

1 no remaining non-arbitrable claims, dismisses Plaintiff's claim *with prejudice*.

2 **II. BACKGROUND**

3 **A. Statement of Facts¹**

4 On February 21, 2015, Plaintiff entered into a Retail Installment Sale Contract -
5 Simple Finance Charge (With Arbitration Provision) (the "RISC") with Yucca Valley
6 Chrysler Center for the purchase and financing of a 2014 Fiat 500 vehicle (the "Vehicle").
7 Motion, ECF No. 4 ("Mot.") at 5²:18-20; *see also* Complaint, ECF No. 1 ("Compl.") at 5,
8 ¶ 24; Opposition, ECF No. 6 ("Oppo.") at 9:18-20. The RISC required Plaintiff to make
9 monthly payments of \$395.07 until February 23, 2021, as part of her agreement to finance
10 the purchase of her **\$16,900.00** Vehicle by agreeing to pay nineteen percent (19%) interest
11 for a total amount owed at the end of the RISC term of **\$28,945.04**. Mot. at 20. Page 2 of
12 the RISC contained a section entitled "Agreement to Arbitration," which said, "By signing
13 below, you agree that, pursuant to the Arbitration Provision on the reverse side of the
14 contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not
15 by a court action." Mot. at 21. Plaintiff signed this provision. *Id.* The actual provision
16 itself requires arbitration of any dispute arising under the Agreement as follows:

17 **ARBITRATION PROVISION**

18 **PLEASE REVIEW - IMPORTANT - AFFECTS YOUR
19 LEGAL RIGHTS**

- 20 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY
21 DISPUTE BETWEEN US DECIDED BY ARBITRATION
22 AND NOT IN COURT OR BY JURY TRIAL.
23 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP
24 YOUR RIGHT TO PARTICIPATE AS A CLASS
25 REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS

24 ¹ The majority of the facts set forth are taken from the operative complaint, and for
25 purposes of ruling on Defendant's motion to compel arbitration and motion to dismiss, the
26 Court assumes the truth of the allegations pled and liberally construes all plausible
27 allegations in favor of the non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
28 519 F.3d 1025, 1031 (9th Cir. 2008). Additional facts were also taken from the moving
papers. ECF Nos. 4, 6, 8.

² Unless otherwise indicated, all page number references are to the ECF generated
page number contained in the header of each ECF-filed document.

1 CLAIM YOU MAY HAVE AGAINST US INCLUDING BUT
2 NOT LIMITED TO ANY RIGHT TO CLASS ARBITRATION
3 OR ANY CONSOLIDATION OF INDIVIDUAL
4 ARBITRATIONS.

- 5 3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION
6 ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT,
7 AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE
8 IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

9 **Any claim** or dispute, **whether in contract, tort, statute,** or
10 otherwise (including the interpretation and scope of this
11 arbitration provision, and the arbitrability of the claim or
12 dispute), **between you and us** or our employees, agents,
13 successors or assigns, **which arises out of** or **relates to your**
credit application, purchase, or condition of this vehicle, this
contract or any resulting transaction or relationship (including
14 any relationship with third parties who do not sign this contract)
15 **shall, at your or our election, be resolved by neutral, binding**
16 **arbitration and not by a court action.**

17
18 The arbitrator shall apply governing substantive law and the
19 applicable statute of limitations. The arbitration hearing shall be
20 conducted in the federal district in which you reside unless the
21 Seller-Creditor is a party to the claim or dispute, in which case
22 the hearing will be held in the federal district where the contract
23 was executed . . . Any arbitration under this Arbitration Provision
24 shall be governed by the Federal Arbitration Act (9 U.S.C. § 1,
25 et seq.) and not by any state law concerning arbitration . . .

26 You and we **retain the right to seek remedies in small claims**
27 **court for dispute or claims within the court's jurisdiction,**
28 unless such action is transferred, removed, or appealed to a
different court. **Neither you nor we waive the right to**
arbitrate by using self-help remedies, such as repossession, or
by filing an action to recover the vehicle, to recover a
deficiency balance, or for individual injunctive relief. Any court
having jurisdiction may enter judgment on the arbitrator's award.
This Arbitration Provision shall survive any termination,
payoff or transfer of this contract. . . . If a waiver of class
action rights is deemed or found to be unenforceable for any
reason in a case in which class action allegations have been

1 made, the remainder of this Arbitration Provision shall be
2 unenforceable.

3 (the “Arbitration Provision”). Mot. at 5:24-8:20 (emphasis added); *see also id.* at 25.

4 On March 3, 2015, Yucca Valley Chrysler Center assigned the RISC to Defendant,
5 at which time Defendant carried the loan to Plaintiff in the sum of \$16,900.36. Mot. at
6 8:22-23; Oppo. at 9:20-21.

7 From April 10, 2015 to November 12, 2018, or more than three years, Plaintiff made
8 payments on the loan. Defendants’ Reply Brief in Support of Motion to Compel
9 Arbitration and Dismiss, or Alternatively, Stay the Action, ECF No. 8 (“Reply”) at 10:7-
10 8. However, according to the RISC, these payments were supposed to continue through
11 February 23, 2021, meaning Plaintiff still owed about 27 months of payment when she
12 ceased making payments in November 2018. *Id.* at 10:8-11.

13 In January 2019, Plaintiff voluntarily surrendered the Vehicle to Defendant. Reply
14 at 27, Exhibit D; *see also* Declaration of Veronica Camarillo in Support of Plaintiff’s
15 Opposition to Motion to Compel Arbitration, ECF No. 6-1 (“Camarillo Decl.”) at 2, ¶ 5.
16 Plaintiff alleges that by surrendering the Vehicle, her “account” with Defendant closed,
17 and she no longer owed a balance due. Compl. at 5, ¶ 26; Camarillo Decl. at 2, ¶ 6.

18 On April 5, 2019, the Vehicle was sold at a private sale. Reply at 27, Exhibit D.
19 Shortly thereafter, on April 23, 2019, Defendant sent a Notice of Deficiency and Demand
20 for Payment to Plaintiff, notifying her that she owed a deficiency balance of \$10,674.96,
21 which represented the balance due after Defendant had credited the proceeds from the sale
22 of the Vehicle to Plaintiff’s account. Reply at 10:12-15. This letter claimed that Plaintiff
23 owed the following amounts:

Item:	Amount:
Outstanding Principal & Interest Owed:	\$10,748.80
(Reduced by Proceeds of Sale):	(\$1,800.00)
Late Charges:	\$345.00
Costs/Fees:	\$1,383.16
TOTAL:	\$10,674.96

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28 Reply at 27, Exhibit D.

1 On May 10, 2019, Plaintiff sent Defendant a letter acknowledging receipt of
2 Defendant's notice but claiming the Vehicle had been inoperable since December 6, 2016,
3 so she stopped making payments because she was no longer able to afford to continue to
4 put money into repairs while also making payments on the loan. Reply at 10:16-17; *see*
5 *also id.* at 29 (attaching Plaintiff's letter as Exhibit E).

6 On July 29, 2019, Defendant "pulled" her Experian credit report. Reply at 10:19-
7 20; Compl. at 5, ¶ 27. When Plaintiff reviewed her July 31, 2019 credit report, she
8 discovered this unauthorized "hard" inquiry. Compl. at 5, ¶ 28.

9 On September 17, 2019, Defendant filed a small claims complaint against Plaintiff.
10 Reply at 10:21-22; *see also id.* at 32-34 (attaching the complaint as Exhibit F).

11 **B. Procedural History**

12 On May 15, 2020, Plaintiff filed this lawsuit against Defendant, alleging one claim
13 for relief for violation of the FCRA. *See generally* Compl. On May 29, 2020, Plaintiff
14 served Defendant by substituted service, ECF No. 3, meaning a responsive pleading was
15 due by June 19, 2020, *see* FED. R. CIV. P. 12(a)(1)(A)(i) (providing that a defendant must
16 file a responsive pleading "within 21 days after being served with the summons and
17 complaint").³ On July 20, 2020, Defendant filed the instant motion. Mot., ECF No. 4. On
18 August 25, 2020, Plaintiff filed a response in opposition to the motion. Oppo., ECF No. 6.
19 On September 1, 2020, Defendants filed a reply brief. Reply, ECF No. 8. That same day,
20 Plaintiff filed evidentiary rejections to Defendant's reply brief. ECF No. 10.

21 **III. LEGAL STANDARD**

22 **A. Motion to Compel Arbitration**

23 Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arbitration
24

25 ³ Although Defendant's responsive pleading appears to have been untimely if the date
26 of service is correct, Defendant's Motion to Compel Arbitration raises concerns as to the
27 validity of service. *See* Mot. at 27 (noting in a July 13, 2020 e-mail that Defendant did not
28 believe it had been formally served yet); 30 (inquiring about when the complaint was
served). As such, the Court disregards any potential untimeliness as to the responsive
pleading, particularly given Plaintiff's failure to raise the issue.

