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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

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13 RICHARD EDELMAN,
14 Plaintiff,
15 v.
16 UNITED STATES SECURITIES AND
17 EXCHANGE COMMISSION,
18 Defendant.

Case No.: 15-CV-2750-BEN-BGS

**DECLARATION OF RICHARD
EDELMAN IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND OPPOSITION TO
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

19 Date: March 13, 2017
20 Time: 10:30 a.m.
21 Ctrm: 5A
22 Judge: Hon. Roger T. Benitez

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1 I, Richard Edelman, of San Diego, California, declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if
3 called as a witness, could and would testify competently to such facts under oath.

4 2. I am the plaintiff in this action. I submitted the two requests under the
5 Freedom of Information Act to the SEC which are the subject matter of this action.

6 3. My grandparents purchased ten of the 3,300 units issued by Empire State
7 Building Associates ("ESBA") in 1961, which they intended to keep in the family. My
8 father, Howard Edelman, inherited five units in ESBA in 1981 and placed them in the
9 Edelman Family Trust ("Edelman Trust"), so it would pass along to family members. My
10 family has looked upon their ownership interest in ESBA as a family heirloom.

11 4. Between February 2012 and October 2013, Malkin Holdings Inc. ("Malkin
12 Holdings") orchestrated the consolidation of the multiple private and public entities that
13 became Empire State Realty Trust ("ESRT"), including the initial public offering ("IPO")
14 and a Schedule 14A Proxy Statement, into ESRT, a new public company formed through
15 the IPO. Through that process, ESBA and its ownership of the Empire State Building
16 were merged into ESRT.

17 5. Malkin Holdings used the consent form attached hereto and incorporated
18 herein by reference as Ex. 23 to obtain the consent of investors to the consolidation of
19 ESBA with the entities owning 17 other properties in the New York City metropolitan
20 area into ESRT. The consent form was part of the Form DEF14A filed with the SEC
21 on January 23, 2013.

22 6. If an investor in ESBA did not consent to the IPO and its consolidation in
23 ESRT, Malkin Holdings informed the investor by letter that it would acquire the
24 investor's interest for \$100 under the terms of a preexisting agreement. Malkin Holdings
25 described the communication sent to investors in its Form 425 filed with the SEC on
26 June 12, 2013. A true and correct copy of said Form 425 is attached hereto and
27 incorporated herein by reference as Exhibit 24. It states that Malkin Holdings sent a
28 letter to investors on June 12, 2013, which states in part:

1 To Fellow Participants in Empire State Building Associates L.L.C.
2 ("Associates")

3 We write to advise you that Associates has received more than the required
4 80% supermajority consent for consolidation in each of its three
5 participation groups, as recorded by the vote tabulator MacKenzie Partners,
6 Inc., and certified by the independent inspector Corporate Election Services.
7 The solicitation for the consolidation proposal, third-party portfolio
8 proposal, and voluntary reimbursement is terminated effective today.

9 [FOR INVESTORS THAT HAVE NOT PREVIOUSLY CONSENTED: To
10 each participant who has voted against, or abstained, or not submitted a
11 consent form regarding the consolidation proposal, **we are sending this**
12 **termination notice** by overnight delivery service and by certified or
13 registered mail **and also enclosing the 10-day buy-out notice**. On behalf of
14 Associates for the benefit of all its participants who have voted for the
15 consolidation, the participation interests of such participant will be bought
16 out for \$100 if such participant does not consent to the consolidation
17 proposal within 10 days after delivery of such 10-day buyout notice to such
18 participant's address as shown on Associates' books (emphasis in original)]

19 As soon as participants who have not yet consented to the consolidation
20 proposal either provide their consent or are bought out, such consolidation
21 proposal will be approved.

22 7. As a consequence of the above demand, many investors, including my own
23 father, were forced to change their vote from "against" the consolidation to "for" the
24 consolidation.

25 8. I have also learned from numerous former ESBA investors that they
26 changed their vote from "against" to "for" the consolidation because they received a
27 letter similar to Exhibit 24 from Malkin Holdings making the same demand. True and
28 correct excerpts from the testimony of Joyce Manheimer ("Manheimer") on May 26,
2016, in the arbitration proceeding of *Sasha v. Malkin*, are attached hereto and
incorporated herein by reference as Exhibit 25. In Ex. 25, Manheimer testifies to the
effect of Malkin Holdings's demand (¶ 7 above) as follows: "I felt I had a gun to my
head. I had no choice but to change my vote from a no to a yes, even though I never

1 intended on ever doing anything but keeping this building in my family."

