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SEC Ordered To Turn Over Empire State REIT Docs Index

By **Jack Newsham**

Law360, New York (September 28, 2017, 7:09 PM EDT) -- A California federal judge ordered the U.S. Securities and Exchange Commission on Wednesday to provide a list of 44,000 documents from its investigation of the Empire State Building's primary owner to a small stakeholder who sued for the records under the Freedom of Information Act.

Richard Edelman had sought records of the SEC's investigation into Malkin Holdings LLC, which clashed for years with other shareholders in the world-famous tower over its **now-completed effort** to bundle the building with other properties and sell shares of the real estate investment trust to the public. Edelman was one of several investors with small stakes in the building to accuse Malkin of selling them short when it created Empire State Realty Trust Inc.

The requester said the SEC's explanation of its searches and its justification for withholding certain records was plainly inadequate, but U.S. District Judge Roger T. Benitez largely declined to side with either Edelman or the agency. However, the court did rule that the SEC must turn over an index of documents that Malkin produced in class action settlement discussions with a group of small investors, saying that despite the REIT's objections, the exemption in the FOIA statute for business secrets doesn't apply.

"It may be that the documents described by the Malkin index fall within a FOIA exemption, but the court finds that an index or spreadsheet describing the existence of potentially exempt documents is not protected by Exemption 4," the judge wrote.

Judge Benitez said the SEC's compliance with FOIA was largely unclear. Its attorney's declaration about the searches was "vague and conclusory," he noted, but it didn't lend support to Edelman's allegation that the searches didn't go far enough.

Similarly, the judge wrote, the government's Vaughn index — which explains what exemptions allow it to withhold otherwise responsive records — wasn't detailed enough. Its descriptions of how Malkin would be harmed by the release of the records are "speculative and conclusory," deploying boilerplate language ripped from FOIA Exemptions 4 and 5, so the government must file a new motion for summary judgment and update its index and affidavits, Judge Benitez said.

Both sides successfully objected to parts of each other's motions and evidence. The judge upheld Edelman's objections to parts of an SEC attorney's declaration, finding that some of it didn't flow from her personal knowledge, and completely upheld his objections to declarations by Empire State Realty Trust general counsel Thomas N. Keltner Jr. because they weren't authenticated.

The judge also sustained the SEC's objections to part of Edelman's papers that it called irrelevant and said amounted to "sweeping attacks" on its motive and conduct.

Gary J. Aguirre, who represents Edelman, hailed the decision, noting that it requires the SEC to provide a largely unredacted copy of the index within just three days.

"The key focus of our motion was to get a copy of this index," he said. "This will be a blueprint of the information that was submitted to the SEC" in the Malkin probe.

The SEC doesn't comment on pending litigation, and a representative for Empire State Realty Trust didn't respond to a request for comment Thursday.

Edelman is represented by Gary J. Aguirre of Aguirre Law APC.

The SEC is represented by assistant U.S. attorney Katherine L. Parker.

The case is Edelman v. SEC, case number 3:15-cv-02750, in the U.S. District Court for the Southern District of California.

--Editing by Catherine Sum.

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