1 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds that exist
2 at law or in equity for the revocation of a contract.” 9 U.S.C. § 2. “Once the court has
3 determined that an arbitration agreement relates to a transaction involving interstate
4 commerce, thereby falling under the FAA, the court’s only role is to determine [1] whether
5 a valid arbitration agreement exists and [2] whether the scope of the dispute falls within
6 that agreement.” *Ramirez v. Cintas Corp.*, No. C 04-00281 JSW, 2005 WL 2894628, at
7 *3 (N.D. Cal. Nov. 2, 2005) (citing 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys.,*
8 *Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

9 **B. Motion to Dismiss Under Rule 12(b)(1)**

10 Rule 12(b)(1) of the Federal Rules of Civil Procedure (“Rule 12(b)(1)”) allows a
11 defendant to seek dismissal of a claim or lawsuit by asserting the defense of lack of subject
12 matter jurisdiction. FED. R. CIV. P. 12(b)(1). “If the court determines at any time that it
13 lacks subject matter-jurisdiction, the court must dismiss the action.” FED. R. CIV. P.
14 12(h)(3). “Dismissal for lack of subject matter jurisdiction is appropriate if the complaint,
15 considered in its entirety, on its face fails to allege facts sufficient to establish subject matter
16 jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d
17 981, 984-85 (9th Cir. 2008). “Although the defendant is the moving party in a motion to
18 dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court’s
19 jurisdiction.” *Brooke v. Kashl Corp.*, 362 F. Supp. 3d 864, 871 (S.D. Cal. 2019). As a
20 result, the plaintiff, as “[t]he party asserting jurisdiction[,] bears the burden of establishing
21 subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction.”
22 *DRAM*, 546 F.3d at 984.

23 **C. Motion to Stay**

24 Where a plaintiff files suit “in any of the courts of the United States upon any issue
25 referable to arbitration under an agreement in writing for . . . arbitration, the court in which
26 such suit is pending, upon being satisfied that the issue . . . is referable to arbitration . . .
27 shall on application of one of the parties stay the trial of the action until such arbitration.”
28 9 U.S.C. § 3. A court’s power to stay proceedings is incidental to the inherent power to

1 control the disposition of its cases in the interests of efficiency and fairness to the court,
2 counsel, and litigants. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). A stay may be
3 granted pending the outcome of other legal proceedings related to the case in the interests
4 of judicial economy. *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th
5 Cir. 1979). Discretion to stay a case is appropriately exercised when the resolution of
6 another matter will have a direct impact on the issues before the court, thereby substantially
7 simplifying the issues presented. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708
8 F.2d 1458, 1465 (9th Cir. 1983). In determining whether a stay is appropriate, a district
9 court “must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S.
10 at 254-55. “[I]f there is even a fair possibility that the stay ... will work damage to some
11 one else, the stay may be inappropriate absent a showing by the moving party of hardship
12 or inequity.” *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059,
13 1066 (9th Cir. 2007) (citation and internal quotation marks omitted).

14 **IV. DISCUSSION**

15 Defendant argues that the Court should compel arbitration because Plaintiff signed
16 a RISC that included an arbitration provision which covers her federal claim arising under
17 the FCRA. Mot. at 4:4-9. Plaintiff responds that her FCRA claim arises from Defendant’s
18 unlawful request and review of a credit report, not the sale of the Vehicle, and as such, her
19 claim is not subject to arbitration. Oppo. at 9:2-5. She further contends that even if
20 Defendant relies on an ostensible outstanding debt owed on the Vehicle as justification for
21 pulling the credit report, Defendant failed to prove such a debt exists. *Id.* at 9:5-7. As a
22 result, Defendant fails to show the resolution of Plaintiff’s FCRA claim requires the Court
23 to rely on or refer to the RISC, so the Defendant has not carried its burden of showing a
24 valid agreement to arbitrate the dispute at issue, and the Court should deny the motion. *Id.*
25 at 9:13-16. In response, Defendant argues that FCRA’s claim necessarily implicates the
26 parties’ relationship because if Defendant qualifies as a creditor of Plaintiff, the FCRA
27 authorizes its act of pulling her credit report as a matter of law. *See generally* Reply.
28 Because the Arbitration Provision requires arbitration of any dispute arising out of the

1 parties' relationship, Defendant contends the Court must order the parties to arbitration.
2 *Id.* Defendant also contends in its Reply Brief that even the matter of whether the parties'
3 dispute falls within the scope of the Arbitration Provision is subject to determination by
4 the arbitrator, not the Court. Reply at 5:5-8.

5 The Arbitration Provision between Plaintiff and Defendant is part of the RISC signed
6 by Plaintiff on February 21, 2015. Mot. at 5:18-20; *see also* Compl. at 5, ¶ 24. It states
7 that it covers “[a]ny . . . dispute . . . in . . . statute . . . between you and . . . our . . . assigns,
8 which arises out of . . . this contract or any resulting . . . relationship (including any
9 relationship with third parties who do not sign this contract).” Mot. at 23, Ex. A. The
10 original lender assigned the RISC to Defendant. Mot. at 8:22-23; Oppo. at 9:20-21.
11 Plaintiff’s dispute with Defendant arises out of a statute (the FCRA) and exists between
12 herself and the original lender’s assignee,⁴ Defendant, and relates to the resulting creditor-
13 debtor relationship arising out of the RISC. As such, as outlined below, the Court finds
14 the Arbitration Provision in the RISC at constitutes a valid agreement to arbitrate and is
15 unpersuaded by Plaintiff’s arguments that the Arbitration Provision is unconscionable.

16 **A. Jurisdiction**

17 The FAA allows a party aggrieved by another party’s failure to arbitrate pursuant to
18 a valid arbitration agreement to bring either an original petition to arbitrate, or where an
19 action has already been filed, a motion to compel arbitration “in any United States district
20 court which, save for such agreement, would have jurisdiction under title 28, in a civil
21

22 ⁴ Although not directly raised in Plaintiff’s Opposition, for the avoidance of doubt,
23 “[t]he United States Supreme Court has held that a litigant who is not a party to
24 an arbitration agreement may invoke arbitration under the FAA if the relevant state
25 contract law allows the litigant to enforce the agreement.” *Kramer v. Toyota Motor Corp.*,
26 705 F.3d 1122, 1128 (9th Cir. 2013) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S.
27 624, 632 (2009) (looking to California contract law to determine whether Toyota, as a
28 nonsignatory to the arbitration agreement, could compel arbitration)). Because California
law allows an assignee to step into the shoes of the assignor and assume all rights,
privileges, and liabilities, Defendant may enforce the Arbitration Agreement. *See* CAL.
CIV. CODE §§ 1457; 1458.

1 action . . . of the subject matter arising out of the controversy between the parties.” 9 U.S.C.
2 § 4. Defendant argues that but for the requirement to arbitrate, Plaintiff’s FCRA claim
3 arises under federal law, and as a result, subject matter jurisdiction is proper under 28
4 U.S.C. § 1331. Mot. at 10:27-18. Under 28 U.S.C. § 1331, “[t]he district courts . . . have
5 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of
6 the United States.” Plaintiff filed suit under a federal law (i.e., the FCRA), which provides
7 that where a consumer brings an action to enforce liability under its provisions, he or she
8 may bring the suit “in any appropriate United States district court, without regard to the
9 amount in controversy, or in any other court of competent jurisdiction.” 15 U.S.C. § 1681p.
10 Thus, this Court, as the court possessing jurisdiction over the underlying controversy, has
11 jurisdiction to determine this motion.

12 **B. Federal Arbitration Act**

13 The FAA provides that once a defendant files a motion to compel arbitration, a
14 district court must “hear the parties, and upon being satisfied that the making of the
15 agreement for arbitration or the failure to comply therewith is not” at issue, must “make an
16 order directing the parties to proceed to arbitration in accordance with the terms of the
17 agreement.” 9 U.S.C. § 4. It “reflects both a ‘liberal federal policy favoring arbitration’ .
18 . . . and the ‘fundamental principle that arbitration is a matter of contract.’” *Kramer v.*
19 *Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (quoting *AT&T Mobility LLC v.*
20 *Concepcion*, 563 U.S. 333, 339 (2011)). The district court’s role in ruling on a motion to
21 compel arbitration is “limited to determining (1) whether a valid agreement to arbitrate
22 exists[,] and if it does, (2) whether the agreement encompasses the dispute at issue.”
23 *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 716 (9th Cir. 2020) (applying California contract
24 law). Only if the court answers both questions in the affirmative will the FAA require the
25 Court “to enforce the terms of the arbitration agreement in accordance with its terms.” *Id.*
26 The Supreme Court has reminded that “courts should order arbitration of a dispute only
27 where the court is satisfied that neither [1] the formation of the parties’ arbitration
28 agreement *nor* [2] (absent a valid provision specifically committing such disputes to an

1 arbitrator) its enforceability or applicability to the dispute is in issue.” *Granite Rock Co.*
2 *v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original).