2 9. Malkin Holdings also threatened to sue investors communicating with other
3 investors regarding the ESRT IPO. A true and correct copy of the August 24, 2016,
4 declaration of Samuel L. Kluck, Legal Branch Chief in the Office of Real Estate and
5 Commodities in the Division of Corporation Finance of the SEC since February 2008 is
6 attached hereto and incorporated herein by reference as Exhibit 26. This declaration
7 was filed before the U.S. District Court for the District of Columbia in Case no. 1:14-cv-
8 1140 (RDM). In paragraph 5 of his declaration, Mr. Kluck testifies

9
10 During my review of ESRT's registration statement, I received many emails,
11 telephone calls and written correspondence from investors regarding their
12 concerns. A number of these investors expressed their fear that ESRT
13 management would retaliate against them if ESRT discovered that they
14 submitted complaints to the SEC regarding the transaction. In addition, a
15 number of investors communicated with me only with the understanding that
16 the SEC would try to keep their comments and complaints confidential.

17 10. Attached hereto and incorporated herein by reference as Exhibit 27 are
18 excerpts of the testimony of Peter Benjamin on May 25, 2016, in the arbitration
19 proceeding of *Sasha v. Malkin* where he describes how he was threatened with litigation
20 by Malkin Holdings. Attached hereto and incorporated herein by reference as Exhibit 28
21 are true and correct copies of letters from Malkin Holdings and its attorneys to Peter
22 Benjamin. In Manheimer's testimony (Exhibit 25), she also describes how she was
23 threatened with litigation by Malkin Holdings if she continued participating in phone
24 conferences with other investors.

25 11. Malkin Holdings carries out its threats. It sued my cousin, Steven Edelman,
26 his stepmother, Joy Edelman, my father, Howard Edelman, and me. The suit against me
27 was dismissed on January 20, 2016.

28 12. My February 9, 2015, FOIA request to the SEC sought the release of the
following documents:

1 All documents, records, material of any nature concerning investigation in
2 the matter of Empire State Realty Trust MNY08894. This would include
3 Wells Notices and Wells Submissions in response. This FOIA also requests
4 similar documents of any other SEC investigation concerning Empire State
5 Realty Trust.

6 13. I do not believe the SEC has not fully complied with that request for the
7 following reasons:

- 8 a) The SEC initially informed me it had located three boxes containing an
9 estimated 9,000 pages of records responsive to my FOIA request and that I had
10 to pay between \$336 and \$672 for the documents to be released. Exhibit 3 to
11 the complaint. After I agreed to make this payment (Exhibit 4 to the complaint),
12 the SEC, *without explanation*, stated that there were only 1,442 pages of
13 records. Exhibit 9 to the complaint. This change in the estimate (from 9,000 to
14 1,442 pages) suggests someone decided to redefine and narrow the scope of my
15 request.
- 16 b) I had communications with dozens of investors between February 2012 and
17 May 2013 regarding the ESRT IPO and the consolidation of ESBA into ESRT.
18 These investors informed me they intended to contact the SEC by phone, letter
19 or email, and later confirmed to me they had communicated with Enforcement
20 staff. I find no reference to these communications in either the records released
21 by the SEC or its Vaughn index, Exhibit A to the declaration of Carin M. Cozza
22 (Dkt. No. 22-2, at 8-21).
- 23 c) I had email communications with Craig Phillips ("Phillips") during a week in
24 early 2012. Phillips is an accountant, not an attorney, with Enforcement. I find
25 no documents in the records released by the SEC or in its Vaughn index relating
26 to these communications.
- 27 d) From the 1,442 pages released by the SEC, 911 pages are copies of records kept
28 in a three-ring binder. The binder is described as "Empire State Realty Trust,
Inc. Supplemental Binder of Disclosure, Correspondence, Scripts and

1 Transcripts Relating to Buyout, appraisal and Participant Calls." The pages
2 released include a five-page index describing the documents contained in the
3 binder, which in most cases are excerpts. The pages are not numbered, so it is
4 hard to ascertain the correspondence between a page and its description in the
5 index. It appears the section of the binder described in the index as "Draft S-4
6 Prospectus and Private Wrappers Sent to Participants in the Private Entities"
7 was not released.

