) 331-5700
Facsimile: (401) 331-5787
bgladstone@cm-law.com
Counsel for Defendant J. Michael Saul

Mark A. Berthiaume, Esq.
Greenberg Traurig
One International Place, 20th Floor
Boston, MA 02111
Telephone: (617) 310-6000
Facsimile: (617) 310-6001
berthiaumem@gtlaw.com
Counsel for Defendant Jennifer MacLean

Jonathan Bell, Esq.
Greenberg Traurig
One International Place, 20th Floor
Boston, MA 02111
Telephone: (617) 310-6000
Facsimile: (617) 310-6001
bellj@gtlaw.com
Counsel for Defendant Jennifer MacLean

Timothy E. Maguire, Esq.
Greenberg Traurig
One International Place, 20th Floor
Boston, MA 02111
Telephone: (617) 310-6000
Facsimile: (617) 310-6001
maguiret@gtlaw.com
Counsel for Defendant Jennifer MacLean

Carl E. Metzger, Esq.
Goodwin Procter LLP
One Exchange Place
Boston, MA 02109
Telephone: (617) 570-1000
Facsimile: (617) 523-1231
cmetzger@goodwinprocter.com
Counsel for Defendant Curt Schilling

Sarah Heaton Concannon, Esq.
Goodwin Procter LLP
One Exchange Place
Boston, MA 02109
Telephone: (617) 570-1000
Facsimile: (617) 523-1231
sconcannon@goodwinprocter.com
Counsel for Defendant Curt Schilling

Josh L. Launer, Esq.
Goodwin Procter LLP
One Exchange Place
Boston, MA 02109
Telephone: (617) 570-1000
Facsimile: (617) 523-1231
jlauner@goodwinprocter.com
Counsel for Defendant Curt Schilling

Claire Richards, Esq.
82 Smith Street, Room 119
Providence, RI 02903
Telephone: (401) 222-8114
Claire.richards@governor.ri.gov
Counsel for the Office of the Governor

Raymond Marcaccio, Esq.
Oliverio & Marcaccio LLP
55 Dorrance Street, Suite 400
Providence, RI 02903
Telephone: (401) 861-2900
ram@om-rilaw.com
Counsel for the General Treasurer's Office

Joseph D. Whalen, Esq.
Matthew H. Parker, Esq.
Whelan, Kinder & Siket LLP
30 Kennedy Plaza, Suite 402
Providence, RI 02903
Telephone: (401) 270-4500
jwhelan@whelankindersiket.com
mparker@whelankindersiket.com
Counsel for Shivan Subramanian

Robert D. Murray, Esq.
21 Garden City Drive
Cranston, RI 02920
Telephone: (401) 946-3800
rdmurray@taftmcsally.com
Counsel for Taft & McSally LLP

Jennifer Sternick, Esq.
Chief Legal Counsel
Division of Legal Services
Department of Administration
One Capitol Hill
Providence, RI 02908
Telephone: (401) 222-8339
Michael.mitchell@doa.ri.gov
Counsel for Rhode Island Department of Administration, Rhode Island Department of Revenue and Rhode Island Budget Office