IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITECH COMPOSITES, INC., an Idaho corporation,

Plaintiff,

v.

AVCORP INDUSTRIES INC., a federally incorporated reporting company in Canada,

Defendant.

Case No. 3:18-cv-1399-YY

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Youlee Yim You issued Findings and Recommendation in this case on March 2, 2020. ECF 56. Magistrate Judge You recommended that Defendant's motion to compel arbitration be granted and that this case be stayed pending arbitration.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if a party objects, "but not otherwise"). Although without objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Plaintiff timely filed an objection (ECF 58) to which Defendant responded. ECF 61. Plaintiff objects to the portion of Judge You's recommended findings that Defendant did not waive arbitration and that Plaintiff's promissory estoppel claim "arises under" the purchase orders and thus is subject to the arbitration clause. Based on a *de novo* review, the Court declines to adopt the Findings and Recommendation because the Court finds that Defendant waived its right to arbitration.

To prove waiver of a party's right to arbitration, the moving party "must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016). The moving party "bears a heavy burden of proof." *Id.* (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)). Defendant disputes the second and third elements.

"There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate. [The Ninth Circuit has] stated, however, that a party's extended silence and delay in moving for arbitration may indicate a 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims,' which would be inconsistent with a right to arbitrate." *Martin*, 829 F.3d at 1125 (first alteration added, second alteration in original) (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988)). Courts have found compelling cumulative acts that include: (1) failing to raise the right to arbitration in pleadings; (2) entering into joint stipulations setting case schedules; (3) failing to object to the plaintiff's assertion of the right to a jury trial; (4) litigating for a substantial period; (5) the parties engaging in discovery; and (6) engaging in *judicial* settlement conferences. *See, e.g.*, *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718-19 (6th Cir. 2012); *Garcia v. Acosta Tractors, Inc.*, 2013 WL 462713, at *5 (S.D. Fla. Feb. 7, 2013); *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1067-68 (C.D. Cal. 2011).

Defendant waited thirteen months to assert its rights to arbitrate. Defendant did not raise its arbitration right as an affirmative defense in its answer. Defendant also actively litigated the case in federal court, including: (1) filing its corporate disclosures; (2) filing a joint Rule 26(f) discovery plan; (3) participating in a Rule 16 conference with the Court; (4) agreeing to Plaintiff's proposed case schedule filed with and adopted by the Court, which included a request that a jury trial be scheduled in spring 2020, although the Court has not yet scheduled a jury trial; and (5) accepting Plaintiff's discovery requests. Importantly, Defendant also participated in a judicial settlement conference with U.S. Magistrate Judge Stacie Beckerman on February 26, 2019. The free assistance of a United States Magistrate Judge to mediate this dispute would not generally be available to parties in arbitration. Thus, this is not simply an attempt at settlement,

which may not be inconsistent with an attempt to arbitrate, but was "tak[ing] advantage of being in federal court." *Martin*, 829 F.3d at 1129.

Defendant argues how each act is not sufficient to contradict an intent to arbitrate. "The problem with [Defendant's] argument is that, regardless of whether each of these circumstances is insufficient to show that [Defendant] acted completely inconsistently with its right to arbitration, they may well be sufficient when considered together." *Johnson Assocs.*, 680 F.3d at 719. Considering Defendant's acts cumulatively, the Court finds that they are sufficient to show that Defendant acted inconsistently with asserting its rights to arbitrate.

Defendant also argues that Plaintiff was not prejudiced by Defendant's actions. Plaintiff argues that it was prejudiced because "as a result of [Defendant] having delayed seeking arbitration, [Plaintiff has] incurred costs that [it] would not otherwise have incurred." *Martin*, 829 F.3d at 1126. These costs must be more than "self-inflicted" wounds from filing the complaint or litigating jurisdiction or venue. *Id.*

Defendant argues that all of Plaintiff's attorney's fees and costs were "self-inflicted" wounds akin to filing the complaint and litigating jurisdiction and venue. The Court disagrees. Participating in Rule 26(f) meetings with Defendant's counsel, filing a joint Rule 26(f) plan with the Court, participating in a Rule 16 conference, participating in a judicial settlement conference, conferring on a revised case schedule, filing an unopposed amended case schedule with the Court, and preparing and serving federal court discovery requests are not litigation activities that come simply with filing a complaint, before arbitration rights can be litigated. Defendant's interpretation of "self-inflicted" wounds essentially is everything in federal court because Plaintiff should not have filed a case in federal court. Defendant's interpretation is rejected. It would render the cases finding prejudice for litigation fees and costs meaningless. It also

presupposes that all litigants will always pursue, rather than waive, their arbitration rights, which is not necessarily true. Even assuming Plaintiff knew about the arbitration clause and believed that it could apply to all of Plaintiff's claims, Plaintiff still could have sued in federal court and Defendant may have elected not to pursue its right to arbitrate. Defendant may have chosen to waive that right and remain in federal court to take advantage of the different rules that apply in federal litigation, including broader discovery, or to take advantage of federal judicial settlement options.

The question is whether Defendant's delay caused additional fees and costs to Plaintiff. The answer is yes. Plaintiff engaged in activities that led to fees and costs that Plaintiff would not have incurred had Defendant exercised its arbitration right without delay. These include expenses relating to preparing for and attending a judicial settlement conference, negotiating and filing a revised federal court case schedule, and preparing and serving federal court discovery requests.

Because the Court finds that Defendant waived its rights to arbitration, the Court need not reach Plaintiff's argument that its promissory estoppel claim is not covered by the arbitration clause. The Court notes, however, that "the phrase 'arising under' in an arbitration agreement should be interpreted narrowly." *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 921 (9th Cir. 2011). "[U]nder an arbitration agreement covering disputes 'arising under' the agreement, only those disputes 'relating to the interpretation and performance of the contract itself' are arbitrable." *Id.* at 924 (quoting *Mediterranean Enters., Inc. v. Ssangyong Constr. Co.*, 708 F.2d 1458, 1464 (9th Cir. 1983)). Plaintiff's promissory estoppel claim is based on allegations that in July 2015 Defendant solicited bids for a long-term program to provide parts for the manufacture of hundreds of aircraft for about 13 years, and then made assurances to Plaintiff that

Defendant would order parts from Plaintiff throughout the entirety of the term. Plaintiff alleges that based on those assurances, Plaintiff spent more than $145,000 in research and engineering costs. Plaintiff also alleges that it manufactured some parts, including the parts covered by specific purchase orders that contain the arbitration agreements, for which Defendant did not pay. Plaintiff's promissory estoppel claim is not based on an interpretation or performance of the individual purchase orders for specific parts. Instead, that claim relies on allegations relating to whether Defendant made assurances of long-term purchases and a future ongoing business relationship. Thus, this claim would not be subject to arbitration even if Defendant had not waived its arbitration rights. *See Wireless Warehouse, Inc. v. Boost Mobile, LLC*, 2010 WL 891329, at *6 (C.D. Cal. Mar. 10, 2010) (finding that the promissory estoppel claim was independent of the arbitration agreement because it was alleged to arise from promises by the defendant "regarding a future business relationship between the parties . . . a long-term relationship between the parties for the distribution of Boost's new product").

The Court declines to adopt the Findings and Recommendation (ECF 56). Defendant's motion to compel arbitration (ECF 32) is DENIED.

IT IS SO ORDERED.

DATED this 17th day of April, 2020.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge