

COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, ss.

SUPERIOR COURT  
1984CV03644-BLS2

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THE SHAMROCK GROUP AND OTHERS<sup>1</sup>

*v.*

BASE, INC.

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**MEMORANDUM AND ORDER ALLOWING  
DEFENDANT'S PETITION TO COMPEL ARBITRATION**

The National Marine Fisheries Service ("NMFS") helps manage the Northeast multispecies fishery in part through the use of "sectors," which are groups of three or more people who hold limited access vessel permits and agree to restrictions on taking groundfish for a period of time. See 50 C.F.R. § 648.87. The Plaintiffs (which the Court will refer to collectively as "Shamrock") bought commercial fishing vessels and federal fishing permits from a seller enrolled in Northeast Fishery Sector VII (which everyone calls "Sector 7.")

BASE, Inc., contends that, under the Sector 7 operations plan and agreement, it had a right of first refusal to buy those permits. BASE tried unsuccessfully to stop the sale to Shamrock, first by filing a civil action and seeking injunctive relief against the seller, and then by seeking an interim arbitration award against the seller. After the assets were nonetheless transferred to Shamrock, BASE amended its arbitration demand to add Shamrock as respondents.

Shamrock then filed this action, seeking a declaration that they are not bound to arbitrate. BASE removed the case to federal court, but the United States District Court concluded that the dispute does not involve substantial questions of federal law and remanded the case. BASE then filed a petition to compel arbitration, as a motion in this same action.

The Court will **allow** BASE's petition to compel arbitration because Shamrock assumed a contractual obligation to arbitrate disputes with Sector 7 members when they bought the contested vessels and permits, BASE has standing to compel arbitration, and BASE did not waive its right to arbitrate through litigation conduct. The Court will order the parties to proceed to arbitration, see G.L. c. 251, § 2(a), and declare the rights of the parties.

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<sup>1</sup> Shamrock Fisheries LLC, Kineo Fisheries LLC, Mariner Fisheries LLC, Seafarer Fisheries LLC, Cynbel Fisheries LLC, Torbay Fisheries LLC, Galway Fisheries LLC, and Bill & Eileen LLC.

**1. Assumption of Arbitration Agreements.** The Sector 7 operations plan and agreement requires that any alleged breach of the agreement not resolved through direct negotiation must be submitted to binding arbitration at the request of the Sector or any interested Member. To ensure that such disputes are decided by someone with the requisite expertise, the operations plan requires that the arbitrator or arbitrators either have held a federal fishing master license for at least ten years or have practiced law in the area of fisheries for at least ten years. The Sector 7 membership agreement similarly provides that any dispute arising under it shall be resolved through binding arbitration subject to the same requirements.

Shamrock insists that it cannot be compelled to arbitrate because they were never accepted as Sector 7 members and thus never became parties to these contracts. The Court is not persuaded. By operation of federal law, when Shamrock bought vessels and permits from a Sector 7 member it assumed an obligation to comply with all “conditions of the sector operations plan, sector contract, or any other binding agreements among participating sector vessels for the remainder of the fishing year.” 50 C.F.R. 648.87(b)(1)(iv)(B). Shamrock are therefore obligated to arbitrate their dispute with BASE.

“Arbitration is strictly ‘a matter of consent,’ ... and thus ‘is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration’ ” (emphasis in original). *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 299 (2010), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“matter of consent”), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“only those disputes”).

This does not mean, however, that the parties to an arbitration agreement may be compelled to arbitrate. Under certain circumstances, others who did not sign an arbitration agreement are nonetheless bound by it. “[C]ourts have recognized six theories for binding nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) equitable estoppel, and (6) third-party beneficiary.” *Machado v. System4 LLC*, 471 Mass. 204, 209–210 (2015); accord *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

“Under an ‘assumption’ theory, ‘a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate,’ despite being a nonsignatory.” *Machado, supra* at 210 n.10, quoting *Thomson-CSF, S.A. v. Am. Arb. Ass’n*, 64 F.3d 773, 777 (2d Cir. 1995).