3 In this case, Defendant argues that in order for the Court to grant its Motion, it need
4 only “assert: (1) the existence of a dispute between the parties; (2) a written agreement that
5 includes an arbitration provision purporting to cover the dispute; (3) interstate or foreign
6 commerce; and (4) the opposing party’s failure or refusal to arbitrate the dispute.” Mot. at
7 10:1-5. Plaintiff responds that “Defendant’s motion should be denied because: (a)
8 Plaintiff’s FCRA claim does not arise out of or related [sic] to the parties’ former purchase
9 agreement” and “(b) expanding the scope of the arbitration to include the FCRA claims
10 would be unconscionable.” Oppo. at 14:3-6. As outlined below, the Court finds the RISC
11 requires the parties to arbitrate their dispute, including the gateway issue of whether the
12 Arbitration Provision covers the dispute at issue.

13 1. Governing Law

14 As a preliminary matter, federal substantive law governs the scope of an arbitration
15 agreement. *Kramer*, 705 F.3d at 1126. “[A]s a matter of federal law, any doubts
16 concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether
17 the problem at hand is the construction of the contract language itself or an allegation of
18 waiver, delay, or a like defense to arbitrability.” *Chiron Corp. v. Ortho Diagnostic Sys.,*
19 *Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000). State contract law, on the other hand, governs
20 issues pertaining to the validity, revocability, and enforceability of an agreement to
21 arbitrate. *See, e.g., Revitch*, 977 F.3d at 716-17 (applying California contract law to a
22 wireless services agreement because the agreement’s choice-of-law provision states that
23 the contract is governed by the law of the state in which the customer’s billing address is
24 located, and the customer resided in California).

25 The RISC itself aligns with the law, providing that “[f]ederal and California law
26 apply to this contract.” Mot. at 22. The arbitration provision of the RISC elaborates that
27 “[a]ny arbitration under this Arbitration Provision shall be governed by the Federal
28 Arbitration Act (9 U.S.C. § 1, et seq.) and not by any state law concerning arbitration.”

1 Mot. at 5:24-8:20; *see also id.* at 25. Thus, the Court applies federal substantive law to the
2 scope of the RISC, and California contract law to the enforceability of the agreement itself.

3 **2. Plaintiff Signed a Valid Agreement to Arbitrate**

4 Section 2 of the FAA governs the enforcement of agreements to arbitrate and
5 provides that a provision to settle by arbitration a controversy arising out of a contract
6 covering a transaction involving interstate commerce “shall be valid, irrevocable, and
7 enforceable, save upon such grounds as exist at law or in equity for the revocation of any
8 contract.” 9 U.S.C. § 2; *see also* 9 U.S.C. § 1 (defining “commerce” as “commerce among
9 the several States”). The FAA’s “savings clause” allows a party to challenge an arbitration
10 agreement based on any state law contract defenses, such as fraud, mistake, duress, or
11 unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

12 “Under California law, a contract is formed when there are (1) parties capable of
13 contracting, (2) mutual consent, (3) a lawful object, and (4) sufficient cause or
14 consideration.” *Grimes v. New Century Mortg. Corp.*, 340 F.3d 1007, 1011 (9th Cir. 2003)
15 (McKeown, J., dissenting) (citing CAL. CIV. CODE § 1550). “The consent of the parties to
16 a contract must be: (1) [f]ree; (2) [m]utual; and, (3) [c]ommunicated by each to the other.”
17 CAL. CIV. CODE § 1565. The FAA “leaves no place for the exercise of discretion by a
18 district court, but instead mandates that district courts shall direct the parties to arbitration
19 on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds,*
20 *Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Courts determine mutual consent and the intention
21 of the parties “from the written terms of the contract alone, so long as the contract language
22 is clear and explicit and does not lead to absurd results.” *Revitch*, 977 F.3d at 717 (internal
23 quotations omitted); *see also* CAL. CIV. CODE §§ 1638 (“The language of a contract is to
24 govern its interpretation, if the language is clear and explicit, and does not involve an
25 absurdity.”), 1639 (“When a contract is reduced to writing, the intention of the parties is to
26 be ascertained from the writing alone, if possible.”).

27 In this case, neither party contends that (1) they lacked the capability to contract, (2)
28

1 the RISC⁵ or Arbitration Provision lacked a lawful object, or (3) the RISC or Arbitration
2 Provision lacked consideration. Rather, as part of her argument that there is no valid
3 agreement to arbitrate, Plaintiff advances two arguments: First, she argues that her FCRA
4 claim does not arise out of the alleged relationship between the parties, and is, therefore,
5 not covered by the Arbitration Provision. *Oppo*. at 14:7-9. Second, Plaintiff contends that
6 expanding the scope of the arbitration agreement to add the FCRA claim that arose after
7 the account was closed, and the Vehicle was surrendered would be unconscionable. *Oppo*.
8 at 20:24-27. Because the first argument predominantly pertains to whether Plaintiff’s claim
9 falls within the scope of the Arbitration Provision rather than whether the agreement itself
10 is valid, the Court defers addressing that issue until it addresses whether Plaintiff’s claim
11 is covered by the Arbitration Provision. As to mutual consent, Plaintiff argues somewhat
12 paradoxically not that the RISC or its Arbitration Provision are unconscionable or that she
13 did not consent to their terms, but that if the Court interprets them as covering the FCRA
14 claim, it would be unconscionable. *Oppo*. at 20:24-27. Thus, Plaintiff contends Defendant
15

16 ⁵ As a preliminary matter, in ruling on this motion, the Court takes judicial notice of
17 the RISC under the incorporation by reference doctrine as the RISC, which covers
18 Defendant’s loan to Plaintiff, is alleged in the complaint and is central to Plaintiff’s FCRA
19 claim. *Compare* Compl. at 5, ¶¶ 25, 27 (“In or around February 2015, Plaintiff obtained
20 an automobile loan from Defendant,” and “on July 29, 2019, Defendant pulled Plaintiff’s
21 Experian credit report”) *with Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005)
22 (extending incorporation by reference doctrine to situations “in which the plaintiff’s claim
23 depends on the contents of a document, the defendant attaches the document to its motion
24 to dismiss, and the parties do not dispute the authenticity of the document, even though the
25 plaintiff does not explicitly allege the contents of that document in the complaint”). The
26 court may treat a document incorporated by reference as “part of the complaint, and thus
27 may assume that its contents are true for purposes of a motion to dismiss under Rule
28 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). However, to the
extent a document incorporated by reference contradicts the allegations of a complaint, the
court “need not accept as true allegations contradicting documents that are referenced in
the complaint.” *Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d 1005, 1007-08 (9th
Cir. 2015). “Otherwise, a plaintiff with a legally deficient claim could survive a motion to
dismiss simply by failing to attach a dispositive document on which it relied.” *Pension
Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

1 has failed to show a valid agreement to arbitration. However, the Court finds Plaintiff fails
2 to explain how or why the RISC does not constitute a valid agreement to arbitrate.

3 a. *The Arbitration Provision Is Not Unconscionable*

4 Under California law, a court may refuse to enforce a provision of a contract if it
5 finds the provision at issue was “unconscionable at the time it was made.” CAL. CIV. CODE
6 § 1670.5(a). Courts may find a contract as a whole “or any clause of the contract” to be
7 unconscionable. *Id.* “The party asserting that a contractual provision is unconscionable
8 bears the burden of proof.” *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023-28 (9th Cir.
9 2016) (citing *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015)).
10 “Unconscionability has ‘both a procedural and a substantive element, the former focusing
11 on oppression or surprise due to unequal bargaining power, the latter on overly harsh or
12 one-sided results.’” *Id.* (quoting *Sanchez*, 61 Cal. 4th at 910). “Both procedural and
13 substantive unconscionability must be present in order for a clause to be unconscionable,
14 but they need not necessarily be present to the same degree.” *Id.* (citing *Armendariz v.*
15 *Found. Health Psychcare Services*, 24 Cal. 4th 83, 114 (2000)). Although California
16 courts characterize “substantive unconscionability” in various ways, “[a]ll of these
17 formulations point to the central idea that unconscionability doctrine is concerned not with
18 ‘a simple old-fashioned bad bargain’ but with terms that are ‘unreasonably favorable to the
19 more powerful party.’” *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013).

20 In the present case, Plaintiff never argues that the terms of the RISC were
21 substantively or procedurally unconscionable. Reply at 13:11-12. To the extent she may
22 try to advance such arguments now, the Court would likely view them as waived as having
23 not been raised in Plaintiff’s Opposition. *See, e.g., Pac. Dawn LLC v. Pritzker*, 831 F.3d
24 1166, 1178 n.7 (9th Cir. 2016) (noting that “the plaintiffs did not raise that argument to the
25 district court in their . . . opposition to the defendants’ motion for summary judgment, so
26 the argument was waived.”). Rather, Plaintiff argues that expanding the scope of the
27 Arbitration Provision to include the FCRA claims that arose after the account was closed
28 and the Vehicle was surrendered would be unconscionable. Oppo. at 20:24-28. Plaintiff

1 argues that “[e]ven if Defendant seeks to argue that the hard pull of Plaintiff’s credit
2 somehow related to the parties’ relationship, where parties no longer had a relationship and
3 the vehicle was surrendered, allowing Defendant to always arbitrate all claims between the
4 parties from now on until the end of times was never the goal of the contract.” Oppo. at
5 22:10-14. Thus, Plaintiff argues that it would be the Court’s act of “expanding the
6 arbitration clause to encompass unrelated claims [that] would render the clause
7 unconscionable.” *Id.* at 22:17-18. However, as Defendant points out “the arbitration
8 provision makes clear that “[t]his Arbitration Provision shall survive any termination,
9 payoff or transfer of this contract.” Reply at 13:19-21 (citing Mot. at 21, 23). Further, the
10 Court need not “expand” the provision as the provision already requires, at a minimum,
11 arbitration of the gateway issue of whether Plaintiff’s claims are subject to arbitration.

12 b. *The Parties Mutually Consented to Arbitration*

13 Plaintiff correctly notes that “there is no contract until there is mutual consent of the
14 parties.” Oppo. at 12:5-8. However, the Court finds mutual consent exists here for the
15 below reasons.

16 First, Page 2 of the RISC contained a section entitled “Agreement to Arbitration,”
17 which said, “By signing below, you agree that, pursuant to the Arbitration Provision on the
18 reverse side of the contract, you or we may elect to resolve any dispute by neutral, binding
19 arbitration and not by a court action.” Mot. at 21. Plaintiff signed this provision, and as
20 Defendant correctly points out, “[s]he does *not* claim that there was any duress, coercion,
21 or fraud in the signing of the agreement” or “that the agreement is an adhesion contract.”
22 Reply at 13:7-9. She also does not contend that it is not her signature on the document.
23 *See generally* Oppo. As a result, Plaintiff consented to arbitrate, and the Court finds any
24 arguments to the contrary unavailing to the extent the Court finds the claims at issue
25 covered by the Arbitration Provision.

26 Second, without ruling on whether Plaintiff’s FCRA claims are, in fact, within the
27 scope of the Arbitration Provision, the Court finds that if they are encompassed, any
28 argument by Plaintiff that such an outcome was not foreseeable is unreasonable and fails

1 to show a lack of mutual consent. Plaintiff argues in her declaration submitted in support
2 of her opposition that (1) she never agreed to arbitrate claims against Defendant pertaining
3 to any credit pull after she surrendered the Vehicle and (2) “it is unfair and unjust to enforce
4 an arbitration clause to a claim that arose after the surrender of the vehicle because the
5 contract with Chrysler only covers the sale of the vehicle, vehicle condition, and the
6 original credit application.” Camarillo Decl. at 3, ¶¶ 15-16. Plaintiff asserts that
7 “Defendant does not explain . . . how claims under the FCRA could possibly have been
8 considered a term of obligation of the contract at issue; at the time the RISC was executed
9 with Chrysler Center, Plaintiff could not reasonably have intended to agree to arbitrate
10 FCRA claims that would arise after Plaintiff’s surrender of the vehicle.” Oppo. at 13:11-
11 18 (original emphasis) (citing *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 862
12 (2016) (providing that “an offeree, regardless of apparent manifestation of his consent is
13 not bound by inconspicuous contractual provisions of which he was unaware, contained in
14 a document whose contractual nature is not obvious”)); *but see* Mot. at 23 (“This
15 Arbitration Provision shall survive any termination, payoff or transfer of this contract”).
16 In other words, Plaintiff’s position is not that she did not consent to the RISC but rather
17 that she did not expect that if she defaulted on the loan and surrendered the Vehicle while
18 still owing a balance, the RISC would then both allow her creditor to pull her credit report
19 as well as prevent her from suing under the FCRA when the creditor did so. Yet, the Court
20 finds that a reasonable person should have expected this outcome because (1) the RISC
21 expressly stated that if a balance remained after the Vehicle sold, the debtor would still
22 owe the creditor,⁶ and (2) as Plaintiff admits, Compl. at 5, ¶ 24, the law authorizes a creditor
23 to pull the credit report of a debtor.

24
25 ⁶ To the extent Plaintiff may claim the agreement to arbitrate lacks mutual consent
26 because she was unaware of this provision in the RISC as she did not read it, such an
27 argument would fail to provide her with a defense. *See, e.g., Conyer v. Hula Media Servs.,*
28 *LLC*, 53 Cal. App. 5th 1189, 1197 (2020), *review filed* (Oct. 5, 2020) (noting that “[i]t has
long been the rule in California that a party is bound by a contract even if he did not read
the contract before signing it”).

1 For instance, Plaintiff’s Complaint and declaration both state that her account closed
2 upon surrendering the Vehicle. Compl. at 5, ¶ 26; Camarillo Decl. at 2, ¶ 6. She elaborates
3 stating that she disputes owing any debt after surrendering her Vehicle. Camarillo Decl. at
4 2, ¶¶ 7-8. However, under the section entitled “IF YOU PAY LATE OR BREAK YOUR
5 PROMISES,” the RISC expressly stated that if the debtor paid late, she would owe late
6 charges, and “[i]f the money from the sale [of the Vehicle] is not enough to pay the amount
7 you owe, you must pay the rest to us.” Mot. at 22, § 2(f) of the RISC. Thus, Plaintiff’s
8 contention that she did not believe she still owed Defendant after surrendering the Vehicle
9 is untenable based on the plain language of the RISC. *Compare* Compl. at 5, ¶ 26 (alleging
10 Plaintiff “no longer had any account with Defendant” after surrendering the Vehicle) *with*
11 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *opinion amended*
12 *on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001) (“The court need not, however, accept as
13 true allegations that contradict matters properly subject to judicial notice or by exhibit.”).
14 Thus, “[n]ot that foreseeability is a relevant consideration, but the court notes that it was
15 certainly foreseeable (if not known) to [the debtor] that as a result of her obtaining credit
16 with [the creditor] it would report her credit information.” *Mann v. Equifax Info. Servs.,*
17 *LLC*, No. 12-CV-14097, 2013 WL 3814257, at *9 (E.D. Mich. July 22, 2013).

18 Given no other elements essential to contract formation were raised by Plaintiff and
19 the Court finds mutual consent existed, the RISC and the Arbitration Provision contained
20 within it are both valid, enforceable contracts.

21 **3. The Arbitration Provision Covers Plaintiff’s FCRA Claim**

22 Defendant argues that Plaintiff’s one claim for alleged FCRA violations plainly
23 represents “a ‘claim or dispute’ involving a federal ‘statute’ that ‘arises out of or relates to
24 . . . this contract or any resulting transaction or relationship.” Mot. at 12:20-23. Plaintiff
25 responds that “Plaintiff’s FCRA claim arises from Defendant’s unlawful request for and
26 review of a credit report, not the sale of the vehicle.” Oppo. at 9:2-55. She argues that (1)
27 “[t]o the extent it relies on an ostensible debt owed on the vehicle as justification for the
28 inquiry, Defendant has failed to show any such debt exists,” *id.* at 9:5-7, and (2) “[t]he

1 credit inquiry did not pertain to the vehicle, condition of the vehicle, or Plaintiff’s credit
2 application (since Plaintiff no longer sought credit),”⁷ *id.* at 20:14-16. However, Defendant
3 replies by noting that “Plaintiff conspicuously omits that the arbitration language includes
4 a ‘claim’ ‘arising from or relating to’ the ‘purchase’ of the vehicle or ‘any resulting
5 transaction or relationship’ with ‘a third party’ like BTLA.” Reply at 8:23-9:4 (citing
6 *Crooks v. Wells Fargo Bank, NA.*, 312 F. Supp. 3d 932, 937-38 (S.D. Cal. 2018) (Sabraw,
7 J.) (holding that the broad scope of an identical arbitration provision contained within another
8 RISC did not foreclose the possibility that the plaintiff s FCRA claim “relates to the
9 relationship of the parties giving rise to the arbitration provision.”).

