UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61792-CIV-MARTINEZ/Snow

LEA SINGH,

Plaintiff,

v.

MEDNAX SERVICES INC. and
AMERICAN ANESTHESIOLOGY, INC.,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendants' Motion to Compel Arbitration of Plaintiff's Newly Added Claims (Counts II through XI) and to Stay Proceedings (ECF No. 29), which was referred to the undersigned by the Honorable Jose E. Martinez, United States District Judge.

BACKGROUND

Plaintiff is a female of Indian descent who worked from May 2014 to July 2017 as a Director of Operations for Defendant American Anesthesiology, Inc., and then for Defendant MEDNAX Services, Inc., when it succeeded American Anesthesiology, Inc. (ECF No. 28, at ¶¶ 13, 39) Plaintiff claims that she was paid less than male employees based solely on her sex, and that she suffered adverse consequences after she complained about the unequal pay, which culminated in termination of her employment. She also claims that she was paid less than "peers who were not Asian/Indian/dark skinned." (ECF No. , at ¶ 17)

On May 12, 2017, Plaintiff filed a charge of race, color, national origin and gender discrimination with the Equal Employment Opportunity Commission, citing Title VII and the Florida Civil Rights Act, complaining of the adverse consequences she was experiencing at her employment. Charge No. 510-2017-02865. (ECF No. 29-4) She filed a supplemental charge on July 12, 2017,

providing additional factual allegations, including that she had been discharged without cause on July 7, 2017. Charge No. 510-2017-02875. (ECF No. 29-5)[1]

Plaintiff filed this action on September 14, 2017, initially alleging only violations of the Equal Pay Act, 29 U.S.C. § 206(d) (EPA). After receipt of a Notice to Sue from the EEOC dated Nov. 28, 2017 (ECF No. 29-3), Plaintiff filed a request on February 26, 2018, to amend her complaint. (ECF No. 25) On April 25, the Court granted Plaintiff's motion and the next day Plaintiff filed her amended complaint to include claims of sex, race, color, and national origin discrimination, as well as retaliation, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and similar claims under the Florida Civil Rights Act, Fla. Stat. § 760.10.

The following day, April 27, 2018, Defendants filed their motion to compel arbitration of the new claims and to stay the entire proceedings pending arbitration.[2] In support, Defendants refer to Plaintiff's Employment Agreement with American Anesthesiology, Inc. According to that agreement, the parties agreed to arbitrate "[a]ny controversy or claim arising out or relating to this Agreement," and agreed that "any alleged breach hereof shall be finally determined by binding arbitration before a three member panel ...." Agreement, ¶ 9. ECF (No. 29-2)

The Employment Agreement specified Plaintiff's salary, bonus, benefits, and duties. Agreement, ¶¶ 2, 3. (ECF No. 29-2) It also expressly provided for successors to the employer's

[1]Although Plaintiff reports that she was advised on July 7, 2017, that her employment was terminated (ECF No. 29-5), her pleadings describe her as "employed by defendants" at the time of filing this action in September 2017 (ECF No. 1).

[2]Defendants attack Plaintiff as having "waited until the very last minute," *i.e.*, the end of the ninety day period after receipt of the notice of right to sue, to seek to amend her complaint, in an "effort to build an argument that Defendants' right to arbitrate had been waived due to the passage of time." (ECF No. 29, at p. 4) As explained by Plaintiff, her delay was caused by the EEOC's delay in producing a copy of her file, and, in any event, her motion to amend her complaint was filed two months prior to the deadline to amend pleadings. (ECF No. 34, at p. 9 n8) Nothing prevented Defendants, who were aware of Plaintiff's discrimination claims since at least mid-2017 and also knew about the arbitration clause in the Employment Agreement, from advising Plaintiff at some time prior to April 2018 that they intended to demand arbitration. On these facts, Defendants' inflammatory allegation that Plaintiff acted strategically in an attempt to support a future argument that Defendants waived their arbitration rights is unpersuasive, at best.

interest to be bound by the Agreement, and that the employee consented to any such assignment. Id., at ¶ 6. On January 8, 2016, Plaintiff was informed that her Employment Agreement had been assigned to her new employer, MEDNAX Services, Inc., effective January 1, 2016. (ECF No. 29-2)

Plaintiff opposes Defendants' demand for arbitration, and argues that Defendants waived their right to compel arbitration by failing to raise the arbitration issue until April 27, 2018, nearly one year after Plaintiff filed her first charge of discrimination with the EEOC, and seven months after Plaintiff filed this action. Defendants disagree, and claim that the EPA claim was not covered by the arbitration agreement, and that they had no obligation to raise the arbitration clause during the EEOC proceedings as to the other discrimination claims, nor in the earlier months of this litigation prior to amendment of the complaint.

Defendants have agreed to waive the requirement that Plaintiff bear the costs of any of the arbitrators, *i.e.*, Defendants will pay all the costs of the arbitrators. (ECF No. 38, at 9) In response to Defendants' demand for arbitration, Plaintiff argues that if the Court compels arbitration of her Title VII and Florida Civil Rights Act claims, then her EPA claim also should be submitted to arbitration on the condition that Defendants first produce the outstanding discovery they had committed to provide Plaintiff in this litigation. (ECF No. 34)

DISCUSSION

The parties' agreement regarding arbitration must be evaluated according to the Federal Arbitration Act (FAA), 9 U.S.C.§§ 2, 3, which "requires courts to stay a case that is covered by a binding arbitration clause so it may proceed in arbitration." Hernandez v. Acosta Tractors, Inc., ___ F.3d ___, 2018 WL 3761126 (11th Cir. Aug. 8, 2018) (reversing lifting of stay and erroneous entry of default judgment against party whose failure to pay for arbitration had resulted in default in arbitration). As has often been observed, arbitration is a matter of contract, and the FAA requires

courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

Plaintiff does not challenge the validity of the arbitration clause in her Employment Agreement, nor its applicability to her discrimination claims under Title VII and the Florida Civil Rights Act. The only question for the Court is whether Defendants waived their right to enforce the arbitration agreement, which depends upon what claims are covered by the parties' agreement and whether the Defendants' conduct constitutes a waiver. Defendants assert that the amended complaint raised new and independent claims that are subject to arbitration and that they did not have the right to arbitrate the earlier-filed EPA claims, such that their demand for arbitration was timely raised after Plaintiff filed her amended complaint. Plaintiff disagrees, and argues that the addition of the discrimination claims in her amended complaint was expected by Defendants and that such claims are similar to her EPA claims in her initial complaint.

The question of whether Defendants waived their right to arbitration is controlled by the application of federal law. See, e.g., S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) (affirming decision to enjoin arbitration because engaging in litigation and taking depositions prior to demanding arbitration constituted waiver under federal law, regardless of whether state law rendered underlying agreement void). There is a strong federal preference for arbitration of disputes, which must be enforced where possible, Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1258 (11th Cir. 2003); however, "despite the strong policy in favor of arbitration, a party may, by its conduct, waive its right to arbitration," S&H Contractors, 906 F.2d at 1514 (citations omitted). The type of conduct which supports a finding of waiver of the right to arbitration is conduct that is inconsistent with the arbitration right. For example, "[a] party acts inconsistently with the arbitration right when the party 'substantially invokes the litigation machinery prior to demanding arbitration.'" Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012), quoting S&H Contractors.

A. Terms of the parties' arbitration agreement as applied to Plaintiff's claims

According to the parties' Employment Agreement, they agreed to arbitrate "[a]ny controversy or claim arising out or relating to this Agreement." Plaintiff's original complaint alleged violations of the EPA based on her claim that she was paid less than her male counterparts as a result of sex discrimination by Defendants. In her amended complaint, Plaintiff added claims of discrimination based on sex (Counts II, VII), race (Counts III, VIII), national origin (Counts IV, IX), color discrimination (Counts V, X), and retaliation (Counts VI, XI) under Title VII and the Florida Civil Rights Act.[3] The parties agree that Plaintiffs' discrimination claims under Title VII and the Florida Civil Rights Act meet the definition of arbitrable claims according to the terms of their agreement, but disagree as to whether the EPA claim "arises out of or relates to" Plaintiff's Employment Agreement.

Defendants concede that "there is an argument to be made that [the EPA claim] may be within the bounds of the [parties' arbitration agreement," but assert that"they have taken the more reasoned position that [the newly added claims] are within the bounds ... while the EPA Claim is not, and it should simply be stayed while the remainder of the claims are arbitrated."[4] According to Defendants, the EPA claim does not arise out of Plaintiff's Employment Agreement and instead "arises out of the comparison between the compensation offered to Plaintiff and her alleged comparators, not the Employment Agreement itself." (ECF No. 29, at n 4) The Court rejects Defendants' strained reading of the EPA claim, and finds that such claim was subject to arbitration according to the terms of the parties' agreement, as discussed below.

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[3]"Because the FCRA is modeled after Title VII, and claims brought under it are analyzed under the same framework," Alvarez v. Royal Atlantic Developers, Inc., 610 F.3d 1253, 1271 (11th Cir. 2010), the Court need not separately analyze the claims brought under the Florida Civil Rights Act for the purpose of this decision.

[4]Defendants maintain that they do not seek to compel arbitration of the EPA claim, but they do not oppose Plaintiff's proposal that if the court requires arbitration of the other claims, the EPA claim should be included in the arbitration.

The Equal Pay Act amended the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., to prevent pay discrimination based on sex. Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1164 (11th Cir. 2008). Courts in this circuit have found FLSA claims clearly fall within agreements to arbitrate "all controversies or claims arising out of or relating to" an employment agreement. See, e.g., Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1221 (11th Cir. 2000) (agreement to arbitrate "any dispute between [the parties]" encompassed FLSA claim); Smith v. Physicians United Plan, Inc., No. 14-60534-CIV-SCOLA, 2014 WL 12797219 (S.D. Fla. Dec. 19, 2014) (agreement to arbitrate "any and all disputes ... relating to or in any way arising out of or connected with the [employment agreement]" included FLSA claim for unpaid overtime wages as it related to the parties' employment agreement); Muniz v. Sharp Deal Auto Repair, Inc., No. 14-20460-CIV-WILLIAMS, 2014 WL 12609466 (S.D. Fla. July 7, 2014) (FLSA claim "unmistakably" subject to arbitration where parties agreed to arbitrate claims "arising out of" plaintiff's employment); Hamlett v. Owners Advantage, LLC, No. 13-80416-CIV-KAM, 2013 WL 4711165 (S.D. Fla. Aug. 30, 2013) ("any dispute or claim arising out of" employment agreement "clearly encompasses" FLSA claim).

Defendants' assertion that it is "far from certain" that the EPA claim was subject to the parties' arbitration agreement is belied by the rulings cited above. These rulings logically support a determination that claims under the EPA, which amended the FLSA, fall within agreements to arbitrate claims "arising out of" an employment agreement such as Plaintiff's.

In light of the parties' broadly stated agreement to arbitrate "any" claim "arising out or relating to" the Employment Agreement which specified Plaintiff's salary, bonus and benefits, and sufficient precedent in this Circuit to support a determination that EPA claims "arise under" employment agreements, it is clear that Plaintiff's EPA claim arose out of her Employment Agreement. As such, the EPA claim was subject to arbitration and Defendants were able to discern that fact from Plaintiff's initial pleading in September 2017.

B. Waiver of right to arbitrate by delay in demanding arbitration

A failure to raise the issue of arbitration is relevant to the analysis of waiver only to the extent that a party delays in demanding arbitration after a pleading is filed raising arbitrable issues. Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1222-23 (11th Cir. 2000) (defendant was "under no obligation to make a pre-suit demand for arbitration"). The key is that a pleading is filed which notifies a party that a right to arbitration has been triggered; it is the party's conduct after that time that can subject them to a finding that they waived their right to arbitration. Courts will find waiver by "a party's substantial participation in litigation to a point inconsistent with an intent to arbitrate which results in prejudice to the other party." Id. at 1222 (internal quotations omitted), citing Morewitz v. West of England Ship Owners Mut. Prot. & Indem. Ass'n, 62 F.3d 1356, 1366 (11th Cir. 1995) (finding insurer waived right to arbitrate question of coverage by failing to request arbitration timely in context of related litigation, noting that insurer colluded with insured to the detriment of injured third party).

Courts in this district have found the following types of litigation conduct inconsistent with a right to arbitrate: answering a complaint, participating in a settlement conference and serving discovery demands before filing a request for arbitration six months after the complaint was filed. Garcia v. Acosta Tractors, Inc., No. 12-2111-CIV, 2013 WL 462713 (S.D. Fla. Feb. 7, 2013); see also, Lewis v. Keiser School, Inc., No. 11-62176-CIV, 2012 WL 4193366 (S.D. Fla. Sept. 18, 2012) (answering complaint, participating in discovery motion practice, taking plaintiff's deposition, and not mentioning arbitration until seven months after complaint filed). In Fuentes v. Security Forever, LLC, 2017 WL 3207775 (S.D. Fla. July 28, 2017), the court noted the defendants had delayed in seeking to compel arbitration nearly one year after the complaint was filed. The defendants had filed motions to dismiss earlier versions of the complaint, filed a motion for sanctions, and engaged in discovery. Defense counsel, however, had not read the employment contracts until nearly a year after the lawsuit was filed, even though the contracts had been produced by defendants earlier in discovery.

The court determined that, while it was a "close question," the record supported a finding that defendants had invoked the litigation machinery prior to demanding arbitration in a manner and to an extent that was inconsistent with the intent to arbitrate.

Defendants argue that they were not required to seek arbitration until Plaintiff's amended complaint was filed because it was the operative pleading raising arbitrable issues. As discussed above, the issues in this case were arbitrable when Plaintiff filed her initial complaint in September 2017 alleging a violation of the EPA, as such claim was within the scope of the parties' arbitration agreement. Defendants did not seek to compel, nor did they even mention, arbitration until seven months later, in April 2018, when the Court granted Plaintiff's request (filed two months earlier) to amend her pleading. Defendants answered the original complaint, and answered the EPA claim in the amended complaint, engaged in discovery practice, including attending a hearing before the undersigned regarding a discovery dispute, and joined in the submission of a scheduling report. According to Defendants, this conduct was done exclusively as to the EPA claim and Defendants "acted carefully so as not to waive their right to arbitrate claims by not participating in litigation related to the newly added" claims, for example, by "limiting discovery in this matter to issues germane to the EPA claim." Defendants' assertion is discredited by review of the discovery served by Defendants on December 7, 2017 (several months prior to the amendment of the complaint). Defendants served Interrogatories seeking "any and all other matters, charges, lawsuits, ... regarding discrimination, harassment, and/or retaliation against any employer or former employer in which you have been involved at any time in the last ten (10) years ...." (ECF No. 34-4).[5]

The Court finds that Defendants' conduct of litigation prior to seeking arbitration in April 2018 was inconsistent with, and constitutes a waiver of, their right to arbitrate the EPA claim. The Court's inquiry does not end here, however, because "[i]n limited circumstances, ... where a party

[5]Defendants also sought information about "all legal proceedings including civil, administrative, bankruptcy, and criminal proceedings, lawsuits, and claims for damages in which you have been involved." (ECF No. 34-4)

has waived the right to compel arbitration, an amended complaint can revive that right 'if it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims.'" Collado v. J&G Transport, Inc., 820 F.3d 1256, 1259 (11th Cir. 2016), quoting Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194 (11th Cir. 2011).

C. The amended complaint raised claims that did not revive Defendants' right to arbitrate

Defendants do not concede that they waived the right to arbitrate the EPA claim, nor do they argue that the amended complaint revived their right to arbitrate the EPA claim. Instead, Defendants argue that the alleged waiver of the arbitration agreement as to Plaintiff's newly added claims "is evaluated entirely independently from analysis of whether the EPA claim may have been subject to the arbitration agreement," and cite the Eleventh Circuit's decision in Collado v. J&G Transport, Inc., 820 F.3d 1256 (11th Cir. 2016). That case is distinguishable and also does not stand for the proposition that newly added claims are "evaluated entirely independently" from original claims for purpose of enforcement of arbitration agreements.

In Collado, the plaintiff, a truck driver who worked approximately 85 hours weekly as an independent contractor, filed an FLSA claim for overtime wages and the defendant failed to seek arbitration despite the right to do so, which it acknowledged as a waiver of its right to arbitrate the FLSA claim. After the close of discovery, the plaintiff added new claims under state law for breach of contract and *quantum meruit* based on information revealed in discovery showing that plaintiff was not paid the correct compensation for loads he delivered, pursuant to his contract. The defendant immediately sought to compel arbitration of the new claims, which was denied by the lower court based on that court's determination that the new claims "did not unexpectedly change the scope or theory of the litigation." Id., at 1258. The Eleventh Circuit reversed, finding that the defendant was not required to anticipate claims which may "lurk in the shadows of a case," and that a waiver of the right to arbitrate a federal claim (the FLSA claim) does not extend to a waiver of a right to arbitrate

later asserted state law claims. "Some cases speak of revival of a waived right to arbitrate ... [i]n these circumstances, however, it is more accurate to say that there was never a waiver of the right to arbitrate the state claims in the first place." Id., at 1260.

The Eleventh Circuit noted that Mr. Collado did not dispute that his new claims changed the scope or theory of the litigation, and instead had focused on the "unexpected" nature of the change due to the defendant's prior knowledge of the contract breach. The court explained, however, that the change in "scope" of the litigation was the pertinent fact. The court rejected the parties' reliance on a prior decision of the court, Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194 (11th Cir. 2011), and explained that the Krinsk decision to grant a defendant's request to arbitrate claims in a class action after it had waived its right to seek arbitration of an earlier version of the plaintiffs' pleading, was not based on the filing of the amended pleading which asserted "revised, but mostly similar" claims, *i.e.*, claims not unexpected in the context of the litigation already filed, but rather was based on the unexpected change in definition of the class which increased the class from hundreds of plaintiffs to thousands or tens of thousands of potential plaintiffs.[6]

In the Collado case, the facts relevant to the newly added claims for failure to pay contractually agreed amounts based on the number of loads delivered were distinct from the facts required to prove an FLSA violation based on hours worked. In contrast, the facts relevant to Plaintiff Singh's claim of unequal pay are inextricably intertwined with the facts required to support her discrimination claims, which relate to her claims of unequal treatment as manifested by unequal pay, and the adverse consequences she suffered after raising her claims of unequal pay. There also is no dispute that Plaintiff's newly added claims were expected by Defendants in this litigation, as the

[6]The court observed that "[a] defendant who was willing to litigate the claim pleaded against it would need to identify all of the possible claims that could have been but weren't pleaded against it and file a motion insisting that those unpleaded claims be arbitrated. Otherwise, under Collado's approach, the defendant would waive the right to arbitrate those claims if they ever were pleaded." Collado, 820 F.3d at 1261.

parties had been before the EEOC since May 2017 on such claims and, as noted above, Defendants sought discovery from Plaintiff regarding her other claims.

A finding that Plaintiff's Title VII claims are similar to, or merely revise, her original EPA claim is appropriate here, where all of Plaintiff's later-added claims depend upon her original allegations of unequal pay filed in her initial complaint on September 14, 2017. For example, the higher paid male employees were not of the same race, national origin or color as Plaintiff, so the facts which support Plaintiff's claims of sex, race, national origin and color discrimination all depend on the facts originally alleged in support of her EPA claim, *i.e.*, that these comparators were paid more than Plaintiff. Defendants acknowledge that the facts underlying the sex discrimination claim "plainly interlace with" the EPA claim. (ECF No. 29)[7] The new claim which differs the most from Plaintiff's original claim is the claim for retaliation, and even that claim is dependent, in large part, upon the facts of the original claim, because her retaliation claim alleges that she suffered adverse consequences after raising her claim of unequal pay.

Defendants not only delayed in raising the arbitration agreement but also engaged in litigation conduct, including serving and responding to discovery, attending a hearing on a discovery issue, and answering the initial and amended pleading as to the EPA claim. The filing of the amended complaint with additional discrimination claims did not revive Defendants' right to arbitrate, as discussed above, because such claims were similar to, and dependent upon, the facts alleged in the original claim. In summary, Defendants' conduct which the Court finds was inconsistent with their right to arbitrate the EPA claim also supports a finding that Defendants' conduct was inconsistent with their right to arbitrate the new claims of discrimination, as the new claims were expected by Defendants and are similar to, and are necessarily factually intertwined with, the original claim.

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[7]The Eleventh Circuit has described EPA and Title VII claims as existing "side by side in the effort to rid the workforce of gender-based discrimination." Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518, 1527 (11th Cir. 1992). "Title VII was intended to 'supplement, rather than supplant, existing laws and institutions relating to employment discrimination.'" Id., quoting Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

D. Prejudice to Plaintiff from Defendants' delayed invocation of arbitration

Even if a party engages in conduct inconsistent with the intent to arbitrate, they remain entitled to invoke arbitration rights if the other party has not been prejudiced. "To determine whether the other party has been prejudiced, 'we may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.'" Garcia v. Wachovia Corp., 699 F.3d at 1277, quoting S&H Contractors. Prejudice can be found where a party has been forced to incur "the types of litigation expenses that arbitration was designed to alleviate," Morewitz, 63 F.3d. at 1366. Arbitration is designed to achieve a "quicker and less expensive result through a more streamlined dispute resolution process." Lewis v. Keiser School, Inc., No. 11-62176-CIV, 2012 WL 4193366 (S.D. Fla. Sept. 18, 2012) (declining to compel arbitration where defendant employers delayed seven months to seek arbitration, and plaintiff incurred litigation costs she would not have incurred in arbitration). In Beaver v. Inkmart, LLC, No. 12-60028, 2012 WL 3834944 (S.D. Fla. Sept. 4, 2012), the court found that a defendant would be prejudiced by being compelled to arbitrate claims after spending "'tens of thousands of dollars in pretrial proceedings and discovery' that may have been avoided had the demand been made earlier," where the plaintiff sought arbitration six months after filing its complaint based on breach of a franchise agreement.

The parties before the Court have participated in discovery, including appearing at a hearing before this Court in January 2018 (after the proceedings at the EEOC were concluded but prior to amendment of the complaint) to obtain an order regarding production of privileged information. Defendants also answered the original and the amended complaint as to the EPA claim, and joined in the filing of a scheduling report prior to amendment of the complaint. Plaintiff argues that she incurred a total of $48,000 in attorney's fees to date, and an additional $4,000 for an expert report, but fails to delineate which expenses were unique to this litigation and which expenses would have been incurred in arbitration. Such expenditures do not necessarily demonstrate substantial prejudice caused by Defendants' delay, unless such expenditures would not have been incurred in

arbitration or could have been avoided if the demand for arbitration had been made earlier. For example, Defendants have agreed to "work with Plaintiff on reasonable and proportional discovery efforts moving forward, including properly bounded e-discovery searches that will result in production of electronic records," apparently even if the case proceeds to arbitration. (ECF No. 38) Accordingly, Plaintiff's expenditures related to discovery in this litigation might also have been incurred in arbitration proceedings.

It is undisputed that Plaintiff has incurred tens of thousands of dollars in attorney's fees and costs in this litigation that has continued for nearly one year. What is not clear from the record, and this Court cannot rely on speculation as to this question, is whether Defendants' delay in seeking arbitration has prejudiced Plaintiff by requiring her to incur expenses which otherwise could have been minimized or eliminated. The burden on the party advocating waiver of a right to arbitration is a heavy one. If a question remains as to whether to compel arbitration, it "must be addressed with a healthy regard for the federal policy favoring arbitration." Picard v. Credit Solutions, Inc., 564 F.3d 1249, 1253 (11th Cir. 2009) (quotations omitted).

The Court finds that Plaintiff has failed to demonstrate prejudice based on her failure to show how her expenses were greater than if her claims were arbitrated, and also because Defendants have agreed to pay for the arbitrators' costs and to comply with the discovery demands already served in this litigation.

CONCLUSION

The Court finds that Defendants' conduct in this litigation was not consistent with an intent to arbitrate. However, in light of the strong preference for enforcement of arbitration agreements, and Plaintiff's failure to articulate how she has been prejudiced by Defendants' delay, the Court finds that Plaintiff has not met her heavy burden of demonstrating that Defendants waived their right to arbitration. Accordingly, it is

RECOMMENDED that Defendants' Motion to Compel Arbitration of Plaintiff's Newly Added Claims (Counts II through XI) and to Stay Proceedings (ECF No. 29) be GRANTED. Further, it is recommended that Plaintiff's EPA claim (Count I) also be compelled to arbitration, conditioned upon Defendants paying all the costs of the arbitrators, as they have agreed to do, and Defendants' compliance with their outstanding discovery obligations. In addition, if all of Plaintiff's claims are to be arbitrated, it is recommended that this case be DISMISSED, without prejudice.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Jose E. Martinez, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained therein, except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 28th day of August, 2018.

LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record