American Arbitration Association

In the Matter of the Arbitration between: Martin B. Bloch, Claimant, v Frequency Electronics, Inc., The Compensation Committee of the Board of Directors of Frequency Electronics, Inc., in its capacity as administrator of the deferred compensation agreements between Martin B.Bloch and Frequency Electronics, Inc. and The Deferred Compensation Plan Agreement Dated March 27, 1980 and Amendments Thereto, Respondents.	**AAA No. 01-20-0005-4627**
In the Matter of the Arbitration between: Martin B. Bloch, Claimant, v Frequency Electronics, Inc., The Compensation Committee of the Board of Directors of Frequency Electronics, Inc., in its capacity as administrator of the deferred compensation agreements between Martin B.Bloch and Frequency Electronics, Inc. and The Deferred Compensation Plan Agreement Dated March 7, 2008, as amended and restated, Respondents.	**INTERIM DECISION AND ORDER (MOTION TO DISMISS)**

Martin B. Bloch ("Bloch") has brought these two arbitrations against Frequency Electronics, Inc. ("FEI") and the Compensation Committee ("the Compensation Committee" or "the Committee") of FEI's Board of Directors ("the Board") to seek payment of deferred compensation that he claims is owed by FEI under an agreement dated March 27, 1980, and its amendments ("the 1980 Agreement"), and an agreement dated March 7, 2008 ("the 2008 Agreement"), as amended and restated in March 2013 ("the March 2013 Agreement"). FEI has raised a threshold issue of arbitrability, which Supreme Court, Nassau County, ruled fell within the purview of the Panel to decide (*see In the Matter of the Application of Frequency Electronics, Inc. v Martin B. Bloch*, Sup Ct, Nassau County, Feb 16, 2021, DeStefano, J., index no. 611405/2020).

On May 6, 2021, FEI moved to dismiss both of Bloch's above-captioned arbitrations, arguing that Bloch's claims for deferred compensation are not arbitrable. FEI filed a Memorandum of Law and accompanying exhibits in support of its motion. On May 24, 2021, Bloch filed a Memorandum of Law in opposition to FEI's motion to dismiss, also accompanied by exhibits. FEI then filed a Reply Memorandum of Law on May 31, 2021, with an accompanying exhibit. The Panel heard oral argument on June 22, 2021, during which counsel responded to certain questions that had been raised by the Panel prior to the Hearing. Upon consideration of the Agreements' text and the parties' arguments and exhibits, the Panel unanimously rules that (1) the March 1980 Agreement is separate and distinct from the March 2008/March 2013 Agreements; and (2) Bloch's claims are arbitrable. Accordingly, the Panel denies FEI's motion to dismiss these proceedings.

BACKGROUND

Bloch founded FEI in 1961 and worked there until his unwilling departure in January 2020. He served as the Company's President and Chief Scientist from 1961 until 2018, when he continued as FEI's Chief Scientist and became Executive Chairman of the Board. These arbitrations involve a dispute between FEI and Bloch about whether Bloch is entitled to deferred compensation benefits pursuant to the 1980 and/or 2008/2013 Agreements, which are covered by the Employee Retirement Income Security Act of 1974, 29 USC § 1101 *et seq.* ("ERISA"). These Agreements commit the resolution of disputes arising under them to arbitration, and are to be "interpreted in accordance with and governed by the laws of the State of New York" (1980 Agreement, § 14; 2008 Agreement, § 14; 2013 Agreement, §13).

The 1980 Agreement states that "[Bloch] and the Company agree that in the event any controversy arises under or in connection with any of the terms or provisions of this Agreement, same shall be settled by arbitration under the rules then obtaining of the American Arbitration Association" (*see* 1980 Agreement, § 13). The 1980 Agreement does not include any internal claims-procedure for contesting the denial of benefits claims prior to arbitration even though, at the time, the United States Department of Labor ("the DOL") had in place a claims-procedure regulation for employee benefit plans governed by ERISA (*see* 42 Fed Reg 27426 [1977] ["1977 claims-procedure regulation"]), such as the 1980 Agreement.