10 The RISC’s Arbitration Provision covers “[a]ny claim or dispute, whether in
11 contract, tort, statute (including the interpretation and scope of this arbitration provision,
12 and the arbitrability of the claim or dispute), between you and us or our . . . or assigns,
13 which arises out of or relates to your credit application, purchase, or condition of this
14 vehicle, this contract or any resulting transaction or relationship (including any relationship
15 with third parties who do not sign this contract).” Thus, the Arbitration Provision did not
16 just cover “the sale of the vehicle, vehicle condition, and the original credit application,”
17 as Plaintiff contends. Camarillo Decl. at 3, ¶¶ 15-16. Plaintiff’s current FCRA claim
18 relates to (1) outstanding amounts owed resulting from her purchase of the Vehicle, (2)
19 amounts owed under the RISC, and (3) the resulting creditor-debtor relationship between
20 her and Defendant, as the assignor of the seller of the Vehicle. This is because by Plaintiff’s
21

22
23 ⁷ Plaintiff contends that any deficiency balance that Plaintiff may have “is separate
24 from Defendant’s right or authority to pull Plaintiff’s credit.” *Oppo.* at 14:10-18. Plaintiff
25 argues that “as a general rule, where the contract at issue has expired, the parties are
26 released from their respective contractual obligations and any dispute between them cannot
27 be said to arise under the contract.” *Oppo.* at 14:27-15:1-2 (citing *Poore v. Simpson Paper*
28 *Co.*, 566 F.3d 922, 927 (9th Cir. 2009)) (internal quotations omitted). However, this
argument does not apply here because Plaintiff’s contract had not, in fact, expired. Not
only was the loan maturity date February 23, 2021, but pursuant to its terms, it expired only
when Plaintiff repaid the amounts owed, including any deficiency. *Mot.* at 21-23.

1 own admission,⁸ residual amounts owed defeat her entire FCRA claim. *See, e.g.*, Compl.
2 at 5, ¶ 24 (“Under the FCRA, companies are permitted to pull their customers credit reports
3 with account⁹ review inquiries if the customer has an account with that company”); *see*
4 *also id.* at 5, ¶ 25 (“In or around February 2015, Plaintiff obtained an automobile loan from
5 Defendant”). However, as analyzed below, although the Court finds Plaintiff’s FCRA
6 claim involves interstate commerce, it lacks the ability to determine whether the FCRA
7 falls within the scope of the Arbitration Provision as the Arbitration Provision vests the
8 arbitrator with the authority to make that determination.

9 a. *Plaintiff’s Claim Involves Interstate Commerce*

10 As an initial matter, for the Court to compel arbitration under the FAA, Plaintiff’s
11 FCRA claim must pertain to interstate commerce. The Arbitration Provision explicitly
12 states that any arbitration will be governed by the FAA and not by any state law concerning
13 arbitration. Mot. at 14:2-4; *see also* ECF No. 4 at 23. Subject to certain exceptions
14 inapplicable here, the FAA “governs arbitration agreements in contracts involving
15 interstate commerce.” *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1058-60 (9th Cir.
16 2020) (applying Arizona contract law). Section 1 of the FAA defines “commerce” as
17 “commerce among the several States.” 9 U.S.C. § 1.

18 In *Hamby v. Power Toyota Irvine*, No. 11CV0544-BTM (BGS), 2012 WL
19 13036860, *1-2 (S.D. Cal. Mar. 22, 2012) (Moskowitz, J.), another court in this district
20

21 ⁸ To the extent Plaintiff may later attempt to argue that the FCRA does not authorize
22 a creditor to pull the credit report of a consumer who has an account with the creditor, the
23 doctrine of judicial estoppel would bar Plaintiff from attempting to assert a position
24 contrary to this concession in her complaint. *Clear Connection Corp. v. Comcast Cable*
25 *Commc’ns Mgmt., LLC*, 149 F. Supp. 3d 1188, 1204 (E.D. Cal. 2015). The doctrine of
26 judicial estoppel serves to “protect the integrity of the judicial process by ‘prohibiting
27 parties from deliberately changing positions according to the exigencies of the moment.’”
28 *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012) (quoting *New*
Hampshire v. Maine, 532 U.S. 742, 749-50 (2001)).

⁹ The FCRA defines an “account” as including an “asset account . . . established
primarily for personal, family, or household purposes.” 15 U.S.C. § 1681b(r)(4); 15 U.S.C.
§ 1693a(2).

1 held that a similar retail sales contract for the purchase and financing of an automobile
2 affects interstate commerce and granted the defendant’s motion to compel arbitration. The
3 *Hamby* plaintiff filed suit, alleging violations of, *inter alia*, the Rosenthal Fair Debt
4 Collection Practices Act, arising out of the extension of credit from a car dealership in
5 connection with the sale of a vehicle. *Id.* at *1. Like Plaintiff here, the plaintiff alleged
6 that “one or more adverse actions were taken regarding his credit application.” *Id.* Like
7 Defendant, the defendant moved to compel arbitration. *Id.* at *1-2. The court cited to the
8 Supreme Court case of *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003), which made
9 clear that “[n]o elaborate explanation is needed to make evident the broad impact of
10 commercial lending on the national economy or Congress’ power to regulate that activity
11 pursuant to the Commerce Clause.” *Hamby*, 2012 WL 13036860, at *6. The *Hamby* court
12 reasoned that because commercial lending necessarily included automobile lending, the
13 RISC at issue in that case involved interstate commerce. *Id.*

14 Defendant argues that “the financing of plaintiff’s automobile, and BLTA’s pulling
15 of her credit report, involved interstate commerce.” Mot. at 14:10-11. Plaintiff responds
16 that the case does not involve interstate commerce because it pertained to Defendant’s
17 actions with respect to the plaintiff’s credit report, not the sale of the Vehicle, which would
18 implicate the Arbitration Provision. Oppo. at 13:6-18. However, just as the *Hamby* court
19 determined that the case involved interstate commerce, 2012 WL 13036860, *1-2, this
20 Court likewise concludes this case involves interstate commerce, such that the Court must
21 enforce the RISC’s Arbitration Provision.

22 b. *The Arbitrator Must Determine the Gateway Issue of Whether*
23 *Plaintiff’s Claim Falls Within the Scope of the Arbitration*
24 *Provision*

25 In its Reply Brief, Defendant raises for the first time its request that the arbitrator,
26 not the Court, determine whether Plaintiff’s claim is subject to arbitration. Reply at 5:17-
27 7:27. In response, Plaintiff filed Evidentiary Objections arguing that raises this new
28 argument requesting relief that Defendant failed to request in its original motion, and as
such, the Court should decline consideration of this argument. ECF No. 10 at 3:14-4:4.

1 A moving party may not raise new arguments in a reply brief. *See, e.g., Coos Cty.*
2 *Bd. of Cty. Comm'rs v. Kempthorne*, 531 F.3d 792, 812, n. 16 (9th Cir. 2008) (“The general
3 rule is that [litigants] cannot raise a new issue for the first time in their reply briefs.”); *U.S.*
4 *ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (noting that “[i]t is
5 improper for a moving party to introduce new facts or different legal arguments in the reply
6 brief than those presented in the moving papers”); *see also Lujan v. National Wildlife*
7 *Fed'n*, 497 U.S. 871, 894-95 (1990). Thus, the Court has the discretion to reject and refuse
8 to consider such improper arguments. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
9 1996). In this case, Defendant failed to request that the arbitrator decide whether Plaintiff’s
10 claims are subject to arbitration under the Arbitration Agreement in the original motion.
11 Defendant raised this argument for the first time in its Reply Brief by arguing that it was
12 raised in response to Plaintiff’s argument that the Court should decide whether Plaintiff’s
13 claim is subject to arbitration. Reply at 5:21-23. Regardless of whether Defendant raised
14 the issue in the original motion, the Court must decide whether to compel arbitration based
15 on the facts and law of this case.

16 “[P]arties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as
17 whether the parties have agreed to arbitrate or whether their agreement covers a particular
18 controversy.” *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). An
19 arbitration provision expressly delegates such gateway issues to the arbitrator where “the
20 parties clearly and unmistakably provide otherwise.” *AT & T Techs., Inc. v. Commc'ns*
21 *Workers of Am.*, 475 U.S. 643, 649 (1986). “Such [c]lear and unmistakable evidence of
22 agreement to arbitrate arbitrability might include . . . a course of conduct demonstrating
23 assent . . . or . . . an express agreement to do so.” *Momot v. Mastro*, 652 F.3d 982, 988 (9th
24 Cir. 2011) (citations and internal quotation marks omitted). The Ninth Circuit has indicated
25 “language delegating to the arbitrators the authority to determine the validity or application
26 of any of the provisions of the arbitration clause[] constitutes an agreement to arbitrate
27 threshold issues concerning the arbitration agreement.” *Mohamed v. Uber Techs., Inc.*,
28 848 F.3d 1201, 1208 (9th Cir. 2016) (internal quotations omitted). Here, the language of

1 the Arbitration Provision evidences the parties’ clear and unmistakable intent to delegate
2 the threshold questions of arbitrability to an arbitrator. It provides, in part, that “[a]ny
3 claim or dispute, . . . (including the interpretation and the scope of this arbitration provision,
4 and the arbitrability of the claim or dispute), . . . shall . . . be resolved by neutral, binding
5 arbitration and not by a court action.” Mot. at 6:16-25. Based on the language of the
6 Arbitration Provision, the Court finds the parties agreed to arbitrate the gateway issues,
7 including whether Plaintiff’s FCRA claim is within the scope of the Arbitration
8 Provision. *See, e.g., Crooks*, 312 F. Supp. 3d at 937-38 (“To respect the province of the
9 arbitrator, no opinion is expressed on whether the FCRA claim falls within the scope of the
10 arbitration provision.”); *see also Gadomski*, 281 F.Supp.3d at 1020 (holding parties agreed
11 to arbitrate gateway issues because the arbitration agreement provides “[a] claim may
12 include, but shall not be limited to, *the issue of whether any particular claim must be*
13 *submitted to arbitration.*”).

14 In *Crooks*, 312 F. Supp. 3d at 938-39 and *Gadomski v. Wells Fargo Bank N.A.*, 281
15 F. Supp. 3d 1015, 1016-18 (E.D. Cal. 2018), the plaintiffs¹⁰ entered into a credit agreement
16 with a lender,¹¹ defaulted on their debts, filed for Chapter 7 bankruptcy, received a
17 discharge, and after receiving their discharge, sued the defendant creditors for violations
18 under the FCRA. In both cases, the courts (1) held that the issue of whether the disputes
19 should be arbitrated should be decided by the arbitrator, not the Court; (2) granted the
20 defendants’ motions to compel; and (3) dismissed or stayed the cases because there were
21

22 ¹⁰ In both cases, the plaintiffs were represented by the same law firm, Kazerouni Law
23 Group, APC, which also represents Plaintiff in this case.

24 ¹¹ In *Gadomski*, the plaintiff signed a credit card application containing an arbitration
25 provision with the defendant and alleged the defendant caused inaccurate information to
26 be reported in her credit report after she received a discharge of the debt. 281 F. Supp. 3d
27 at 1017. Meanwhile, in *Crooks*, the plaintiff, like Plaintiff here, purchased a vehicle and
28 signed a RISC with the dealership, which contained an arbitration provision, and the
seller’s rights were later assigned to the defendant. 312 F. Supp. 3d at 935. The *Crooks*
plaintiff, also like Plaintiff here, alleged that after the discharge, the defendant “submitted
an unauthorized account review credit inquiry to Equifax.” *Id.* at 935.

1 no remaining claims that were not subject to arbitration. *Gadomski*, 281 F. Supp. 3d at
2 1020-21 (holding that “whether Plaintiff's claims arising under FCRA and CCCRAA are
3 within the scope of the Agreement must be decided by the arbitrator”); *Crooks*, 312 F.
4 Supp. 3d at 935, 938-39 (staying the case to allow the arbitrator to decide the questions of
5 arbitrability but requiring that “[w]ithin 14 days of the completion of the arbitration
6 proceedings, the parties shall jointly submit a report advising the Court of the outcome of
7 the arbitration, and a request to dismiss the case or vacate the stay.”). In both cases, the
8 courts reasoned that even though the debts at issue had been discharged (unlike the present
9 case), the discharge of the debts did not render an otherwise valid arbitration agreement
10 unenforceable, especially where the agreement explicitly provided that it survived “any
11 termination, payoff or transfer of this contract.” *Crooks*, 312 F. Supp. 3d at 935, 938;
12 *Gadomski*, 281 F.Supp.3d at 1019; *see also* Mot. at 25 (providing that “[t]his Arbitration
13 Provision shall survive any termination, payoff or transfers of this contract”).

14 Defendant also argues that “the arbitration provision . . . is a standard form that is
15 used for the purchase and financing of a vehicle from a dealership.” Reply at 6:22-23.
16 Defendant points out that “there are opinions involving the same language as the arbitration
17 provision in the present case that concern FCRA claims,” and “[i]n each case, the Court
18 held that the arbitrator was required to determine whether plaintiff’s claim is arbitrable.”
19 Reply at 6:24-26. As Defendant notes, in *Rumbough v. Courtesy Toyota*, No.
20 615CV869ORL41GJK, 2016 WL 4134584, at *1 (M.D. Fla. Apr. 14, 2016), *Perei v.*
21 *Arrigo DCJ Sawgrass, Inc.*, No. 18-CV-60091, 2018 WL 1182570, at *1 (S.D. Fla. Mar.
22 7, 2018), and *Johnson v. Santander Consumer USA Inc.*, No. CV-15-00774-PHX-DLR,
23 2015 WL 7567483, at *1 (D. Ariz. Nov. 25, 2015), the courts granted the defendants’
24 motions to compel arbitration and stayed the proceedings, pending arbitration. In all three
25 cases, the plaintiffs sued the defendant for violations of, *inter alia*, the FCRA after
26 purchasing vehicles from lenders and signing a RISC containing identical (in the cases of
27 *Rumbough* and *Perei*) or near identical arbitration provisions to the one at issue in this case,
28 which were later assigned to third-parties. *Rumbough*, 2016 WL 4134584, at *1; *Perei*,

1 2018 WL 1182570, at *1; *Johnson*, 2015 WL 7567483, at *1. The defendants in all three
2 cases then argued that the plaintiff’s claims were subject to arbitration due to the provision
3 contained in the RISC. *Rumbough*, 2016 WL 4134584, at *1; *Perei*, 2018 WL 1182570,
4 at *1; *Johnson*, 2015 WL 7567483, at *1. The courts determined that the issue of whether
5 the plaintiff’s claims under the FCRA fell within the purview of the arbitration provision
6 should be determined by the arbitrator. *Rumbough*, 2016 WL 4134584, at *1; *Perei*, 2018
7 WL 1182570, at *1; *Johnson*, 2015 WL 7567483, at *1.

8 Thus, Defendant urges that “the Court here should follow the reasoning found in the
9 foregoing cases and find that the arbitration provision here ‘clearly and unmistakably’
10 provides that the arbitrator, not the Court, should decide whether plaintiff’s FCRA claim
11 is covered by the arbitration provision.” Reply at 7:22-26. Plaintiff responds that because
12 she does “not seek to enforce or challenge the terms, duties, or obligations” of the RISC in
13 her lawsuit, “there can be no finding that the arbitration clause it contains applies to the
14 FCRA claim against Defendant.” Oppo. at 13:19-21. However, the RISC plainly
15 contemplates that it would cover more than a simple breach of contract dispute directly
16 pertaining to the RISC by expressly stating it extends to claims brought by statute. Mot. at
17 23. Further, the Arbitration Provision explicitly states that “the arbitrability of the claim
18 or dispute . . . shall . . . be resolved by neutral, binding arbitration and not by a court.” Mot.
19 at 23. Thus, the facts (e.g., the Arbitration Provision) as well as the law warrant having the
20 arbitrator decide the issue of arbitrability.

21 **C. Defendant’s Motion to Dismiss, or in the Alternative, Stay the Case**

22 Defendant notes that “[a] motion to compel arbitration may be construed as a motion
23 to dismiss for lack of subject matter jurisdiction.” Oppo. at 9:7-10. In that vein, Defendant
24 argues the Court should dismiss this case because Plaintiff’s sole claim is subject to
25 arbitration. Mot. at 14:27-28. In the alternative, Defendant argues that the Court should
26 stay the case. *Id.* at 15:17-19. Plaintiff admits that courts have discretion to dismiss claims
27 where the parties have agreed to arbitration and no other claims remain. Oppo. at 22:20-
28 21. However, Plaintiff argues that because she never agreed to arbitrate the FCRA claims,

1 “[t]he request to dismiss or stay the matter is moot.” *Id.* at 22:26-28.

2 “[N]otwithstanding the language of § 3, a district court may either stay the action or
3 dismiss it outright when . . . the court determines that all of the claims raised in the action
4 are subject to arbitration.” *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1073-
5 74 (9th Cir. 2014); *see also Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638, 641
6 (9th Cir. 1988) (affirming the district court’s dismissal of one the plaintiff’s claims because
7 the parties agreed to submit those claims to arbitration, and no nonarbitrable claims
8 remained in the case); *Gadomski*, 281 F. Supp. 3d at 1020-21 (holding that “because both
9 claims are to be arbitrated, the Court dismisses Plaintiff’s claims in favor of arbitration”).

