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April 4, 2014

**BY ELECTRONIC FILING AND HAND DELIVERY**

The Honorable O. Peter Sherwood
New York State Supreme Court, Commercial Division
60 Centre Street
Room 615
New York, NY 10007

Re: *In re Empire State Building Associates, L.L.C. Participants Litigation*, Index No. 654456/2013 (N.Y. Sup. Ct.)

Dear Justice Sherwood:

We represent Plaintiffs in the above-referenced action. Pursuant to Rule 10(A) of Your Honor's Individual Practices, we write in advance of the April 9, 2014 preliminary conference concerning a discovery dispute between the parties.

By way of background, this class action asserts breach of fiduciary duty claims against the individuals and entities that controlled the Empire State Building ("ESB") and Empire State Building Associates L.L.C. ("ESBA"). As alleged in the Consolidated Class Action Complaint (the "Consolidated Complaint"), Defendants refused to consider a series of premium all-cash offers made for the ESB between June 18, 2013 and September 9, 2013. Defendants spurned the offers because they faced a clear conflict of interest. Specifically, Defendants were poised to receive more than $730 million in stock if they completed an IPO for a real estate investment trust that included the ESB as its centerpiece and 17 other properties which Defendants owned and controlled. This transaction, and the $730 million windfall to Defendants, would not be possible if the ESB was sold as a standalone property. Thus – even though the offers provided the ESBA Participants with as much as $600 million more in value than the IPO – Defendants summarily rejected these offers in violation of their fiduciary duties.

On February 7, 2014, Plaintiffs filed the Consolidated Complaint. Plaintiffs served their first requests for the production of documents on February 10, 2014. In their responses and objections served on March 3, 2014, Defendants refused to produce any documents.

On March 7, 2014, Defendants moved to dismiss. Rather than meaningfully address the core of Plaintiffs' claims, *i.e.* the fact that Defendants, faced with a stark conflict of interest, summarily rejected offers that were worth $600 million more to the Participants than the IPO, Defendants principally asserted a series of technical arguments as to why Plaintiffs' claims should be dismissed. Plaintiffs filed their opposition to the motion to dismiss on April 4, 2014. In that opposition, Plaintiffs explained in detail why Defendants' arguments are incorrect. The motion will be fully briefed by April 18, 2014.

On a March 11, 2014 meet-and-confer to discuss Defendants' responses and objections to Plaintiffs' document requests, Defendants refused to produce any documents unless and until the Court denied the motion to dismiss – unilaterally determining, in essence, that all discovery is stayed during the pendency of the dismissal motion. Following a subsequent meet-and-confer on March 24, 2014, Defendants maintained the position that all discovery should be stayed while the motion to dismiss is pending.

Defendants' assertion is directly contrary to the rules of this Court, which make clear that discovery is not stayed while the motion to dismiss is pending. In particular, Rule 10(D) of Your Honor's Individual Practices states that "[u]nless otherwise directed by the court, discovery is not stayed by a dispositive motion." *See also* Commercial Division Rule 11(d) (same). Defendants' position also ignores the practical reality that the parties can productively use this time while the motion to dismiss is pending to engage in targeted discovery. In particular, during the March 24 meet-and-confer, Plaintiffs proposed limiting document discovery during the pendency of the dismissal motion to the offers made for the ESB and ESBA between June 18, 2013 and September 9, 2013, and documents and communications concerning those offers. Engaging in limited discovery of this sort would allow the parties to productively advance the litigation without imposing a significant burden on Defendants, and is consistent with the rules of this Court.

However, Defendants have refused to engage in even this limited discovery. Accordingly, Plaintiffs respectfully request that this issue be addressed at the earliest time convenient for the Court, or at the April 9, 2014 preliminary conference.

Respectfully submitted,

/s/ *Mark Lebovitch*

Mark Lebovitch

cc: Counsel of Record, by NYSCEF Filing