The DOL's 1977 claims-procedure regulation placed obligations on the plan administrator to notify the plan participant or beneficiary (collectively hereafter in the text, "participant") of a claim denial and to explain in detail the reasons for the denial; to set up an internal review procedure for a participant to contest a denial; and to provide the participant all plan documents and other papers that had affected the disposition of the claim (*see* 29 CFR former 2560.503-1 [e], [f], [g]). While the 1980 Agreement provided for arbitration of a denial of benefits, ERISA claims were not necessarily considered to be arbitrable until after the United States Supreme Court's decision in *Rodriguez de Quijas v Shearson/Amer. Express, Inc.*, 109 S Ct 1017 (1989) (holding that agreements to arbitrate statutory claims arising under Securities Act of 1933 were enforceable); *see also Bird v Shearson Lehman/Amer. Express, Inc.*, 926 F2d 116 (2d Cir 1991) (in light of *Rodriguez*, holding that the Federal Arbitration Act requires courts to

enforce agreements to arbitrate statutory ERISA claims notwithstanding that ERISA provides for exclusive federal court jurisdiction).

In 2000, the DOL replaced the 1977 claims-procedure regulation with a more detailed version of the minimal standards that a claims administrator (here, the Compensation Committee) must meet in order to ensure the procedural fairness required by ERISA (*see* 65 Fed Reg 70246 [2000] ["2000 claims-procedure regulation"]). The revised standards derive from section 503 of ERISA, which requires every employee benefits plan, in accordance with the DOL's regulations, to "provide adequate notice in writing to any participant . . . whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant" and to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim" (29 USC §1133 [1], [2]).

Section 13 of the 2008 Agreement and section 12 of the 2013 Agreement, both entitled "Administration and Claims Procedures," are identical[1] and closely track the text of the DOL's 2000 claims-procedure regulation, as shown by a demonstrative exhibit displayed by Bloch's counsel during oral argument (*see* 2013 Agreement, § 12 [b] [the claims procedures in section 12 "will be administered and interpreted in a manner consistent with the requirements of § 503 of (ERISA) . . . and the regulations thereunder"]).[2] These contractual provisions differ from the DOL's 2000 claims-procedure regulation in one crucial respect, however. Wherever the regulation refers to a participant's rights under section 502 (a) of ERISA to bring a civil action in federal court to contest an adverse benefits determination (*see* 29 USC § 1132 [a]), the 2008 and 2013 Agreements substitute arbitration. In sum, in the 2008 and 2013 Agreements, Bloch agreed to forego an available judicial remedy in federal court in favor of arbitration.

For instance, section 12 of the 2013 Agreement (like the DOL's 2000 claims-procedure regulation) requires the claims administrator (i.e., the Compensation Committee) to send the Claimant a written or electronic notice of its initial determination to deny a claim, which

> must contain . . . the specific reason(s) for the denial; a specific reference to pertinent provisions of [the 2013] Agreement on which the denial is based; if additional material or information is necessary for the Claimant to perfect the claim, a description of such material or information and an explanation of why such material or information is necessary; and an explanation of the claim review (i.e. appeal) procedures, the time limits applicable to such procedures, and the [Claimant's] right to request arbitration if the claim denial is upheld in whole or in part on appeal (emphasis added) (*see* 2013 Agreement, § 12 [b] [ii]; *compare id. with* 29 CFR 2540.503-1 [g] [iv]).

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[1] For the sake of brevity, references hereafter to a specific subdivision of section 12 of the 2013 Agreement should be understood to refer also to the parallel subdivision of section 13 of the 2008 Agreement.

[2] Although the 2000 claims-procedure regulation has subsequently been amended, none of the amendments are relevant to any issue in this arbitration. These subsequent amendments generally address issues related to group health plans and disability benefits.

A Claimant must take an appeal within 60 days after receipt of the Compensation Committee's denial of a claim in whole or in part (*see* 2013 Agreement, § 12 [b] [iii]). If the Compensation Committee, "in its sole and complete discretion," determines to uphold all or a portion of the initial denial, the Committee must send the Claimant a written or electronic notice to that effect, again with specific items of information to be included; this notice must generally be given within 60 days after the Compensation Committee's receipt of the request to appeal (*id.* § 12 [b] [iv]; *compare id. with* 29 CFR 2540.503-1 [j] [4]). A Claimant then has 15 days after receipt of the Compensation Committee's final decision to commence an arbitration in order to contest that decision. Otherwise, "the decision of the Committee will be final, binding and unappealable" (*id.* § 12 [b] [v]).

