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Fox Keeps Up Fight For SEC Madoff Docs

By **Jessica Dye**

Law360, New York (January 05, 2010) -- The Fox Business Network has asked a federal judge to reconsider an order denying the 24-hour news organization access to certain information gathered by the U.S. Securities and Exchange Commission on Ponzi scheme mastermind Bernard L. Madoff.

FBN, a subsidiary of Fox News Network LLC, filed a motion to reconsider the December order on Monday in the U.S. District Court for the Southern District of New York, arguing that the decision to allow the SEC to redact or withhold certain Madoff documentation following a closed-door court review was "both premature and fundamentally unfair."

The network first filed suit against the SEC in March after the agency allegedly blocked or redacted a vast portion of information requested under the Freedom of Information Act seeking any tips received by the SEC on another alleged Ponzi schemer, Robert Allen Stanford, and any subsequent audits or inquiries.

In May, FBN filed an amended complaint seeking the same information from the SEC on Madoff, who pled guilty in March 2009 to running a \$50 billion Ponzi scheme.

According to the complaints, the SEC claimed exemptions over both Stanford and Madoff documents, releasing some cleared for public viewing but redacting and withholding others, arguing their release could interfere with enforcement proceedings.

As investigations into both Madoff and Stanford continued, the SEC decided to disclose some records compiled for internal investigations conducted by the SEC's Office of the Inspector General and the majority of documents deemed predecisional deliberative memorandums, according to the plaintiff.

However, the remainder listed in the Stanford and Madoff indexes were still exempt, it contended.

Judge Jed S. Rakoff ordered SEC staffers to bring in random samplings from both indexes for an ex parte, in camera review. In a Dec. 7 ruling, Judge Rakoff affirmed the SEC's exemptions over the vast majority of both, but acknowledged there were still certain documents for which a legitimate exemption was still in question.

On further examination, the judge upheld exemptions for the majority of the remaining documents, while directing the SEC to review the Madoff entries to see what information had already been released publicly.

FBN's objection to the order pertains specifically to three groups of documents — two containing information created by SEC staffers during 2004 and 2005 compliance examinations of Madoff's investment firm, and one containing internal SEC OIG communications about Madoff, according to the reconsideration motion.

Many of the documents in the first two categories were publicly released on Dec. 18, FBN claims, but the large amount of redaction still calls into question what those files contained.

The SEC responded in a brief that the contested entries had not yet been fully reviewed but were "voluminous" and unlikely to contain the information FBN was seeking.

The regulator also claimed a different class of exemption over parts of the contested documents, from an exemption 7(a) — pertaining to enforcement proceedings — to an exemption 5 — pertaining to inter-agency documents whose disclosure is barred by law.

According to FBN, however, the new exemption claim, coupled with incomplete index documentation, made it impossible for the news organization to evaluate whether the documents could be protected under exemption 5.

Further, the plaintiff had never had a fair chance to litigate the new exemptions and provide some adversarial review of the claims, it said.

"Underscoring the unfairness inherent in the process, the ultimate outcome in the case is as opaque as were the events in the court's ex parte hearing," the motion said.

FBN is seeking withdrawal of the December judgment and an order directing the SEC to provide more information on the three contested entries.

Motions for summary judgment from both parties are currently pending.

A representative for the SEC declined to comment on the matter.

FBN is represented by Mintz & Gold LLP.

The case is Fox News Network LLC v. U.S. Securities and Exchange Commission, case number 1:09-cv-02641, in the U.S. District Court for the Southern District of New York.

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