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Investors Launch \$600M Suit Over Empire State Building Deal

By **Kaitlin Ugolik**

Law360, New York (February 10, 2014, 1:22 PM ET) -- Former investors in the Empire State Building launched a consolidated class action Friday against the executives in charge of the real estate investment trust that swallowed up the iconic building last year and issued an initial public offering, claiming the deal lost investors \$600 million.

Meant to combine the allegations in a long string of lawsuits aimed at Malkin Holdings LLC and its officers since the IPO and REIT roll-up were **announced in 2011**, the consolidated complaint notably does not list Empire State Realty Trust as a defendant, aiming instead to allege unjust enrichment and breach of fiduciary duty against Malkin Holdings and the Malkin family in their individual capacities as executives.

As in previous lawsuits, the current plaintiffs — whose units were converted into shares of ESRT when the IPO was **consummated in October** — argue that the Malkins improperly ignored several \$2 billion offers for the Empire State Building in order to save their IPO and REIT deal, which allegedly made them millions while leaving investors out to dry.

"The Malkins had a fiduciary obligation to evaluate, in good faith, any bona fide value maximizing offer for the benefit of [Empire State Building Associates LLC] participants. Yet they faced a conflict of interest in light of their strong personal incentives to keep the ESB as part of the REIT," the plaintiffs said. "Acting to further their personal interests, the Malkins pursued the IPO at the expense of the ESBA participants."

The Malkins were hit with several lawsuits almost immediately after announcing the plan to combine the Empire State Building with their 17 other properties into one large public REIT, but a string of increasingly high bids for the star property followed as well.

In June, investor Rubin Schron **offered \$2 billion** for the building, followed shortly by **another \$2 billion offer** from an unnamed bidder.

Then Joseph Sitt's **Thor Equities LLC made a bid**, later **increasing it to \$1.4 billion** in September.

In total, the Empire State Building had eight different bidders, but the Malkins, who allegedly could not have completed their REIT plans without the trophy building, rejected all of them.

After ignoring Thor's bid, the Malkins allegedly issued a letter stating that they would not entertain any other alternatives to their REIT IPO plan.

"In other words, rather than seeking to maximize value for the participants, as their fiduciary duties required, the Malkins did the exact opposite: they aborted an escalating, all-cash bidding war that was driving the price of the participants' units upward, greatly in excess of the consideration the participants were to receive upon consummation of the REIT," the complaint says.

In what the suit calls confirmation of their bad faith, the defendants launched the IPO on Oct. 1 at a price of \$13 per share, resulting in a total value for investors of about \$800 million, or almost \$600 million less than Thor's \$1.4 billion offer.

The IPO also valued the Empire State Building at about \$1.59 billion, also several hundred million dollars less than the all-cash offers received before the IPO, according to the complaint.

A spokesperson for Malkin Holdings did not immediately respond to a request for comment Monday.

The plaintiffs are represented by Stephen B. Meister, James M. Ringer and Remy J. Stocks of Meister Seelig & Fein LLP; Mark Lebovitch, John J. Rizio-Hamilton and Katherine Stefanou of Bernstein Litowitz Berger & Grossmann LLP; Jeffrey C. Block, Jason M. Leviton and Joel Fleming of Block & Leviton LLP; and Lee Rudy, Michael Wagner and Tamara Gavrilova of Kessler Topaz Meltzer & Check LLP.

Counsel information for the defendants was not immediately available.

The case is Marc Postelnek et al. v. Anthony E. Malkin et al., case number 654456/2013, in the Supreme Court of the State of New York, County of New York.

--Editing by Katherine Rautenberg.

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