FEI argues that the 1980 and 2008 Agreements must be read together as one document, with the ERISA-mandated claims procedure in section 13 of the 2008 Agreement having replaced section 13 of the 1980 Agreement. Bloch concededly did not take any appeal to the Compensation Committee. As a result, FEI argues, Bloch's claims are not arbitrable because these Agreements (and the 2013 Agreement) only provide for arbitration of the Committee's final decision upholding a denial of benefits after an appeal. Stated another way, having failed to exhaust the internal appeal procedures specified by the 2008 and 2013 Agreements, there is nothing for Bloch to arbitrate because the Compensation Committee did not make (and could not have made) a decision on a non-existent appeal. Relatedly, FEI contends that Bloch's statutory ERISA claims are not arbitrable or within the Panel's authority to decide because the parties only agreed to arbitrate the right to "contest" a "final decision" on an internal appeal from a denial of benefits (*see id.*).

Bloch responds that he has two separate deferred compensation plans -- the 1980 Agreement and the 2008/2013 Agreements, and that the 1980 Agreement concededly does not contain the ERISA-mandated exhaustion-of-appeal requirement that FEI invokes to challenge his right to arbitrate the denial of deferred compensation benefits. In addition, he contends, the Compensation Committee never transmitted to him a denial of benefits that complied with ERISA's and the 2008 and 2013 Agreements' procedural requirements. As a consequence, Bloch argues that he is deemed to have exhausted all the claims procedures and the internal appeal that would otherwise serve as conditions precedent to arbitration under those Agreements.

DISCUSSION

1. Whether the 1980 and 2008 Agreements Are Separate and Distinct Benefit Plans, and, Consequently, Whether the Claims Procedure in Section 13 of the 2008 Agreement Applies to Bloch's Claims for Benefits that Accrued to Him Under the 1980 Agreement

Under New York's "four-corners rule," a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). A "complete" written agreement is integrated, which means that it represents the parties' entire understanding with respect to its subject matter.

Greenfield and *W.W.W. Assoc. v Giancontieri* (77 NY2d 157 [1991]) are perhaps the most frequently cited New York cases discussing New York's "four-corners rule." Former Chief Judge Judith S. Kaye, a notable commercial litigator in New York City before her 25-year tenure on the Court of Appeals, has characterized *W.W.W. Assoc.*, which she authored, as a "steadfast affirmation of the 'four-corners rule.' When parties set down their agreement in what the court determines is a clear, complete document, their writing will be enforced according to its terms, with extrinsic (parol) evidence as to what they might have meant inadmissible to vary what they in fact wrote" (Judith S. Kaye, *New York and International Arbitration: A View from the State Bench*, NY Dispute Resolution Lawyer, Spring 2016, at 25).

Further, extrinsic evidence may not be introduced to create an ambiguity in an agreement (*see W.W.W. Assoc.*, 77 NY2d at 163; *see also* Kaye, *op. cit.* at 25 ["New York courts will not consider outside evidence offered to create an ambiguity. An analysis that begins with consideration of outside evidence of what the parties really, really had in mind -- instead of looking first at what they actually said -- unnecessarily denigrates the contract and unsettles the law. Another bedrock principle of New York contract law"]). Rather, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the court to decide" (*Greenfield.* 98 NY2d at 569; *see also W.W.W. Assoc.*, 77 NY2d at 162). Accordingly, absent fraud or mutual mistake, where the parties have reduced their agreement to a complete, clear and unambiguous writing, the parol evidence rule excludes evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their written agreement (*see Marine Midland Bank-S. v Thurlow*, 53 NY2d 381, 387 [1981]).

An agreement is ambiguous and extrinsic evidence is admissible when, after considering the contract as a whole, the court concludes that the "language was written so imperfectly that it is susceptible to more than one reasonable interpretation" (*Brad H. v City of New York*, 17 NY3d 180, 186 [2001]). Stated the other way around, "if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield*, 98 NY2d at 569-570; *see also id.* at 569 ["A contract is unambiguous if the language its uses has a definite and precise meaning, unattended by danger of misconception in the purport of the (agreement) itself, and concerning which there is no reasonable basis for difference of opinion"] [alteration in the original]). Further, "ambiguity does not arise from silence, but from what was written so blindly and imperfectly that its meaning is doubtful" (*Nissho Iwai Europe PLC v Korea First Bank*, 99 NY2d 115, 121-122 [2002] [internal quotation marks omitted]; *see also Greenfield*, 98 NY2d at 570).