8 e) The SEC has released as pages 1220 and 1221 a February 20, 2013, letter from
9 the SEC to the attorneys representing Malkin Holdings. This letter contains a
10 footnote that reads: "We understand that there are additional documents your
11 client would like to bring to our attention, including information concerning
12 Richard and [redacted] Edelman. We are happy to receive any such additional
13 information that your client wishes to provide." I find no documents in the
14 records released by the SEC or in its Vaughn index that is or relates to these
15 "additional documents."

16 f) Item 48 to the Vaughn Index describes handwritten notes prepared by an SEC
17 staff attorney that are responsive to my requests. The document is described as
18 follows: "To do list for *multiple investigations* reflecting deliberations about
19 how to proceed *on various matters* (emphasis added)." I understand the SEC
20 only claims to have released records relating to one MUI and no other
21 investigations.

22 14. I have read the declarations filed by Thomas N. Keltner, Jr. ("Keltner"), Dkt.
23 Nos. 22-3 and 22-4. The only concrete statement Keltner makes in this first declaration is
24 that the index

25 contains information about documents regarding the properties supervised
26 by Malkin holdings, the existence and contents of which are confidential.
27 For example, it contains the names of tenants at various properties in lease
28 abstracts. Malkin holdings has not publicly released such a list. Neither

1 Malkin holdings nor ESRT has made public the identical information
2 contained in the Index.

3 Dkt. No. 22-3, ¶ 4. Keltner makes a similar statement in ¶ 4 of his declaration of
4 January 11, 2017, Dkt. No. 22-4:

5 the Index includes listings of tenants at our various properties. That
6 information is not readily available to the public. Disclosing that information
7 will allow our competitors to identify and then contact these tenants in an
8 effort to have them lease space (whether at the renewal of their leases, at
9 additional space the tenant might be looking for, or otherwise) at competing
10 properties.

11 15. Malkin Holdings has publicly stated the identity of many of ESRT's tenants.
12 True and correct excerpts of the Form 425 ESRT filed on August 7, 2012, are attached
13 hereto and incorporated herein by reference as Exhibit 29. In relevant part, Exhibit 29
14 reads:

15 Those properties...have a roster of quality tenants including:

16 Office tenants: Aetna Life Insurance Company, Air Castle Advisor LLC,
17 Ales Group USA, Inc., American Bureau of Shipping, Bank of Ireland, BP
18 Energy, Carolina Herrera Ltd., Carrier Corporation, Chase Paymentech (a
19 division of JPMorgan Chase Bank), Cisco Systems, Inc., CIT LLC,
20 Citibank, N.A., a division of E-Bay, Crane Company, Elizabeth Arden, Inc.,
21 Equifax, Ernst & Young, Evolution Markets, LLC, Fairfield Maxwell
22 Group, Fifth Street Capital, Inc., Forevermark US Inc., Gleacher Securities
23 Group Inc., Hitachi Cable America Inc., IPREO Holdings LLC, Jefferies
24 Group, Jones Lang LaSalle, JP Morgan Chase Bank, Legg Mason, LF USA,
25 Inc., Liberty Mutual, Local InitiativesSupport Corporation, Mariner
26 Investment Group, Marketfish, Marubeni Specialty Chemicals Inc., Multiple
27 Myeloma Research Foundation, National Indemnity Company, Nestle
28 Holdings, Inc., Nokia, O'Connor Davies Munn & Dobbins, OCE-USA
Holdings, Olympus Partners, OMI Group, Open Space Institute, Parkinson's
Disease Foundation, Pasternak Wine Imports, Pearson Education, Inc.,
Perseus Books Group, Pine Brook Road Partners, LLC, Reed Elsevier, Inc.,
Robert W. Baird, Inc., Rockwood Capital, LLC, SAP America, Inc., Stark

1 Business Solutions, SunGard, SymphonyIRI Group, Tarter Krinsky &
2 Drogin LLP, Thomson Reuters, Tourist Office of Spain, Universal Remote
3 Control, US Renewables Group, and Warnaco.

4 Retail tenants: A&P, Allen Edmonds, Ann Taylor, AT&T, Au Bon Pain,
5 Bank of America, N.A., Bank Santander (Sovereign Bank), Best Buy
6 Mobile, Charles Schwab & Co., Chipotle Mexican Grill, Duane Reade (a
7 division of Walgreen Co.), Ethan Allen, Food Emporium, FedEx/Kinko's,
8 GameStop, the Gap, HSBC, JP Morgan Chase Bank, Kate Spade, Loews
9 Theatre, Lululemon, Men's Wearhouse, Nike, Panera Bread, Pot Belly
10 Sandwich Works, Sprint, Starbucks, Theory, TJ Maxx, and Walgreens.