As noted above, by purchasing Sector 7 vessels and permits, Shamrock agreed to be bound by the Sector 7 operating and membership agreements; Shamrock therefore assumed the duty to arbitrate disputes with Sector 7 members like BASE. See *Ryan, Beck & Co., LLC v. Fakh*, 268 F. Supp. 2d 210, 219 (E.D.N.Y. 2003) (broker-dealer that acquired client accounts, and thereby assumed existing client contracts, was bound by arbitration clauses and thus assumed duty to arbitrate disputes with clients); see also *Trippe Mfg Co. v. Niles Audio Corp.*, 401 F.3d 529, 533 (3d Cir. 2005) (company that bought assets and agreed to assume related liabilities also assumed duty to arbitrate included in contract it acquired); *Fyrnetics (Hong Kong) Ltd. v. Quantum Grp., Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002) (successor to licensee assumed arbitration agreement in license); *Shaffer v. Mitchell Transp., Inc.*, 635 F.2d 261, 267 (3d Cir. 1980) (successor employer that assumed collective bargaining agreement was bound by arbitration provision).

Shamrock's assertion that the federal judge who remanded this case to State court decided that NMFS regulations are not controlling authority is wrong. Judge Casper did not reach the merits of whether BASE may compel binding arbitration. She merely declined to exercise jurisdiction.

In any case, the Court may reach its own conclusion as to the meaning and effect of the NMFS regulation. The remand decision has no preclusive effect here, with respect to Judge Casper's jurisdictional ruling or otherwise, because BASE had no right to seek any appellate review of that decision. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 646-647 (2006). "While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning[.]" *Id.* at 647.

**2. Standing.** Shamrock's argument that BASE lacks standing to compel arbitration because it purportedly was not an active member of Sector 7, and therefore cannot show that it had a right of first refusal, wrongly conflates standing with the separate and distinct issue of whether BASE's claim has merit. See G.L. c. 251, § 2(e) ("An order for arbitration shall not be refused on the ground that claim in issue lacks merit[.]"); *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 843 (2007) ("when deciding whether a dispute is arbitrable, a court does not consider the merits of underlying claims").

"The threshold question whether [a plaintiff] has standing is different than the ultimate merit of [its] allegations." *Hoffman v. Bd. of Zoning Appeal of Cambridge*, 74 Mass. App. Ct. 804, 809, rev. denied, 455 Mass. 1104 (2009). "A review of standing ... does not require that the factfinder ultimately find a plaintiff's

allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff," which would be incorrect. *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 91 (2007), quoting *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996).

BASE has standing whether or not it can prove his claims. All Sector 7 members have a right to arbitrate disputes under the operating agreement, whether they are active or inactive members.

**3. No Waiver.** Shamrock's further argument that BASE waived its right to compel binding arbitration by acting in a manner inconsistent with that right, and by unduly delaying its arbitration demand, is also not convincing. The Court finds that BASE acted at all times in a manner consistent with its right to demand arbitration and moved with dispatch to add Shamrock as respondents in its arbitration proceeding. No waiver happened here.

**3.1. Legal Background.** "The right to arbitration may be lost, as any contractual right which exists in favor of a party may be lost[,] through a failure properly and timely to assert the right." *Home Gas Corp. of Massachusetts, Inc. v. Walters of Hadley, Inc.*, 403 Mass. 772, 775 (1989) (internal quotation marks and citation omitted). "[A] party must 'proceed with dispatch in seeking arbitration' if it does not wish to waive that right." *Id.*, quoting *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers, Local No. 633 of N.H.*, 671 F.2d 38, 42 (1st Cir.), cert. denied, 459 U.S. 943 (1982), quoting in turn *E.T. Simonds Constr. Co. v. Local 1330, Int'l Hod Carriers*, 315 F.2d 291 (7th Cir. 1963). For example, if a party gets sued in court, and opts to file and litigate a motion to dismiss on the merits without also moving to compel arbitration, that party will have waived any right to compel arbitration of the dispute. See *Shalaby v. Arctic Sand Technologies, Inc.*, No. MICV2014-03621, 32 Mass. L. Rptr. 401, 2014 WL 7235830 (Mass. Sup. Ct. Dec. 15, 2014) (Salinger, J.) (collecting appellate case law).