Here, we conclude that there is no ambiguity in what was written in the 2008 Agreement. The parties plainly stated the sole reason for and limited purpose of the 2008 Agreement in relation to the 1980 Agreement, in the Whereas clauses; specifically,

> WHEREAS, the American Jobs Creation Act of 2004 amended the Internal Revenue Code of 1986 . . . by adding § 409A . . . specifically applicable to benefits that have accrued under [the 1980 Agreement] for taxable years commencing after December 31, 2004; and
>
> WHEREAS, § 409A is inapplicable to benefits accrued under [the 1980 Agreement] before January 1, 2005, provided said amounts were vested as of December 31, 2004 (the "Grandfathered Benefits"); and
>
> WHEREAS, it is intended that [the 1980 Agreement] shall remain in full force and effect with respect to the Grandfathered Benefits that have accrued thereunder and that this Agreement shall be effective solely with respect to all non-Grandfathered Benefits to which [Bloch] is or may be entitled hereunder (emphasis added).

The Compensation Committee has interpreted the 2008 Agreement to have replaced the 1980 Agreement's section 13 arbitration provision, thereby making Bloch's arbitration of the denial of deferred compensation benefits that he accrued under the 1980 Agreement subject to section 13 of the 2008 Agreement. In the face of language that clearly states otherwise (the 1980 Agreement "shall remain in full force and effect with respect to the Grandfathered Benefits that have accrued thereunder," etc.), the Panel rejects this interpretation. If the parties had intended for section 13 of the 2008 Agreement to replace the 1980 Agreement's arbitration provision, this could easily have been done. Such a replacement would have been a significant amendment to the 1980 Agreement, and the parties to a contract normally embody a significant amendment in an explicit written term (*see* 2013 Agreement, § 18). FEI discounts this actual text of the Agreement on the ground that it appears in "Whereas" clauses (although this is where FEI and Bloch explicitly state their intent), and instead relies on silence and parol evidence. This does not comport with longstanding principles of New York law, as discussed above (*see also Potter v Padilla*, 143 AD3d 1246, 1247 [4th Dept 2016] [using whereas clause to construe a contract]).

Accordingly, Bloch's claims for deferred compensation benefits pursuant to the 1980 Agreement (as subsequently amended in 1984, 1989, 1998 and 2000) are arbitrable. As noted earlier, in the 1980 Agreement FEI and Bloch simply agreed that "in the event any controversy arises under or in connection with any of the terms or provisions of this Agreement, same shall be settled by arbitration under the rules then obtaining of the American Arbitration Association" (1980 Agreement, § 13).

2. Whether the Compensation Committee's Failure to Strictly Follow the Claims Procedures in the 2008 and 2013 Agreements Entitles Bloch to *De Novo* Review by the Panel of the Denial of His Deferred Compensation Benefits, Or, Alternatively, Whether Bloch's Failure to Appeal the Compensation Committee's Denial of His Benefits Claim Precludes Arbitration

At the outset, the Panel observes that there is no dispute about what actions Bloch and the Compensation Committee, respectively, took, or failed to take, to comply with the claims procedures in the 2008 and 2013 Agreements. FEI does not contest that the Committee failed to strictly follow these claims procedures, which govern whether Bloch has a right to arbitrate the

Compensation Committee's denial of the deferred compensation benefits that he claims are owed to him pursuant to these Agreements. In short, the parties do not disagree about the facts, but they disagree about the legal significance of the undisputed facts. The legal significance of the undisputed facts turns on whether and how the Panel applies the precedent established by the United States Court of Appeals for the Second Circuit in *Halo v Yale Health Plan*, 819 F3d 42 (2d Cir 2016).

In *Halo*, the Second Circuit examined the consequences of an ERISA-governed benefits plan's failure to comply with the DOL's 2000 claims-procedure regulation. As noted earlier, section 13 of the 2008 Agreement/section 12 of the 2013 Agreement conform to DOL's 2000 claims-procedure regulation, except with regard to the forum for dispute resolution. The Court in *Halo* held that "when denying a claim for benefits, a plan's failure to comply with the [DOL's] claims procedure regulation, 29 C.F.R. § 2560.503-1, will result in that claim being reviewed *de novo* in federal court, unless the plan has otherwise established procedures in full conformity with the regulation and can show that its failure to comply with the regulation in the processing of a particular claim was inadvertent *and* harmless (819 F3d at 45) (emphasis in original).

As an initial matter, FEI points out that the Panel is not required to follow the "strict-compliance" test established by the Second Circuit. At oral argument, FEI drew the Panel's attention to the New York Court of Appeals' decision in *Flanagan v Prudential Bache*, 67 NY2d 500, 506 (1986), *cert. denied* 479 US 931 (1986) ("When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits"). FEI notes that several federal circuit courts have adopted some form of a "substantial-compliance" test with respect to DOL's 2000 claims-procedure regulation, and advocates for the Panel to follow suit.