11 16. This information is also publicly available in other filings. True and correct
12 excerpts of the Form S-4 ESRT filed on February 13, 2012, are attached hereto and
13 incorporated herein by reference as Exhibit 30. In relevant part, Exhibit 30 contains a
14 table that sets forth "information regarding the ten largest tenants in the company's
15 portfolio" and provides their names, number of leases and properties, date of lease
16 expiration, annualized base rent, and other information. In relevant part, Exhibit 30 also
17 provides a table summarizing "information regarding the primary tenants of the Empire
18 State Building as of September 30, 2011." The information provided includes, among
19 other information, the names of the tenants, nature of their business, date or earliest
20 termination option, renewal options, amount of leased square feet.

21 17. I am generally familiar with the New York office buildings which ESRT
22 owns. To the best of my knowledge, a tenant roster is customarily located at the lobby of
23 the ESRT's buildings.

24 18. I have also read ¶ 9 of Keltner's January 11, 2017 declaration (Dkt. No. 22-
25 4), where he asserts:

26 The disclosure of these documents is likely to cause substantial competitive
27 harm because our competitors do not know the terms under which we retain
28 our vendors, and in particular providers of valuation services. Moreover,
such vendors are frequently retained in the industry, and ESRT should not be
put to a competitive and negotiating disadvantage when seeking to retain

1 those services in the future by the disclosure of the terms under which it has
2 retained them in the past

3 This statement refers to the agreements between Malkin Holdings and Duff & Phelps and
4 correspondence relating to those agreements, which are described on the Vaughn Index
5 as documents 2 through 8. A far more likely reason that Malkin Holdings refuses to
6 release this records is that the disclosure would likely provide information relating to:

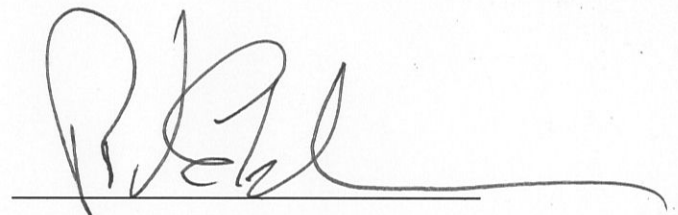
- 7 A. Whether Duff & Phelps's contract provided that it would provide independent
8 and fair evaluations of properties that were consolidated into ESRT;
- 9 B. Whether Duff & Phelps's contract provided it would provide independent and
10 fair evaluations of the amount of fees, compensation and property interests that
11 would flow to Malkin Holdings through the IPO and the consolidation;
- 12 C. The extent to which Malkin Holdings retained the ability to influence or effect
13 Duff & Phelps's decisions on the above points; and
- 14 D. The reason the following language was deleted from the SEC filings: "The
15 independent valuer believes that basing such allocations on the value of net
16 assets contributed is fair from a financial point of view."

17 19. I have maintained and operated the following website for the past five years:
18 empirestatebuildinginvestors.com. I originally set it up to organize decades of SEC
19 filings by ESBA, the owner of the Empire State Building. My father, Howard Edelman,
20 asked me to help him understand the finances of our family's investment in the Empire
21 State Building and the website made it easier for him to access the relevant documents.
22 The empirestatebuildinginvestors.com website began to attract other ESBA investors who
23 were struggling to understand the IPO and proxy proceeding and how it affected their
24 ownership of ESBA. Overtime, I expanded the website to cover the various lawsuits that
25 had been filed in relation to the ESRT IPO and consolidation. For the past couple years,
26 the largest body of new content for the website has been the releases of records through
27 my SEC FOIA requests and related litigation. These records have enabled former ESBA
28 and current ESRT investors, the media, and the public to better understand the role the

1 SEC played in approving the IPO and consolidation and, if this case is successful, the
2 released records will help the same readers understand the extent to which the SEC
3 investigated the IPO and consolidation and why it closed its investigation. The website
4 has had almost 50,000 visitors, including universities and government agencies. It
5 averages approximately 1,000 visits a month.

6 Executed this 7th day of February 2017, in Bethesda, Maryland.

7 I declare under penalty of perjury under the laws of the United States that the
8 foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'R. Edelman', is written over a horizontal line. The signature is stylized and cursive.

RICHARD EDELMAN

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