10 Where a defendant moving to compel arbitration also seeks dismissal of the case
11 pursuant to Rule 12(b)(1), the “jurisdictional attack may be facial or factual.” *Safe Air for*
12 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the moving
13 party “asserts that the allegations contained in a complaint are insufficient on their face to
14 invoke federal jurisdiction.” *Id.* In a factual attack, the moving party “disputes the truth
15 of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.*
16 Further, in a motion to dismiss, the Court must construe all reasonable inferences in favor
17 of the nonmoving party, *Manzarek*, 519 F.3d at 1031, but has no obligation to draw
18 unreasonable inferences when determining whether the pleading under attack states a
19 plausible claim, *see, e.g., Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th
20 Cir. 1998) (“[W]e are not required to accept as true conclusory allegations which are
21 contradicted by documents referred to in the complaint.”); *Cisco Sys., Inc. v. Capella*
22 *Photonics, Inc.*, No. 20-CV-01858-EMC, 2020 WL 4923697, at *3 (N.D. Cal. Aug. 21,
23 2020), *motion to certify appeal denied*, No. 20-CV-01858-EMC, 2020 WL 7227153 (N.D.
24 Cal. Dec. 8, 2020) (“When a written instrument contradicts allegations in a complaint to
25 which it is attached, *the exhibit trumps the allegations.*”). If a defendant advances “a
26 factual attack on subject matter jurisdiction, the defendant may introduce testimony,
27 affidavits, or other evidence to dispute the truth of the allegations that, by themselves,
28 would otherwise invoke federal jurisdiction.” *Terenkian v. Republic of Iraq*, 694 F.3d

1 1122, 1131 (9th Cir. 2012) (internal quotations omitted). “Under these circumstances, ‘no
2 presumptive truthfulness attaches to plaintiff’s allegations.’” *Id.* “Once the moving party
3 has converted the motion to dismiss into a factual motion by presenting affidavits or other
4 evidence properly brought before the court, the party opposing the motion must furnish
5 affidavits or other evidence necessary to satisfy its burden of establishing subject matter
6 jurisdiction.” *Safe Air*, 373 F.3d at 1039.

7 In the present case, Defendant argues not only that the Court lacks jurisdiction of
8 Plaintiff’s FCRA claim as the parties contracted for it to be arbitrated but also that a
9 creditor, like Defendant, “is entitled to make a credit inquiry of an open or closed account.”
10 Mot. at 11:22-23. If Defendant’s argument is true, Plaintiff’s complaint would fail to state
11 a claim for relief as a matter of law. However, Plaintiff argues that “Defendant’s arguments
12 on the merits of Plaintiff’s FCRA claim and Defendant’s defenses, including whether the
13 consumer report inquiry was permissible, should be disregarded. *See, e.g., Teamsters Local*
14 *890, infra*, 2012 WL 669900, at *2.” *Oppo*. at 8:27-28.

15 “[I]n deciding whether the parties have agreed to submit a particular grievance to
16 arbitration, a court is not to rule on the potential merits of the underlying claims.” *AT & T*,
17 475 U.S. at 649. However, in determining this motion to compel arbitration, the Court also
18 faces a co-pending motion to dismiss, and courts may examine merits on a motion to
19 dismiss.

20 That Plaintiff would owe a deficiency balance after the sale of the Vehicle was an
21 express term contained in the RISC. Mot. at 23. At no point in Plaintiff’s Opposition does
22 she dispute Defendant’s factual assertion that had the RISC gone as planned, she was
23 obligated to make payments through February 23, 2021. *Compare* Mot. at 11:19-20 *with*
24 *Oppo*. Nor could she: Under the plain terms of the RISC, Plaintiff was supposed to make
25 monthly payments of \$395.07 until February 23, 2021, as part of her agreement to finance
26 the purchase of her Vehicle (\$16,900.00) by agreeing to pay nineteen percent (19%)
27 interest for a total amount owed at the end of the RISC term of **\$28,945.04**. Mot. at 20.
28 The record indicates that (1) Plaintiff stopped making payments on November 12, 2018,

1 Reply at 10:7-8, and (2) when Plaintiff stopped making payments she would have owed at
2 least \$10,666.89 (27 [months between November 12, 2018 and February 23, 2021] x
3 \$395.07 [amount of monthly payment] = \$10,666.89), *id.* at 10:8-11. This amount
4 excluded late fees and costs the of the sale of the Vehicle. *See generally* RISC. Thus,
5 Plaintiff cannot plausibly contend that after surrendering a more than three year old
6 Vehicle, on which she owed in excess of \$10,666.89, that she expected there would be no
7 deficiency balance. This is confirmed by the fact that her May 10, 2019 letter, signed by
8 Plaintiff, acknowledging that she knew she owed the amount of \$10,707.00 and requesting
9 an accounting of fees. *See* Reply at 29.¹²

10 The FCRA imposes civil liability on any creditor willfully securing a consumer’s
11 credit report¹³ for an unauthorized purpose. 15 U.S.C. §§ 1681b(f), 1681n(a). However,
12 the FCRA also expressly authorizes distribution of a credit report to an entity intending “to
13

14 ¹² Although Plaintiff objects to these exhibits in her Evidentiary Objections submitted
15 after Defendants’ Reply Brief, the Court finds consideration of these documents
16 appropriate given Plaintiff’s objections do not dispute the authenticity of the exhibits, only
17 that they were not submitted with the original motion. *See* ECF No. 10. However, as
18 discussed below, the Court finds these exhibits responsive to Plaintiff’s arguments
19 advanced in the Opposition, namely, her declaration in which she disputed owing a
20 deficiency balance. *See, e.g., McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142, 154,
21 n. 6 (S.D. Cal. 2019) (Bashant, J.) (noting that “[a] district court should not ‘rely[] on
22 formalistic evidentiary objections,’ including objections that evidence is ‘ ‘new evidence”
23 submitted in reply’ to exclude evidence”); *see also Sali v. Corona Reg’l Med. Ctr.*, 909
24 F.3d 996, 1006 (9th Cir. 2018) (holding that the district should have considered
25 declarations that the district court declined to consider based on adopting a “narrow
26 approach” resulting from “evidentiary formalism in striking those declarations as ‘new
27 evidence’ submitted in reply”). The Court notes that Plaintiff’s Evidentiary Objections
28 assert no basis for exclusion of the contested exhibits other than that they are “new” and
were not submitted with the original motion.

¹³ The FCRA defines a “consumer report” as “any written, oral, or other
communication of any information by a consumer reporting agency bearing on a
consumer’s credit worthiness, credit standing, credit capacity, . . . for the purpose of serving
as a factor in establishing the consumer’s eligibility for . . . credit . . . or . . . any other
purpose authorized under section 1681b of this title.” 15 U.S.C. § 1681a(d)(1)(A) & (C);
see also *Oppo*. at 11:25-12:1 (citing 15 U.S.C. § 1681a(d)(1)(A) & (C)).

1 use the information in connection with a credit transaction involving the consumer on
2 whom the information is to be furnished and involving the . . . collection of an account of,
3 the consumer.” 15 U.S.C. § 1681b(a)(3)(A); *see also* Oppo. at 12:2-9; *see also* 15 U.S.C.
4 § 1691a(e) (defining a “creditor” as “any person who regularly extends, renews, or
5 continues credit . . . or any assignee of an original creditor who participates in the decision
6 to extend, renew, or continue credit.”). Although the FCRA refers to “an account”
7 belonging to the consumer, “[t]he text of the FCRA does not distinguish between closed
8 and open accounts.” *Banga v. First USA, NA*, 29 F. Supp. 3d 1270, 1278 (N.D. Cal. 2014)
9 (noting that “[t]he plain language of the FCRA does not prohibit a creditor such as Chase
10 from obtaining a credit report for the purpose of reviewing a closed credit card account”)
11 (citing 15 U.S.C. § 1681b(a)(3)(A)). Thus, even if Plaintiff’s account was closed, this does
12 not mean Defendant’s act of pulling her credit report violated the FCRA. Where a person
13 receives credit from a lender, accumulates debts, and the lender accesses the debtor’s credit
14 report to collect on delinquent accounts, the creditor is authorized to use the consumer
15 information under such circumstances. *See, e.g., Huertas v. Galaxy Asset Mgmt.*, 641 F.3d
16 28, 34 (3d Cir. 2011) (holding that the assignee of record of the plaintiff’s debt did not
17 violate the FCRA by obtaining the plaintiff’s creditor report on the original lender’s
18 behalf); *Newfield v. City Nat’l Bank, NA*, No. CV163833DSFJPRX, 2017 WL 540944, at
19 *3 (C.D. Cal. Jan. 27, 2017) (citing to *Huertas* for the proposition that Section
20 1681(b)(3)(A) authorizes the acquisition of a plaintiff’s credit report by the purchaser of
21 the plaintiff’s debt from the original lender).

