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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE LEHMAN BROTHERS SECURITIES  
AND ERISA LITIGATION

Civil Action 09 MD 2017

*This Document Applies To:*  
In the Matter of the Application of  
Richard S. Fuld, Jr. for an Order to Show Cause  
To Enjoin the Arbitration Captioned  
Booth Foundation, Inc. v. Martin D. Shafiroff,  
Morgan C. McLanahan and Richard S. Fuld, Jr.,  
No. 09-01844, Now Pending before the  
Financial Industry Regulatory Authority,  
Case No. M-82.

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IN MISCELLANEOUS UNIT

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**PETITION**

Petitioner Richard S. Fuld, Jr., by his attorneys, Allen & Overy LLP, for his petition to  
enjoin the arbitration captioned Booth Foundation, Inc. v. Martin D. Shafiroff, Morgan C.  
McLanahan and Richard S. Fuld, Jr., No. 09-01844, respectfully alleges as follows:

**NATURE OF ACTION**

1. This is an action to enjoin an arbitration initiated by Booth Foundation, Inc. (the  
“Foundation”) against Mr. Fuld and others before the Financial Industry Regulatory Authority  
(“FINRA”) on or about April 3, 2009, captioned Booth Foundation, Inc. v. Martin D. Shafiroff,  
Morgan C. McLanahan and Richard S. Fuld, Jr., No. 09-01844 (the “FINRA Arbitration”),  
pursuant to the All Writs Act, 28 U.S.C. § 1651, and section 4 of the Federal Arbitration Act, 9  
U.S.C. § 4. The FINRA Arbitration should be barred from proceeding so that the claims asserted  
therein may be heard as part of the multidistrict litigation captioned In re Lehman Brothers

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Securities and ERISA Litigation, 09 MD 2017 (the “MDL Action”), pending before the Honorable Lewis A. Kaplan of the Southern District of New York.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over the MDL Action pursuant to 28 U.S.C. § 1331 because it involves claims asserted pursuant to Sections 11 and 15 of the Securities Act of 1933 (the “Securities Act”), among others, and pursuant to 28 U.S.C. § 1334(b) because the MDL Action is “related to” a case under Chapter 11, In re Lehman Brothers Holdings Inc., Case No. 08-13555 (JMP) currently pending before the U.S. Bankruptcy Court for the Southern District of New York.

3. This Court is authorized, pursuant to the All Writs Act, 28 U.S.C. § 1651, to issue writs in aid of the Court’s jurisdiction over the MDL Action. See In re Baldwin-United Corp., 770 F.2d 328, 337 (2d Cir. 1985). Additionally, this Court is authorized, pursuant to the All Writs Act to issue writs against persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice. United States v. New York Tel. Co., 434 U.S. 159, 174 (1977).

4. This Court has personal jurisdiction over the Foundation because the FINRA Arbitration arises out of specific activities undertaken by the Foundation in New York, including but not limited to maintaining at least two accounts with Lehman Brothers, Inc. (“LBI”) in New York, and purchasing through LBI brokers in New York approximately \$22 million in Lehman Brothers Holdings, Inc. (“LBHI”) 5.540% medium term notes due December 15, 2028. In addition, representatives of the Foundation participated in numerous telephone calls with one or more LBI employees in the Southern District of New York. During those calls, the participants

covered issues concerning the structuring, terms and conditions and pricing of the note transaction.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events giving rise to the FINRA Arbitration occurred within this judicial district.

### **FACTUAL BACKGROUND**

6. On September 15, 2008, LBHI filed for bankruptcy in the Southern District of New York. By now, over 40 civil actions have been commenced by Lehman investors who seek to recover their investment losses from present and former LBHI directors and officers. All of the actions by investors in LBHI securities are now pending before (or in the process of being transferred to) the Southern District of New York for pretrial proceedings pursuant to the February 9, 2009 order of the Judicial Panel on Multidistrict Litigation (the “MDL Panel”) under 28 U.S.C. § 1407, In re Lehman Brothers Holdings, Inc. Sec. & Employee Retirement Income Security Act (ERISA) Litigation, 598 F. Supp. 2d 1362 (J.P.M.L. 2009), and subsequent orders.<sup>1</sup>

7. In the initial transfer order, the MDL Panel identified two reasons to put all the related cases before a single judge: (i) “[a]ll actions share factual questions relating to whether defendants allegedly made materially false and/or misleading statements which had a negative impact on Lehman Brothers securities” and (ii) “[c]entralization under Section 1407 will eliminate duplicative discovery; avoid inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel and the judiciary.” Id. at 1364.

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<sup>1</sup> Two cases brought against Lehman officers and directors that did not arise out of securities issued by LBHI were not consolidated with the cases pending before Judge Kaplan. A third case, filed by the State of New Jersey, Department of Taxation, Division of Investment, is before the Third Circuit Court of Appeals on the issue of whether removal was proper under 28 U.S.C. §§ 1334(b) and 1452(a).

8. On February 23, 2009, as directed by Judge Kaplan, lead plaintiffs in In re Lehman Brothers Equity/Debt Securities Litigation, No. 08 Civ. 5523 (LAK) (the “Securities Class Action”), filed their Second Amended Consolidated Class Action Complaint (the “Second Amended Complaint”). Thereafter, on or about April 3, 2009, the Foundation filed its statement of claim with FINRA.

9. The Foundation’s claims arise out of its September 2006 purchase of approximately \$22 million in LBHI 5.540% medium term notes due December 15, 2028 (the “Note”). The Foundation’s founder and main principal, Alex Booth, is a Florida resident who has been a brokerage client of LBI for over twenty years. Mr. Booth, a sophisticated investor who traded in a wide variety of risky instruments, maintained several non-discretionary accounts at LBI, as well as other brokerage firms, and regularly placed investments with two brokers at Lehman Brothers Private Investment Management, a unit of LBI based in New York. FINRA designated Boca Raton, Florida as the venue of the arbitration, at the Foundation’s request.

10. The Note was a bespoke transaction, privately negotiated and structured between Mr. Booth and his brokers at LBI. Mr. Booth dictated the essential terms: the Foundation was to receive \$1,750,000 per year for 22.25 years. For the final terms of the Note, Mr. Booth through his Foundation lent \$22 million to LBHI, which agreed to provide a fixed return of 5.54% per year to be paid semi-annually on an amortized basis. Despite its private footing, the Note was issued as a public offering through the LBHI Form S-3 Shelf Registration Statement and Prospectus dated May 30, 2006, the LBHI Medium-Term Notes, Series I, Prospectus Supplement dated May 30, 2006 and the Free Writing Prospectus dated August 21, 2006. For two years, the Note performed exactly as planned, with LBHI as the issuer making its fixed payments of

interest and principal, some \$3,000,000 through June 2008. The payments ceased with LBHI's filing for bankruptcy protection in September 2008.

11. The Foundation's statement of claim seeks damages for violations of Sections 11 and 15 of the Securities Act, Florida blue sky laws and FINRA and NYSE rules, as well as for breach of fiduciary duty, breach of contract, negligence and common law fraud. Despite this litany of purported claims, there are no facts even suggesting that Mr. Fuld had any involvement with the Foundation's LBI brokerage account, or that he participated in or had knowledge of the brokerage activities relating to the Foundation's purchase of the Note. Mr. Fuld was not a financial advisor to the Foundation and did not have any role in recommending the Note to the Foundation or in structuring the Note's terms. Mr. Fuld moreover did not supervise the LBI brokers and did not oversee the creation or issuance of the Note.

12. On May 11, 2009, Mr. Fuld submitted to FINRA's Director of Dispute Resolution a letter requesting that FINRA decline the use of the arbitral forum as to Mr. Fuld. In the letter, Mr. Fuld argued that the Foundation should not be permitted to use FINRA arbitration as a vehicle to sidestep the MDL Action and advance its claims on a footing different than similarly-situated holders of LBHI securities. Mr. Fuld further argued that the benefits of consolidation would be frustrated if the case were allowed to proceed outside the framework of the MDL Action, with all the attendant dangers of inconsistent rulings, uncoordinated discovery and subsequent cost of duplicative litigation.

13. Mr. Fuld also explained in detail the overlap between the Second Amended Complaint and the Foundation's statement of claim. First, both pleadings assert claims against Mr. Fuld under Sections 11 and 15 of the Securities Act. Second, the statement of claim refers to the same LBHI SEC filings and the same public statements of Mr. Fuld as the Second Amended

Complaint. In particular, similar to the statement of claim, the Securities Class Action complaint sought to recover for alleged misrepresentations and omissions made in connection with the sale of a series of retail products marketed to investors, known as principal protection notes, among others. Those principal protection notes were issued pursuant to the same offering materials as the Note at issue in this arbitration: the Form S-3 Shelf Registration Statement and Prospectus dated May 30, 2006 and the Medium-Term Notes Series I Prospectus Supplement dated May 30, 2006. Third, substantially all of the alleged misrepresentations and omissions enumerated in paragraph 33 of the statement of claim -- as generalized and vague as they may be -- are directly at issue in the Seconded Amended Complaint.

14. The Foundation responded on May 21, 2009 declaring the Foundation's claims arbitrable. The Foundation argued that the "gravamen of the Foundation's Statement of Claim" "is improper selling activities on behalf of Respondents [Martin] Shafiroff and [Morgan] McLanahan and Fuld's failure to supervise two of his top producing registered representatives, as well as Fuld's aiding and abetting Shafiroff and McLanahan in the creation of this unique investment." (emphasis in original) The Foundation emphasized that its claims are properly within FINRA jurisdiction because the MDL proceedings "do not involve garden variety broker-dealer claims of unsuitability and failure to supervise that are at issue in the instant arbitration." On June 9, 2009, FINRA issued a statement that the Director "denied" Mr. Fuld's request, and that the case would proceed before a FINRA tribunal. No explanation was given for the Director's ruling.

15. On November 18, 2009, Mr. Fuld moved to dismiss the statement of claim. By Order dated January 15, 2010, the FINRA panel denied Mr. Fuld's motion to dismiss, again

without any explanation. After one adjournment of the hearing on consent of the parties, the Panel reset the hearing to commence on April 5 and 6, 2010 and continue on June 21-24, 2010.

16. Throughout the discovery process, the Foundation, respondents and various third parties, including Barclays Wealth and the LBI Trustee, have produced tens of thousands of pages of documents. Neither the Foundation nor any other party sought the production of documents from LBHI. Notably, not a single document produced in the arbitration proceeding has a substantive reference to Mr. Fuld relating to the Note, to the Foundation or to Mr. Booth.

17. On March 11, 2010, the Examiner's Report was unsealed and made available to the public. On March 16, 2010, less than three weeks before the FINRA arbitration hearing was set to begin, the Foundation voluntarily dismissed the LBI brokers from the FINRA arbitration. March 16 also was the date set for the exchange of pretrial briefs in the FINRA arbitration. In its brief, served just a few hours after it dropped the LBI brokers, the Foundation completely reworked its theories of recovery to encompass the allegedly "colorable claims" against Mr. Fuld relating to disclosures of LBHI's financial condition set forth by the Examiner in his 2,200-page report. On March 22, 2010, the Panel held a telephonic prehearing conference on Mr. Fuld's request to adjourn the April 5 and 6, 2010 hearing dates, a request which the Foundation opposed. On March 23, 2010, FINRA advised the parties that the Panel denied the requested adjournment.

## CLAIMS FOR RELIEF

### COUNT I

(For an injunction barring the FINRA Arbitration pursuant to the All Writs Act)

18. Petitioner repeats and realleges paragraphs 1 through 17 as though fully set forth herein.

19. An injunction barring the FINRA Arbitration from proceeding at this time is necessary and appropriate to aid this Court's jurisdiction over the MDL Action, to preserve the Court's flexibility to decide the securities law-related issues before it and to avoid the possibility of inconsistent rulings on these complex matters.

20. Seeking to circumvent the order from the MDL Panel that transferred a series of related securities law and ERISA cases to Judge Kaplan of this Court, the Foundation has recast its claims in the FINRA Arbitration to involve complex questions relating to the adequacy of LBHI's financial disclosures under the federal securities laws, including disclosure issues relating to the May 30, 2006 Form S-3 Shelf Registration and Prospectus and the May 30, 2006 Prospectus Supplement, as well as issues relating to the alleged "colorable claims" outlined in the LBHI Examiner's Report. To have these issues decided in the FINRA Arbitration would impair this Court's jurisdiction and authority over the MDL Action, limit this Court's flexibility to adjudicate the securities law questions raised in the civil complaints before it, and expose Petitioner to the real risk of inconsistent judgments.

21. FINRA does not have jurisdiction to hear these claims, pursuant to FINRA Rule 12200, because they relate to business activities carried out by LBHI, which is not a FINRA registered entity.

22. Petitioner, therefore, requests that this Court issue an injunction barring the FINRA Arbitration from proceeding pursuant to the All Writs Act, 28 U.S.C. § 1651, in aid of this Court's jurisdiction over the MDL Action and to protect Petitioner from being subject to inconsistent adjudications on matters properly before this Court.

## COUNT II

(For an injunction barring the FINRA Arbitration pursuant to the Federal Arbitration Act)

23. Petitioner repeats and realleges paragraphs 1 through 22 as though fully set forth herein.

24. This Court is authorized, pursuant to 9 U.S.C. § 4, to stay or enjoin arbitration proceedings. Neither Petitioner nor LBHI agreed to arbitrate the claims now asserted by the Foundation in the FINRA Arbitration, and FINRA does not otherwise have jurisdiction over this matter.

25. For these reasons and those described in Count I, Petitioner requests that this Court issue an injunction pursuant to section 4 of the Federal Arbitration Act barring the FINRA Arbitration from proceeding.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully request that this Court enter an order:

- (1) provisionally and permanently enjoining the FINRA Arbitration from proceeding;
- (2) awarding Petitioner costs of suit; and
- (3) granting such other relief as may be just and proper.

Dated: March 24, 2010  
New York, New York

Yours, etc.,

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