"Where we are dealing with a forfeiture by inaction (as opposed to an explicit waiver), the components of waiver of an arbitration clause are undue delay and a modicum of prejudice to the other side." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003). Thus, "a party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) 'delaying its assertion to such an extent that the opposing party incurs actual prejudice.'" *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713 (6th Cir. 2012), quoting *Hurley v. Deutsche Bank Trust Co. Ams.*, 610 F.3d 334, 338 (6th Cir. 2010), quoting in turn *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356

(6th Cir. 2003). All of the more specific factors that courts consider in deciding whether a party has waived its right to arbitration fall within these more general categories. Cf. *Home Gas*, 403 Mass. at 775-776.

“[T]here is no bright-line rule for a waiver of arbitral rights, and each case is to be judged on its particular facts.” *Tyco Int’l Ltd. v. Swartz (In re Tyco Int’l Ltd. Sec. Litig.)*, 422 F.3d 41, 46 (1st Cir. 2005); accord, e.g., *Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010); *In re Mirant Corp.*, 613 F.3d 584, 589 (5th Cir. 2010).

**3.2. BASE’s Litigation Conduct.** When BASE first learned that the former owner of the contested vessels and permits was looking to sell those assets without letting BASE exercise a right of first refusal, BASE filed an action in Bristol Superior Court seeking to enjoin the sale. After it was unsuccessful, BASE promptly commenced a binding arbitration proceeding against the seller. It brought a motion for an interim arbitration award to block the sale. BASE prevailed, and obtained an arbitration panel order barring the seller from completing the transaction. But the decision came too late, as by then the seller and Shamrock had closed on their deal and NMFS had processed the permit transfers. Two weeks later BASE amended its arbitration demand to add Shamrock as parties, since they had now acquired the contested assets.

Shamrock’s argument that by this course of conduct BASE waived its right to compel Shamrock to arbitrate this dispute is without merit.

Though BASE brought a civil action seeking injunctive relief before commencing arbitration, it did so against the party that owned and was planning to sell Sector 7 vessels and permits, not against Shamrock. In any case, seeking interim preliminary injunctive relief from a court is not inconsistent with then seeking further relief from an arbitrator. See, e.g., *Next Step Med. Co. v. Johnson & Johnson Int’l*, 619 F.3d 67, 70 (1st Cir. 2010). Doing so did not waive BASE’s right to compel arbitration of its claim to a right of first refusal.

Nor did Shamrock waive its arbitration rights by moving for an interim arbitration award to block the asset sale without first seeking to add Shamrock as parties to the arbitration. At the time, before Shamrock bought any Sector 7 vessels or permits, BASE had no right to compel Shamrock to arbitrate.

The earliest that BASE could have compelled Shamrock to arbitrate was in late September 2019, when Shamrock bought Sector 7 vessels and permits and thereby assumed the contractual obligation to engage in binding arbitration to resolve disputes under the Sector 7 operations plan. BASE asserted its

arbitration demand against Shamrock in early November 2019. There was no undue delay, and Shamrock has not shown that it suffered any unfair prejudice because BASE did not seek to add Shamrock as arbitration respondents a few weeks earlier.

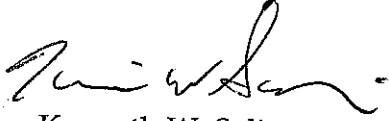
In sum, BASE did not waive its right to compel Shamrock to engage in binding arbitration.

#### ORDER

Defendant's petition to compel arbitration is **allowed**. The parties shall proceed to arbitration. See G.L. c. 251, § 2(a).

Final judgment shall enter (1) declaring that The Shamrock Group, Shamrock Fisheries LLC, Kineo Fisheries LLC, Mariner Fisheries LLC, Seafarer Fisheries LLC, Cynbel Fisheries LLC, Torbay Fisheries LLC, Galway Fisheries LLC, and Bill & Eileen LLC assumed a duty under the operating plan and agreement of Northeast Fisheries Sector VII to engage in binding arbitration to resolve disputes with other Sector 7 members under that operating agreement; and (2) ordering The Shamrock Group, Shamrock Fisheries LLC, Kineo Fisheries LLC, Mariner Fisheries LLC, Seafarer Fisheries LLC, Cynbel Fisheries LLC, Torbay Fisheries LLC, Galway Fisheries LLC, and Bill & Eileen LLC to arbitrate the claims against them in the Amended Demand for Arbitration filed by BASE, Inc., in AAA Case no. 01-19-0003-2608.

3 May 2021

  
Kenneth W. Salinger  
Justice of the Superior Court