22 As a result, the Court finds that under the facts pled, as well as the documents upon
23 which Plaintiff’s sole FCRA claim is based, which are incorporated by reference, not only
24 is Plaintiff’s sole FCRA claim implausible under the law, but it is also appropriate for
25 dismissal in light of the Court’s decision to grant Defendant’s Motion to Compel
26 Arbitration. As a matter of law, the Complaint, when considered along with the RISC and
27 briefs submitted herewith, fails to state a plausible claim for relief. The RISC allowed
28 Defendant to pursue Plaintiff after she surrendered the Vehicle as long as she owed a

1 deficiency balance. Mot. at 21-23. The Court disregards Plaintiff's allegation that her
2 account was closed upon surrendering the Vehicle as unreasonable and implausible in light
3 of the RISC, which did not state that an account would immediately close upon surrender
4 of the Vehicle. *Id.* When disregarding this allegation, the remaining facts show that
5 Plaintiff secured a Vehicle loan from Defendant, surrendered her Vehicle, and remained
6 bound by the RISC to pay any deficiency. As a matter of law, this made Defendant
7 Plaintiff's creditor, and as a creditor, Defendant had every right to pull her credit report.

8 Having decided that all of Plaintiff's claims are subject to arbitration, the Court is
9 within its discretion to dismiss the complaint under Rule 12(b)(6). *See Thinket Ink Info.*
10 *Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004). Consequently,
11 because both claims are to be arbitrated, the Court dismisses Plaintiff's claims in favor of
12 arbitration. *See Delgado v. Ally Fin., Inc.*, No. 317CV02189BENJMA, 2018 WL 2128661,
13 at *6 (S.D. Cal. May 8, 2018) (Benitez, J.) (dismissing claims with prejudice after granting
14 a motion to compel arbitration). In the absence of a plausible claim under the FCRA,
15 Plaintiff's factual allegations against Defendant for pulling her credit report lack a federal
16 authorizing statute sufficient to invoke federal jurisdiction of her claim. *See, e.g.*,
17 *Terenkian*, 694 F.3d at 1139 (dismissing the case for lack of federal subject matter
18 jurisdiction after a factual attack on the truth of the allegations creating the basis for federal
19 jurisdiction). Although absent an arbitration issue, the Court would have discretion to grant
20 leave to amend, the Court finds leave to amend would be improper here because (1) the
21 Court simultaneously concludes that the arbitrator should determine the gateway issue of
22 arbitrability and (2) permitting leave to amend would prove to be an exercise in futility.
23 *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987)
24 ("Denial of leave to amend is not an abuse of discretion where the pleadings before the
25 court demonstrate that further amendment would be futile."). Here, no set of facts could
26 avoid that the gateway issues of arbitration must be determined by the arbitrator, and even
27 if the arbitrator determined Plaintiff's FCRA claim was not subject to the Arbitration
28 Provision, the Court finds the RISC in conjunction with the law prevent Plaintiff from

1 stating a plausible claim for relief.

2 Because the Court has dismissed the sole claim in this case, Defendant’s request for
3 a stay is denied as moot. *See, e.g., Tur v. YouTube, Inc.*, 562 F.3d 1212, 1214 (9th Cir.
4 2009) (concluding “that an issue is moot when deciding it would have no effect within the
5 confines of the case itself”).

6 **D. Plaintiff’s Evidentiary Objections**

7 A district court ruling on a motion to compel arbitration must apply a “standard
8 similar to the summary judgment standard of Federal Rule of Civil Procedure 56.” *Lopez*
9 *v. Terra’s Kitchen, LLC*, 331 F. Supp. 3d 1092, 1097 (S.D. Cal. 2018) (Anello, J.) (quoting
10 *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004)); *Three Valleys*
11 *Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991). In that vein,
12 “[a] party may object that the material cited to support or dispute a fact cannot be presented
13 in a form that would be admissible in evidence.” FED. R. CIV. P. 56(c)(2). However, the
14 court will consider the substance of evidence that would be admissible trial even if the form
15 of the evidence is improper so long as that same evidence may be admissible in another
16 form. *See, e.g., Dinkins v. Schinzel*, 362 F. Supp. 3d 916, 922–23 (D. Nev. 2019) (noting
17 that “the 2010 amendments to Federal Rule of Civil Procedure 56 ‘eliminate[d] th[is]
18 unequivocal requirement’ and mandate only that the *substance* of the proffered evidence
19 would be admissible at trial”; declining to “disregard all exhibits for lack of proper
20 authentication because their substance could be admissible at trial”).

21 Plaintiff objects to the Supplemental Declaration of Christine Hatfield and Exhibits
22 C through G, which were not attached to Defendant’s the original motion. ECF No. 10 at
23 2:11-13. Plaintiff argues that because she did not have the opportunity to review the
24 exhibits and address them before the Court, they should not be considered by the Court and
25 should be stricken from the record. *Id.* at 3:8-11. As stated, Plaintiff does not contend this
26 new evidence cannot be authenticated, lacks foundation, is irrelevant, or represents hearsay
27 evidence. *See generally* ECF No. 10.

28 Where a party presents new evidence in a reply brief, the district court should decline

1 consideration of the new evidence unless it provides the non-moving party an opportunity
2 to respond to such evidence. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172
3 (9th Cir. 2018) (“Understanding the potential for unfairness inherent in an unusual
4 submission of new factual matter, the practice rules contemplate relief for the opposing
5 party, but such relief is not limited to simply striking the new matter from consideration.”).
6 “Mitigation of any unfairness, following objection, may take the form of granting the
7 objecting party leave to file a sur-reply opposition to the new matter.” *See id.* (citing, *inter*
8 *alia*, *SEC v. Sabrdaran*, 252 F. Supp. 3d 866, 889 (N.D. Cal. 2017) (overruling objection
9 to new evidence submitted in reply papers where the court provided the opposing party
10 with “an opportunity to file a supplemental submission responding” to the new evidence)).

11 Here, however, the Court finds the exhibits to which Plaintiff objects were produced
12 in response to Plaintiff’s declaration in which she denied owing a deficiency balance. *See*,
13 *e.g.*, *Magic Link Garment Ltd. v. ThirdLove, Inc.*, 445 F. Supp. 3d 346, 358, n. 2 (N.D. Cal.
14 2020) (denying the defendant’s motion to strike because “[t]he argument and evidence that
15 plaintiff advanced in its reply is reasonably related to plaintiff’s initial argument in its
16 opening brief that defendant accepted the PO 542 bras,” and “the challenged evidence was
17 a response to defendant’s argument in its opposition that there exists a triable issue
18 concerning its right to revoke its acceptance of the PO 542 bras”). Further, given the
19 Court’s application of a “summary judgment type” standard as well as the incorporation
20 by reference doctrine’s mandate to consider documents essential to the plaintiff’s claims
21 so as to prevent the plaintiff from defeating a motion to dismiss by failing to attach relevant
22 evidence, the Court finds such evidence appropriate for determination. That being said,
23 although the Court considered this evidence, such evidence was not dispositive to the
24 Court’s ultimate decision, and as such, neither prejudiced Defendant nor changed the
25 outcome of this order.

26 **E. Request for Judicial Notice**

27 Defendant requests that the Court take judicial notice of its small claims court case.
28 ECF No. 8 at 15, ¶ 8 (citing to Exhibit F). Rule 201(b) of the Federal Rules of Evidence

1 allows courts, at any stage of proceeding, to take judicial notice of (1) facts not subject to
2 reasonable dispute and “generally known within the trial court’s territorial jurisdiction”
3 and (2) adjudicative facts, which “can be accurately and readily determined from sources
4 whose accuracy cannot reasonably be questioned.” *See also Asdar Group v. Pillsbury,*
5 *Madison & Sutro*, 99 F.3d 289, 290, fn. 1 (9th Cir. 1996) (taking judicial notice of court
6 records); *Enterprise Bank v. Magna Bank of Missouri*, 92 F.3d 743, 746 (8th Cir. 1996)
7 (holding that the district court did not err by taking judicial notice of pleadings in earlier
8 related proceedings). As a judicial record, the Small Claims Complaint is an appropriate
9 item for judicial notice. As such, the Court grants Defendant’s Request for Judicial Notice.

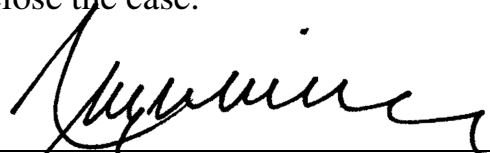
10 **V. CONCLUSION**

11 For the above reasons, the Court rules as follows:

- 12 1. Defendant’s Motion to Compel Arbitration is **GRANTED**.
- 13 2. Defendant’s Motion to Dismiss is **GRANTED WITH PREJUDICE**.
- 14 3. Defendant’s Motion to Stay is **DENIED** as moot.
- 15 4. Plaintiff’s Evidentiary Objections are **OVERRULED**.
- 16 5. Defendant’s Request for Judicial Notice is **GRANTED**.
- 17 6. The Clerk of the Court is directed to close the case.

18 **IT IS SO ORDERED.**

19 DATED: February 4, 2021

20 
21 **HON. ROGER T. BENITEZ**
22 United States District Judge
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