



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

LEHMAN BROTHERS SECURITIES AND ERISA
LITIGATION

This document applies to: 09 MD 2017 (LAK)
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09 MD 2017 (LAK)
and
Case No. M-82

In the Matter of the Application of

RICHARD S. FULD, JR.,

Petitioner,

-against-

BOOTH FOUNDATION, INC.

Respondent.
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TEMPORARY RESTRAINING ORDER

LEWIS A. KAPLAN, *District Judge.*

Richard S. Fuld, Jr., the former chairman and chief executive officer of Lehman Brothers Holdings Inc., is a defendant in all or most of the cases consolidated before me for coordinated and consolidated pretrial proceedings under MDL Docket. No. 2017. He is the only remaining respondent in an arbitration proceeding entitled *Booth Foundation, Inc. v. Martin D. Shafiroff, et al.*, now pending before the Financial Industry Regulatory Authority ("FINRA"), No. 09-01844 (the "Arbitration"). The hearing of the Arbitration is scheduled to begin on April 5 and 6, 2010 and then to resume on June 21, 2010.

On March 24, 2010, Fuld applied in Part I, where as it happens I then was sitting, for an order to show cause enjoining the Arbitration pursuant to the All Writs Act and Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, on the ground, among others, that the claims asserted therein should be heard as part of the Lehman Brothers multidistrict litigation. That matter was assigned a miscellaneous docket number, No. M-82. On March 26, 2010, Fuld filed also in 09 MD

2017 a petition seeking the same relief on similar grounds.¹ Booth Foundation (“Booth”) opposed the motion and answered the petition.

The application and the petition were argued before me this morning. They present issues of some complexity and cannot be fully and satisfactorily resolved before the scheduled start of the arbitration hearing on Monday. Moreover, it appears on a preliminary consideration of the matter that at least some of the claims that Booth proposes to raise in the Arbitration are beyond the scope of any agreement to arbitrate that is binding on Fuld.

The submission of both arbitral and non-arbitral claims in the Arbitration appears to create a genuine risk of irreparable injury to Fuld. Counsel agreed at argument that the arbitrators are not required to make findings or otherwise explain any award they may reach, thus making it difficult or impossible to determine after the fact whether any award against Fuld would rest on or have been tainted by non-arbitrable matters. This problem would be compounded by the limited scope of review of arbitration awards.

The only countervailing consideration is that Booth appears to be a one-man operation, the principal of which is 84 years of age and said to be failing. Fuld, however, has agreed that the principal may be deposed *de bene esse* on April 5, 2010 in order to preserve his testimony and that the testimony may be recorded by video.

In all the circumstances, it is hereby

ORDERED, as follows:

1. Booth be and it hereby is temporarily restrained from proceeding with the Arbitration, provided, however, that nothing herein prohibits Booth from conducting a *de bene esse* deposition of its principal on April 5, 2010 or such other date to which the parties may agree.

2. The restraint contained in paragraph 1 expires at 11:59 p.m. on April 14, 2010 unless extended by the Court.

Dated: March 31, 2010



Lewis A. Kaplan
United States District Judge

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At the argument this morning, Fuld’s counsel represented that he is a citizen of Connecticut. Booth is a citizen of Florida. The matter in controversy appears to exceed \$75,000, exclusive of interest and costs. Fuld therefore relies also on diversity jurisdiction.