The Panel, however, chooses to follow the Second Circuit's "strict-compliance" precedent in *Halo*.[3] The Panel is mindful that "[q]uestions of arbitrability are . . . to 'be addressed with a healthy regard for the federal policy favoring arbitration' and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'" (*Flanagan*, 67 NY2d at 506-507, quoting *Cone v Hosp. v Mercury Constr. Corp.*, 460 US 1, 24-25 [1983]). Further, while FEI is correct that a New York state court is free to reject *Halo*'s interpretation of federal law, the lower federal courts in New York are not. In any section 502 (a) action under ERISA involving a denial of benefits, a federal district court sitting in New York would apply *Halo*.

As the 2008 and 2013 Agreements' plain language shows, the parties agreed to arbitration <u>in lieu of</u> litigation pursuant to section 502 (a) of ERISA to contest a denial of

[3] In light of this decision, the Panel does not reach or discuss whether FEI "substantially complied" with applicable procedural requirements, except to observe that "substantial compliance" by FEI is in no way a given in light of the Compensation Committee's many deviations from claims-procedure requirements.

benefits. Stated another way, Bloch bargained for an arbitral instead of a federal judicial forum in which to adjudicate any ERISA claims that he might have (*see* discussion at pp 2-3 above). For this reason, the Panel rejects FEI's argument that the Panel lacks authority to decide whether Bloch is entitled to the deferred compensation benefits that he claims to be owed under the 2008 and 2013 Agreements. And because the Panel, in effect, stands in the shoes of a federal district court in New York, the Panel will apply, as it has chosen to do, the controlling precedent in the Second Circuit, which is *Halo.*

Two remaining issues merit discussion. First, FEI contends that the Compensation Committee's failure to strictly comply with the notice and other requirements of the 2008/2013 Agreements' "Administration and Claims Procedures" was "inadvertent and harmless," and therefore excusable under *Halo*. Whether the failure was harmless is debatable; certainly, Bloch was aware of the internal investigation of his claimed misconduct and the consequences for his deferred compensation benefits in the event that FEI terminated his employment for cause. But Bloch did not receive the underlying documentation to which he was entitled (*see e.g.* Letter dated March 19, 2020 from Bloch to the Compensation Committee or Administrator). The Compensation Committee's lapses cannot fairly be characterized as inadvertent, meaning not resulting from or achieved by deliberate planning. The repeated withholding of requested and relevant documentation was deliberate.

Finally, FEI offered to deem the March 19th letter requesting information and documentation to be a timely appeal of the denial of Bloch's deferred compensation benefits. Bloch turned down the offer. As FEI correctly states, if Bloch had agreed, FEI would not have been able to argue, as it does, that Bloch's claims are not arbitrable because he failed to exhaust his internal remedies. In hindsight, Bloch's rejection of FEI's offer may have delayed this arbitration, but it does not excuse the Compensation Committee's failures to comply with the claims-procedure requirements of the 2008 and 2013 Agreements.

CONCLUSION

For the foregoing reasons, the Panel unanimously denies FEI's Motion to Dismiss: Bloch's claims in the two arbitrations. These claims are arbitrable. The two arbitrations are consolidated to be heard together because they present the same issue; i.e., whether FEI properly terminated Bloch's employment for cause. As has been presented to the Panel, the sole reason that Bloch was denied the deferred compensation benefits otherwise owed him under the various agreements is the Compensation Committee's alleged determination and recommendation of January 27, 2020 to terminate Bloch's employment at FEI for cause, which the Board endorsed by a Termination Resolution adopted the same day (*see* 1980, 2008 and 2013 Agreements § 4). In accordance with *Halo*, the Panel will resolve this issue *de novo*.

The Panel directs the parties to confer and report to the Panel within 10 days of the date of this Interim Decision and Order to propose agreed-to deadlines for any remaining discovery, and to propose dates for pre-hearing briefing, the final pre-hearing status conference and the hearing. In connection with discovery, the Panel allows each party no more than one deposition of six hours' duration. Finally, the Panel advises of its availability for an in-person hearing the

week of September 27 at the offices of Stroock & Stroock & Lavan in New York City, or, alternatively, for a virtual hearing that same week, if preferred and agreed to by both parties.

Dated: July 15, 2021

Susan Phillips Read

Hon. Susan Phillips Read (Ret.)

(For the Panel)